SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 18, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Saxe, DeGrasse, Richter, Clark, JJ.

11202-
11203 Lawrence Kaplan, Index 112252/10
Plaintiff-Appellant,

-against-

U.S. Coal Corporation,
Defendant-Respondent.
- - - - -
East Coast Miner LLC,
Proposed Defendant-Intervenor.

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Lazarus and Lazarus, P.C., New York (Michael E. Murav of counsel), for appellant.

Nixon Peabody LLP, New York (Christopher M. Mason and Melisa E. Gerecci of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered January 25, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment in lieu of complaint pursuant to CPLR 3213, and granted defendant's cross motion to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7), unanimously modified, on the law, to deny the cross motion and grant plaintiff leave to replead as a

plenary action, and otherwise affirmed, without costs. Order, same court and Justice, entered June 25, 2013, which, to the extent appealable, denied plaintiff's motion for leave to renew, unanimously affirmed, without costs.

The agreement sued upon gives plaintiff a put, affording him the right to require defendant to purchase his shares of U.S. Coal stock upon a certain event and upon proper notice, the occurrence of which are not disputed. The agreement sets the nominal price at $5.40 per share, adjusted for "stock splits, stock dividends and the like." The agreement also provides that defendant's obligation to make payment for such shares shall be secured by a security interest in certain U.S. Coal assets.

Supreme Court properly denied plaintiff's motion for summary judgment in lieu of complaint because determination of the amount to be paid under the agreement requires reference to proof extrinsic to the instrument (*see Weissman v Sinorm Deli*, 88 NY2d 437, 443-445 [1996]). However, nothing in the security interest provision relieves defendant from the obligation to purchase plaintiff's shares, and the court erred in elevating perfection of the security interest to a condition precedent to recovery warranting dismissal of the complaint. A viable cause of action for breach of contract remains, and we grant leave to replead.

Finally, plaintiff's motion for leave to renew was properly denied in the absence of new facts (CPLR 2221[e][2]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part, denied in part* 80 NY2d 1005 [1992]). To the extent that the appeal is predicated on such portion of the motion as sought reargument, it is settled that no appeal lies from the denial of a motion to reargue (*Cross v Cross*, 112 AD2d 62, 64 [1st Dept 1985]).

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

ENTERED: MARCH 18, 2014

CLERK

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

11369 David Benavides, Index 8880/98
Plaintiff-Appellant,

-against-

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

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Ginsberg & Wolf, P.C., New York (Robert M. Ginsberg of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered December 13, 2012, which, in this action for personal injuries sustained when plaintiff was allegedly pushed off a fence by a police officer, denied plaintiff's motion for a new trial, unanimously affirmed, without costs.

Plaintiff brought this action against the City of New York claiming that, on January 21, 1997, during a chase incident to his own arrest, the police officer in pursuit of him used excessive force. The primary factual dispute at trial was whether, as plaintiff claims, he was pushed over a fence by the officer, or, as defendants claim, he jumped. The jury rendered a verdict in favor of defendants dismissing the complaint, and the trial court denied a motion to set aside that verdict.

On the evening of the incident, plaintiff, an admitted drug dealer, was with a group of people at a location acknowledged by him as a place where drug sales regularly occur. At that time, a sergeant with the Bronx Narcotics Division was supervising a team of officers conducting an undercover buy and bust operation. Plaintiff claims that after hearing a barking street dog he left to investigate when he observed a man with a gun. The "man" turned out to be the sergeant, dressed in plain clothes, who, after receiving confirmation that another undercover officer had completed a buy, was proceeding to make arrests. Upon seeing the "man," plaintiff immediately fled, and the sergeant, upon seeing plaintiff flee, gave chase. Plaintiff eventually ran into an alley which ended with a fence. He scaled the fence, trying to get over it, but claims he got caught on barbed wire. There is no dispute that plaintiff fell over the fence to the other side, landing on both feet. While the fence on the near side of the alley was only about six feet high, the drop on the far side was longer, approximately 7½ to 13 feet. Plaintiff is seeking damages for the significant orthopedic injuries sustained to his ankles and feet as a consequence of the fall.

The sole issue on appeal is whether the trial court improperly admitted certain portions of plaintiff's medical

records into evidence which referred to injuries as having been caused by his "jump" from the fence. We conclude that the trial court should have excluded certain hearsay entries that were contained in the medical records, but because there was no reasonable probability that the entries could have affected the jury's determination, the error was harmless, and the trial court's denial of the motion to set aside the verdict was correct (*see Matter of State of New York v Floyd Y.*, 22 NY3d 95 [2103]; *People v Ballerstein*, 52 AD3d 1192 [4th Dept 2008]; *Matter of Lindsay N.*, 300 AD2d 216 [1st Dept 2002] *lv denied* 99 NY2d 511 [2003]).

At trial, plaintiff made a motion in limine in which he only objected to four specific entries in his medical records. Other hearsay medical record entries were not specifically objected to before the jury rendered its verdict. The admissibility of entries to which no timely specific objections were made is not preserved for this appeal (*Balsz v A & T Bus Co.*, 252 AD2d 458 [1st Dept 1998]; *People v Lewis*, 222 AD2d 311 [1st Dept 1995]).

Hearsay entries regarding the cause of an injury contained in a medical record come into evidence under the business records exception if they are germane to the treatment or diagnosis of plaintiff's injuries (see *People v Ortega*, 15 NY3d 610, 617

[2010]; *Grant v New York City Tr. Auth.*, 105 AD3d 445, 446 [1st Dept 2013]). Alternatively, the entry may be admissible as an admission, but only if there is evidence that connects the party to the entry (*id.*). The challenged entries were neither germane to treatment or diagnosis, nor were they admissions.

There was simply no evidence supporting defendants' position that the medical doctors needed to know whether plaintiff jumped or was pushed from the fence in order for doctors to determine what medical testing he needed upon admission to the hospital. No medical expert provided such testimony *(see People v Spicola*, 16 NY3d 441, 451 [2011], *cert denied* __US__, 12 SCT 400 [2011] ["(t)o the extent that the boy's responses to the nurse's inquiries . . . were germane to diagnosis and treatment - and she testified that they were - these responses were properly admitted as an exception to the hearsay rule."]; *Phillipps v. New York City Tr. Auth.*, 83 AD3d 473, 474 [1st Dept 2011] ["In light of the unrefuted testimony of plaintiff's medical expert that a medical record entry, . . . was relevant to diagnosis and treatment, it was a proper exercise of discretion for the court to allow the entry into evidence"]. Defendants' only expert, a biomechanical engineer and accident reconstruction expert, opined that plaintiff's injuries were consistent with a jump from a

height and not a push to a fall. He did not give any opinion on issues relating to treatment or diagnosis. This is not a case where the conclusion is so obvious that no medical testimony is needed to lay the appropriate evidentiary foundation (*see Ortega*, 15 NY3d 610).

The particular challenged entries cannot be characterized as admissions. Although the Lincoln Medical and Mental Health Center Admission Assessment form has a box checked that "patient" is the source of the information, the particular entry on that record, "he jumped off the fence," is not clearly a direct statement attributable to or a quote of plaintiff. The Ambulance Call Report form identifies "PO" or the police officer as the source of the information that plaintiff "jumped off a fence." No other evidence in the record identifies plaintiff as being the source of this information. Nor is there any evidence connecting plaintiff to the 1/21/97 entry in the Progress Record that "s/p fell from a fence after being chased by police officers" or the 1/23/97 entry "fall from 2 storeys [*sic*]" to make them admissible as admissions by him. These entries should have been redacted from the medical records received in evidence.

Notwithstanding that the entries in the medical records were improperly received in evidence, the error is harmless. The last

two entries only refer to plaintiff falling from a significant height. There was no genuine dispute about these issues at trial (see *Continental Ins. Co. v Tollman-Hundley Hotels Corp.*, 223 AD2d 374 [1st Dept 1996], *lv denied* 88 NY2d 801 [1996]). While the first two entries refer to the central disputed factual issue of how the accident occurred, the information they contain is cumulative of other entries in plaintiff's medical records which were not the subject of specific objections by him (*People v Gonzalez*, 179 AD2d 433 [1st Dept 1992]). Other entries properly before the jury include the 5/17/02 Physician Clinic Notes providing: "State h/o (R) ankle broken, & both heels shattered after jump 1997 treated at Lincoln Hospital." Since the improperly admitted entries were redundant of properly admitted entries, and there was otherwise ample evidence supporting the jury's verdict, that plaintiff had not been subject to excessive force by the police department, the error in admitting the

hearsay evidence was harmless (*Matter of Lindsay N.*, 300 AD2d at 217. There is no reasonable probability that had the medical records been properly redacted the jury verdict would have been any different.

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

ENTERED: MARCH 18, 2014

CLERK

Sweeny, J.P., Saxe, Moskowitz, Clark, JJ.

11437 Metropolitan Taxicab Board of Trade, et al., Petitioners-Appellants, -against- New York City Taxi & Limousine Commission, etc., et al., Respondents-Respondents. Index 110594/09

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Emery Celli Brinckerhoff & Abady LLP, New York (Richard D. Emery of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Susan Paulson of counsel), for respondents.

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 8, 2013, which denied petitioners' motion for incidental damages under CPLR 7806, unanimously affirmed, without costs.

Since 1996, under the authority of section 2303 of the New York City Charter, respondent the New York City Taxi and Limousine Commission (the TLC) has promulgated rules setting limitations of lease rates that taxi owners can charge taxi drivers who lease the taxis. The maximum amount an owner may charge a driver is known as the "lease cap." In 2009, the TLC enacted the "Driver Protection Amendments" (the tax rule) (35 RCNY 1-78[a][4]). Among other things, the tax rule prohibited

taxi owners from collecting from their lessees New York State sales and rental taxes in amounts above the lease cap. On May 1, 2009, the rule took effect and effectively reduced the lease cap by requiring that drivers' tax payments be included within the cap. While taxi drivers who lease taxis are responsible for these taxes, taxi owners are required to act as trustees of the State, collecting the tax from drivers and paying it to the State.

In August 2009, petitioners--taxi owners who lease their taxis to drivers--commenced this hybrid action seeking declaratory relief and a judgment under CPLR article 78, in which they challenged, among other things, the tax rule. The motion court upheld the rule and this Court affirmed (71 AD3d 508 [1st Dept 2010]). As to the requirement in the rule that sales and rental taxes be included within the lease cap, this Court found that the provision had a rational basis in that it was "aimed at standardizing divergent practices regarding the payment of such taxes within the vehicle-for-hire industry, as demonstrated in the record" (*id.* at 510). However, the Court of Appeals reversed (18 NY3d 329 [2011]), annulling the rule as arbitrary and capricious and without rational basis.

Petitioners then moved in Supreme Court for damages under

CPLR 7806, seeking $15,732,437.07 from respondents to compensate them for "the monies that they allegedly could not have collected from their taxicab lessees while the regulation was in force"; petitioners argued that they were entitled to recover the money as incidental damages. The court denied the motion, ruling that the damages petitioners sought to recover were not "incidental to the primary relief sought" within the meaning of CPLR 7806, because the monies at issue were not funds that respondents improperly withheld or collected from petitioners and could not then pay or refund to petitioners. Further, the court held that petitioners could not recover these non-incidental damages in a plenary action because, under the doctrine of government immunity, respondents were "immune from suit for the alleged damages arising out of the enactment of 35 RCNY 1-78(a)(4)."

We find that the motion court properly denied petitioners' motion for an award of incidental damages. To begin, with regard to incidental damages, CPLR 7806 states, in pertinent part:

> "Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity."

Petitioners seek damages based on the Court of Appeals' determination that the TLC's effective reduction of the taxi "lease cap" had no rational basis. The Court of Appeals' determination, however, does not lead to a conclusion that the damages are "incidental to the primary relief sought" (CPLR 7806). Contrary to petitioners' argument, monetary injury incurred as a result of agency action does not necessarily constitute incidental damages simply because a court later finds the action to have been arbitrary and capricious. Certainly, whether damages are characterized as incidental "is dependent upon the facts and issues presented in a particular case" (*Matter of Gross v Perales*, 72 NY2d 231, 236 [1988]). Even so, incidental damages are generally confined to monies that an agency either collected from or withheld from a petitioner and then was obligated to reimburse after a court annulled a particular agency determination.

For example, in *Matter of New York Tel. Co. v Nassau County* (267 AD2d 629 [3d Dept 1999], *lv denied* 95 NY2d 756 [2000]), upon which petitioner places much reliance, the court held that Nassau County had to refund to the petitioners the full amount of certain overpayments. In so doing, the court rejected the County's argument that it should not be liable for incidental

damages because it had already reallocated the funds it had improperly collected. Here, however, the TLC never collected the funds at all. Thus, the scenario in this case presents a fundamentally different question from the one in *Matter of New York Tel. Co.*, where a petitioner asked an agency to refund money that it had received and spent.

Petitioners argue that damages are considered incidental in an article 78 proceeding where an administrative determination must be annulled in order to render the damages recoverable. This view, however, constitutes an overly expansive definition of incidental damages. Were we to accept this definition, an agency would have to compensate any monetary loss incurred when its action was later annulled as an improper exercise of discretion. The established authority, however, holds otherwise.

For example, in *Gross v Perales* (72 NY2d 231 [1988]), a leading Court of Appeals case on the meaning of incidental damages, the Court found that the New York State Department of Social Services had acted in an arbitrary and capricious manner in making a determination to withhold $20 million in reimbursements from the New York City Human Resources Administration. Thus, the Court noted, the article 78 court had properly annulled the determination. Rejecting the State's

argument that the claim was essentially one for money damages and thus not incidental to the article 78 proceeding, the Court stated that "the City was [] entitled to the withheld reimbursements under the Social Services Law . . . whether or not the court directed payment, since upon nullification of the underlying administrative action, the State had a statutory duty to reimburse the City" (*id.* at 236). Accordingly, the Court concluded, "the demand for monetary relief was unquestionably incidental to the facts and issues presented" (*id.*).

Petitioners cite the *Gross* Court's emphasis on the threshold inquiry as to "whether the State acted arbitrarily and capriciously" (*id.*). However, the *Gross* Court did not hold that annulment of the agency action required the state to compensate the City for any and all losses it suffered as a result of the arbitrary action. Rather, as noted above, the Court stated that the City was entitled to the "withheld reimbursements" that the State was statutorily "obligated to reimburse" (*id.*). Here, on the other hand, as the motion court held, the City had no statutory duty to reimburse the damages that petitioners sought. While a statutory duty is not essential for a finding of incidental damages, the key point here is that the obligation to reimburse must arise from the agency's withholding of amounts it

should have paid to the petitioner or its retention of amounts it should not have collected. Neither action occurred in this case. Thus, the losses that petitioners incurred as a result of the arbitrary reduction in the taxi lease cap in this case do not qualify as incidental damages.

We turn now to the issue of governmental immunity. This doctrine applies "when official action involves the exercise of discretion or expert judgment in policy matters, and is not exclusively ministerial" (*Haddock v City of New York*, 75 NY2d 478, 484 [1990]).

Petitioners first argue that the doctrine is inapplicable here because it does not apply in article 78 proceedings. In support of this proposition, petitioners rely on cases that address public employees' claims for back pay and benefits (*see e.g. Matter of Pollock v Kiryas Joel Union Free School Dist.*, 52 AD3d 722 [2d Dept 2008] [granting damages as a result of school board's decision to terminate teacher in violation of the Education Law]). However, because the petitioners' right to damages in those cases arose out of the employer-employee relationship, not out of the article 78 relief, the damages could be considered incidental to the "primary relief." Therefore, unlike here, the petitioners in those cases could have recovered

damages "on the same set of facts in a separate action or proceeding . . . in the supreme court" (CPLR 7806).

In addition, as respondents aptly point out, CPLR 7806 explicitly limits the availability of damages in an article 78 proceeding (*see Gross*, 72 NY2d at 237 ["(t)he statute was adopted for the sole purpose of immunizing the State from paying consequential damages in cases where a State agency improperly denied, revoked or suspended a petitioner's license"]). That article 78 permits the court, in certain circumstances, to award damages in an action that also reviews the validity of a government determination does not create a right to damages that does not otherwise exist.

Finally, governmental immunity shields respondents from the payment of damages in a plenary action because imposition of the annulled rule was a "discretionary action[] taken during the performance of government functions" (*Valdez v City of New York*, 18 NY3d 69, 76 [2011]). In this regard, petitioners assert that the doctrine of governmental immunity does not apply here because imposition of the tax rule did not "involve[] the exercise of discretion" (citing *Haddock*, 75 NY2d at 484). That is, petitioners contend that the TLC simply did not exercise discretion at all in this case.

In support of their position, petitioners cite *Haddock v City of New York* (*supra* at 7). In that case, the plaintiff, a nine-year-old girl, sued the City of New York when she was raped by a Parks Department employee with a history of violent crime, claiming that the City had negligently retained the employee. The Court of Appeals held that governmental immunity did not protect the City because it had failed to comply with its own procedures requiring informed discretion in the hiring of employees with criminal records. Thus, the *Haddock* Court found, the City had, in essence, exercised no discretion at all.

Petitioners try to liken this case to *Haddock*, noting that when the Court of Appeals considered this case (18 NY3d 329 [2011]), it found nothing in the record to justify imposition of the tax rule. Further, petitioners note, the Court of Appeals in this case rejected at least one rationale for respondents' position, characterizing that rationale as something that the "Commission never thought about" (*id.* at 333).

Nevertheless, the TLC's determination in this case, however unjustified it may have been, was an exercise of discretion; the TLC did consider the issue of imposing the tax rule and decided to impose it. Putting aside the merits of its decision, there is no escaping that the TLC exercised its discretion. Indeed, a

governmental function such as rulemaking is necessarily an "exercise of judgment and discretion [] performed in the public interest," and is protected as a discretionary act (*Flacke v Salem Hills Sewage Disposal Corp.*, 91 AD2d 739, 741 [3d Dept 1982] [citation omitted]). Accordingly, in a plenary action, governmental immunity would preclude petitioners from recovering incidental damages.

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

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

ENTERED: MARCH 18, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11550-
11550A John Landrum Bryant, et al.,
Plaintiffs-Appellants,

-against-

Christopher Hyland, Inc., et al.,
Defendants-Respondents.

Index 116450/08

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

Kathleen E. Negri Stathopoulos, Brooklyn, for respondents.

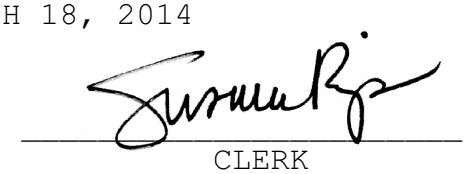
Judgment, Supreme Court, New York County (Cynthia S. Kern, J., and a jury), entered August 7, 2012, against plaintiffs-counterclaim defendants in favor of defendants-counterclaim plaintiffs in the principal amount of $86,407.26, as reduced by the court, unanimously reversed, on the law and the facts, without costs, the judgment vacated, and the matter remanded for further proceedings in accordance with this decision. Appeal from order (same court, Marcy S. Friedman, J.), entered December 22, 2010, which granted defendants' motion to amend their answer to add the defense of an artisan's lien under Lien Law § 180, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

This is an action in contract, to which plaintiffs appended a number of superfluous tort claims including conversion (*see Saint Patrick's Home for Aged & Infirm v Laticrete Intl.*, 267 AD2d 166 [1st Dept 1999]; *McMahan & Co. v Bass*, 250 AD2d 460, 462 [1st Dept 1998], *lv denied*, *lv dismissed* 92 NY2d 1013 [1998]), and in response to which defendants interposed an artisan's lien defense and a counterclaim for the balance due under an invoice memorializing the parties' agreement. The jury found that plaintiffs had repudiated the agreement and awarded defendants contract damages. The finding of repudiation is supported by the record. However, as to the error identified by plaintiffs, it is clear that the trial court admitted material exchanged in the course of settlement negotiations in violation of CPLR 4547. Because this evidence, offered by defendants, was unnecessary to establish any element of their case and because it portrayed plaintiffs as arrogant and pompous, it had "'a tendency to excite the passions . . . of jurors'" (*see Hoag v Wright*, 34 App Div 260, 266 [2d Dept 1898], quoting *People v Corey*, 148 NY 476, 489 [1896]) without any countervailing valid purpose to support its admission, and may have tainted the jury verdict. For this reason, we vacate the judgment.

Further, our calculation of damages, when accounting for costs avoided, indicates that defendants have received more than they would have earned had they been required to tender full performance. Thus, at this juncture, it does not appear that either side possesses a viable claim.

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

ENTERED: MARCH 18, 2014



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Acosta, J.P., Andrias, Saxe, Freedman, Feinman, JJ.

11730 Chapman, Spira & Carson, LLC, Index 651495/12
Plaintiff-Respondent,

-against-

Helix BioPharma Corp.,
Defendant-Appellant,

Robert George,
Defendant.

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Balestriere, Fariello & Abrams LLP, New York (John G. Balestriere of counsel), for appellant.

Schrader & Schoenberg, LLP, New York (Bruce A. Schoenberg of counsel), for respondent.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about May 15, 2013, which, insofar as appealed from, denied the motion of defendant Helix BioPharma Corp. to dismiss plaintiff's claims against it pursuant to CPLR 3211, unanimously modified, on the law, to dismiss the breach of contract claim, and otherwise affirmed, without costs.

The alleged contract is challenged by defendant under both CPLR 3211(a)(7), for failure to state a cause of action, and (a)(5), as barred by the statute of frauds. Initially, we reject defendant's challenges under CPLR 3211(a)(7). When we accept as true the facts as alleged in the complaint, and afford plaintiffs

the benefit of every possible favorable inference, as we must on a motion pursuant to CPLR 3211(a)(7) (*Leon v Martinez*, 84 NY2d 83, 87 [1994]), the allegations of the complaint are sufficient to state the formation of a contract, and its breach. Its allegation that Robert George was acting as Helix's agent when he agreed that Helix would pay plaintiff "according to industry standards" for its work on behalf of Helix suffices, at this juncture, to claim that George acted with Helix's authority to enter into the contract on behalf of Helix. Helix's subsequent contract with George, post-dating the events at issue here, fails to conclusively demonstrate that George lacked authority to act on Helix's behalf at the relevant time.

We also reject defendant's challenge to the sufficiency of the payment arrangement as alleged, namely, the allegation that Helix agreed to pay plaintiff "according to industry standards" for its work. "Before rejecting an agreement as indefinite, a court must be satisfied that the agreement cannot be rendered reasonably certain by reference to an extrinsic standard that makes its meaning clear (1 Williston, Contracts § 47, at 153-156 [3d ed 1957])" (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990]). For example, in *Taussig v Clipper Group, L.P.* (16 AD3d 224 [1st Dept

2005]), this Court held that the claimed agreement should not be dismissed as indefinite, "since its missing terms were determinable by reference to clear objective standards, including those catalogued in the deposition testimony of defendant's president" (*id.* at 225). While plaintiff, to succeed with such a contract claim, would have to provide evidentiary materials establishing the existence and exact nature of the claimed "industry standards," it would be inappropriate in the context of this CPLR 3211 motion to dismiss the contract claim based on the indefiniteness of the allegation that defendant agreed to pay according to industry standards.

The complaint, as supplemented by the affidavit plaintiff submitted in opposition to Helix's motion (*see e.g. Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]), similarly contains sufficient allegations to state a cause of action for quantum meruit (*see Soumayah v Minnelli*, 41 AD3d 390, 391 [1st Dept 2007]).

Even though the allegations are sufficient to avoid dismissal of plaintiff's breach of contract claim under CPLR 3211(a)(7), the contract as alleged fails to satisfy the applicable statute of frauds provision, and defendant has established a right to dismissal of the breach of contract claim

under CPLR 3211(a)(5). Although General Obligations Law § 5-701(a)(1) is unavailing, because it was possible that the contemplated services could be fully performed within one year, we conclude that Helix may raise General Obligations Law § 5-701(a)(10) for the first time on appeal, since it "raises a legal argument which appeared upon the face of the record and which could not have been avoided" if raised initially (*Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009] [internal quotation marks omitted]; *see e.g. Facie Libre Assoc. I, LLC v SecondMarket Holdings, Inc.*, 103 AD3d 565 [1st Dept 2013], *lv denied* 21 NY3d 866 [2013];).

On the merits, plaintiff's breach of contract claim is barred by General Obligations Law § 5-701(a)(10), although the statute does not bar plaintiff's quantum meruit claim (*see Morris Cohon & Co. v Russell*, 23 NY2d 569 [1969]; *Davis & Mamber v Adrienne Vittadini, Inc.*, 212 AD2d 424 [1st Dept 1995]). In *Davis & Mamber*, this Court held that for a writing evidencing a contract "[t]o satisfy the Statute of Frauds . . . a memorandum must contain expressly or by reasonable implication all the material terms of the agreement, *including the rate of compensation if there has been agreement on that matter*" (212 at 425 [emphasis added] [internal quotation marks omitted]).

Applying this rule, *Davis & Mamber* precluded a contract claim for failure to satisfy the applicable provision of the statute of frauds, because the relied-on writings lacked any reference to the agreed-on compensation; however, it permitted a quantum meruit claim, because the rule for a writing establishing quantum meruit claims is less exacting, requiring only that the writing "evidenced the fact of plaintiff's employment [by defendant] to render the alleged services" (*id.*, citing *Cohon & Co.*, 23 NY2d at 575-576). Here, as in *Davis & Mamber*, the emails of Dr. Donald Segal (Helix's chairman and CEO) fail to make *any* reference to payment terms, and accordingly fail to satisfy the statute of frauds as to the contract claim (*id.*). However, they suffice to show that Helix employed plaintiff, and are therefore enough to satisfy the statute for purposes of plaintiff's quantum meruit claim.

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

ENTERED: MARCH 18, 2014

CLERK

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

11973 The People of the State of New York, Ind. 1258/08
Respondent,

-against-

Alvaro Michimani, also known as Alvaro Garcia,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Melanie A. Sarver of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Seth L. Marvin, J. at suppression hearing; Raymond L. Bruce, J. at jury trial and sentencing), rendered November 14, 2011, convicting defendant of robbery in the second degree and bail jumping in the first degree, and sentencing him to consecutive terms of six years and one to three years, unanimously affirmed.

The verdict 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 jury's determinations concerning credibility and identification. The evidence clearly established that defendant was a participant in a robbery.

The court properly denied defendant's suppression motion. Shortly after midnight, officers received a radio transmission of "shots fired," followed by a transmission describing a group of 8 to 10 men. In very close temporal and spacial proximity to the transmissions and the specified location, the officers saw a group of men, alone on a deserted street, matching the description in several respects including number, age and ethnicity. This provided, at least, a founded suspicion justifying a common-law inquiry. The bounds of such an inquiry were not exceeded when, as a safety precaution, the greatly outnumbered officers, who did not draw their weapons, directed the group to stop and line up along a storefront (*see People v Bora*, 83 NY2d 531, 531-535 [1994]; *People v Francois*, 61 AD3d 524, 525 [1st Dept 2009], *affd* 14 NY3d 732 [2010]; *People v Herold*, 282 AD2d 1, 7 [1st Dept 2001], *lv denied* 97 NY2d 682 [2001]). Defendant then fled, and we conclude that his flight was not the product of any unlawful police conduct. Defendant's flight, coupled with the other circumstances, provided reasonable suspicion justifying pursuit (*see People v Woods*, 98 NY2d 627 [2002]; *People v Cintron*, 304 AD2d 454 [1st Dept 2003], *lv denied* 100 NY2d 579 [2003]), followed by a brief investigatory detention. The subsequent recovery of a firearm from along the

path of defendant's flight provided probable cause for his arrest (*see id.* at 454, which resulted in the recovery of additional evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 18, 2014

CLERK

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

11974 Louis Hernandez, Index 304461/10
Plaintiff-Respondent,

-against-

Aldus III Associates, LP, et al.,
Defendants-Appellants.

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Jeffrey S. Shein & Associates, P.C., Syosset (Charles R. Strugatz of counsel), for appellants.

Diamond and Diamond LLC, New York (Stuart Diamond of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered December 19, 2012, which denied defendants' motion for summary judgment dismissing the complaint and granted plaintiff's cross motion for leave to amend the bill of particulars, unanimously affirmed, without costs.

Defendants' motion was properly denied in this action where plaintiff was injured when, while descending the exterior steps of defendants' building while it was raining, he slipped and fractured his right ankle. Plaintiff alleges, inter alia, that he fell because the edge of the step was worn, that the step was slippery because it was painted with high-gloss paint and had no friction strips, and that his ankle broke because his foot slipped between the treads, which had no risers, in violation of

Administrative Code of City of NY § 27-376(c). The record demonstrates that defendants failed to meet their initial burden of demonstrating that they lacked notice of the alleged dangerous conditions of the steps (*see Rodriguez v Board of Educ. of the City of N.Y.*, 107 AD3d 651, 652 [1st Dept 2013]; *Jones v 550 Realty Hgts., LLC*, 89 AD3d 609 [1st Dept 2011]).

Even assuming that defendants met their initial burden, plaintiff raised triable issues in opposition. Defendants' contention that there is no allegation that the subject stair was worn is incorrect, since it was alleged in the bill of particulars and plaintiff testified at his deposition that he attributed his accident to the metal stair's worn tread and edge. A reasonable jury could infer that the complained-of worn condition happened over time (*see Taylor v New York City Tr. Auth.*, 63 AD2d 630 [1st Dept 1978], *affd* 48 NY2d 903 [1979]). The court properly considered plaintiff's expert's affidavit on the question of whether the lack of risers on the staircase violated the Administrative Code (*see Keneally v 400 Fifth Realty LLC*, 110 AD3d 624 [1st Dept 2013]), and defendants failed to rebut plaintiff's expert's opinion that the lack of any risers violated Administrative Code § 27-376(c) and was a proximate cause of the accident *(see Ruffin v Chase Manhattan Bank, N.A.*,

66 AD3d 549, 550 [1st Dept 2009]). Plaintiff's expert affidavit is also sufficient to raise a triable issue as to whether defendants knew or should have known of the alleged existence of the worn tread on the subject stair (*see Garcia v New York City Tr. Auth.*, 269 AD2d 142 [1st Dept 2000]).

The court providently exercised its discretion in granting plaintiff's cross motion to amend the bill of particulars. The proposed amendment is consistent with and relates back to the existing theories of liability as set forth in the complaint and the first supplemental bill of particulars, and the record demonstrates that defendants were on notice that plaintiff was injured on an exterior staircase, not an interior staircase (*see James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 7 [1st Dept 2013]). Defendants' argument that the proposed bill of particulars was improperly verified is belied by the record.

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

ENTERED: MARCH 18, 2014

CLERK

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

11975 In re Ruth R., and Others,

Dependent Children Under
Eighteen Years of Age, etc.,

Diana P.,
Respondent-Appellant,

Mercyfirst,
Petitioner-Respondent,

Administration for Children's Services,
Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson for appellant.

Warren & Warren , P.C., Brooklyn (Ira L. Eras of counsel), for respondent.

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

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about June 25, 2013, which denied respondent mother's motion to vacate orders of fact-finding and disposition entered upon her default, inter alia, terminating her parental rights upon a finding that she abandoned the subject children, unanimously affirmed, without costs.

Respondent argues that the court lacked personal jurisdiction over her. However, it is undisputed that she was personally served with the summons and petition. She did not

raise any jurisdictional objection in support of her motion to vacate, and has not demonstrated on appeal that the summons and petition lacked any of the required statutory notices (Social Services Law § 384-b[3][e]; *see Matter of David John D.*, 38 AD3d 661 [2d Dept 2007]). Respondent's contention that she did not receive notice of the date on which a default could be taken against her is belied by the record, which demonstrates that she was served with the summons and petitions directing her to appear on March 30, 2012, and that her assigned counsel was advised of the adjourned date of May 3, 2012. Nevertheless, respondent did not appear or contact the court or her attorney at any time.

We agree with Family Court that respondent failed to demonstrate a reasonable excuse for her default and a meritorious defense to the petitions (*see* CPLR 5015[a][1]; *Matter of Amirah Nicole A. [Tamika R.]*, 73 AD3d 428 [1st Dept 2010], *lv dismissed* 15 NY3d 766 [2010]). Respondent submitted documentation showing that she was in the hospital on May 3, 2012, but provided no details as to her alleged inability to communicate during that time (*see id.* at 429). Her vague assertion in defense of the allegation of abandonment, that she visited with the children to the best of her physical and mental ability and based upon the availability of visitation, lacked detail sufficient to

demonstrate that she maintained contact with the children or the agency during the relevant time period (*see Matter of Jordan H.*, 103 AD3d 465 [1st Dept 2013]; *Matter of Alec B.*, 34 AD3d 1110 [3d Dept 2006]). Nor did respondent demonstrate an inability to visit and communicate with her children during the relevant period (*see Matter of Andre W.*, 298 AD2d 206 [1st Dept 2002]). Contrary to her contention, in a case of abandonment, the agency has no obligation to make diligent efforts to encourage and strengthen the parental relationship (*Matter of Stefanie Judith N.*, 27 AD3d 403 [1st Dept 2006]).

In any event, a preponderance of the evidence shows that it is in the children's best interests to be freed for adoption (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]; *Matter of Isabella Star G.*, 66 AD3d 536, 537 [1st Dept 2009]). There is no evidence that, at the time of the disposition, respondent was in a position to care for the children.

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

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

ENTERED: MARCH 18, 2014

CLERK

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

11978 The People of the State of New York, Ind. 3629/11
Respondent,

-against-

Alberto Rivera,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about May 23, 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: MARCH 18, 2014

CLERK

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

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

11979 Zurich American Insurance Company, Index 21447/11
Plaintiff-Respondent,

-against-

Lonero Transit, Inc., et al.,
Defendant,

City of New York, et al.,
Defendants-Appellants.

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Michael A. Cardozo, New York (Julian L. Kalkstein of counsel), for appellant.

Coughlin Duffy, LLP, New York (Jonathan F. Donath of counsel), for respondent.

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Order, Supreme Court, Bronx County (Larry Schachner, J.), entered January 24, 2013, which denied the City defendants' motion for summary judgment declaring that plaintiff is obligated to defend and indemnify them in an underlying personal injury action, with leave to renew upon the completion of discovery, unanimously modified, on the law, to grant the motion to the extent of declaring that the City defendants are additional insureds under the subject policy, and otherwise affirmed, without costs.

While the City defendants engaged in dilatory conduct with respect to plaintiff's request for proof of their additional

insured status under the policy issued to defendant Lonero Transit, by producing their full contract with Lonero, they eliminated any issue of fact whether they are insured under the policy. The contract requires Lonero to name the City defendants as additional insureds under the policy. Plaintiff does not challenge the sufficiency of this proof. Thus, discovery as to this issue is complete.

However, due to the City defendants' dilatory conduct, further discovery is needed as to plaintiff's second reason for disclaiming coverage, the policy's "Abuse or Molestation" exclusion. The record demonstrates that Lonero was placed on notice of this ground for disclaiming on or about July 27, 2011. However, it does not demonstrate whether the City defendants received notice of this second ground for disclaiming. The City defendants contend, based on plaintiff's July 27, 2011 letter, that plaintiff's attempt, in its complaint filed September 26, 2011, to disclaim on the ground of the exclusion was untimely as a matter of law. However, the record does not demonstrate whether plaintiff was in possession of all the information it needed to disclaim coverage (*see George Campbell Painting v National Union Fire Ins. Co. of Pittsburgh, PA*, 92 AD3d 104, 111-112 [1st Dept 2012]). In its letter to Lonero of July 27, 2011,

plaintiff requested a copy of Lonero's contract with the City defendants to confirm their status as additional insureds and advised them of the "question" of the applicability of the abuse and molestation exclusion. Plaintiff was not provided with confirmation of additional insured status until the City defendants finally saw fit, in December 2012, to provide it with a full copy of their contract with Lonero.

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

ENTERED: MARCH 18, 2014

CLERK

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

11980 The People of the State of New York, Ind. 1149N/12
Respondent,

-against-

Kenyatta Charles,
Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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Judgment, Supreme Court, New York County (Robert M. Stolz, J.), rendered on or about July 18, 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 [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 18, 2014

CLERK

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

11982 Thabet Al-Nashash, Index 301090/13
Plaintiff-Appellant,

-against-

Soutra Limousine Inc., et al.,
Defendants-Respondents.

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Reid B. Wissner, New York for appellant.

Law Office of Marjorie E. Bornes, Brooklyn (Marjorie E. Bornes of counsel for respondents.

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Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered September 23, 2013, which denied plaintiff's motion for summary judgment, unanimously reversed, on the law, without costs, and the motion granted.

The motion court improperly denied plaintiff's motion for partial summary judgment on the ground that it was premature, based on the fact that depositions had not yet been conducted (*see Griffin v Pennoyer*, 49 AD3d 341 [1st Dept 2008]). Plaintiff, a passenger in defendants' taxicab, demonstrated his entitlement to judgment as a matter of law on the issue of liability, with evidence that, while it was snowing heavily, defendant-driver suddenly and without warning made a sharp turn and lost control of the taxicab, which left the roadway and

struck a wall. Defendant-driver did not submit an affidavit in opposition to the motion, although he was the party presumably with knowledge of any nonnegligent reasons for the accident, thus failing to raise any question of fact (*see Soto-Maroquin v Mellet*, 63 AD3d 449, 450 [1st Dept 2009]). Defendants submitted only their attorney's affirmation in opposition to plaintiff's motion, which did not provide any explanation for the accident and, in any event, was insufficient to raise a triable issue of fact (*see Johnson v Phillips*, 261 AD2d 269, 270 [1st Dept 1999]).

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

ENTERED: MARCH 18, 2014

CLERK

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

11983 Young Woo & Assoc., LLC, et al., Index 652208/10
Plaintiffs-Respondents,

-against-

Andrew Y. Kim,
Defendant,

Christine A. Rodriguez,
Nonparty Appellant.

_____

Edelstein & Grossman, New York (Jonathan I. Edelstein of counsel), for appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered March 28, 2012, which, insofar as appealed from, granted plaintiffs' motion to hold nonparty appellant Rodriguez in contempt of court, and directed that Rodriguez pay plaintiffs' costs, including attorneys' fees, in bringing the motion, unanimously affirmed, without costs.

The motion court properly found Rodriguez in contempt based on her defiance of the court's unequivocal directions as to plaintiffs' right to conduct a forensic investigation of certain electronic devices in the possession, control or custody of

defendant and nonparty Sahn Eagle LLC (*see e.g. Cadlerock Joint Venture, L.P. v Sol Greenberg & Sons Intl., Inc.*, 94 AD3d 580, 581 [1st Dept 2012], *lv denied* 20 NY3d 857 [2013], *cert denied* ___ US ___, 134 S Ct 89 [2013]; *L&R Exploration Venture v Grynberg*, 90 AD3d 538 [1st Dept 2011]).

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

ENTERED: MARCH 18, 2014

CLERK

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

11984 The People of the State of New York, Ind. 1024/09
Respondent,

-against-

Keon Daisley,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered March 20, 2012, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him to a term of 6 months concurrent with 5 years' probation, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The verdict 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 jury's credibility determinations. The evidence supports the inference that defendant shared his companion's intent to cause physical injury to the victim and intentionally aided his companion by either holding or blocking the victim's path of

retreat while his companion cut the victim's face with a box cutter (*see Matter of Tatiana N.*, 73 AD3d 186, 191 [1st Dept 2010]). Even if the jury credited defendant's testimony that he did not know that his companion was going to use a box cutter against the victim, the jury could have rationally concluded from defendant's continued participation in the criminal activity after the box cutter was used that he shared the requisite intent for the crime (*see id.*). Defendant's conduct toward the victim and his departure and subsequent return to the scene provided further evidence of defendant's community of purpose (*see e.g. People v Skinner*, 269 AD2d 202, 203 [1st Dept 2000], *lv denied* 95 NY2d 838 [2000]).

The court's response to a jury note seeking clarification as to the intent requirement of second-degree assault, when viewed in context, could not have misled the jury as to the requisite elements (*see People v Umali*, 10 NY3d 417, 426-427 [2008]). Contrary to defendant's contention, the court was not required to instruct the jury that the People were required to prove that defendant intended that the victim's injury be caused by a dangerous instrument (*see* Penal Law § 120.05[2]). Rather, the court properly instructed the jury that the People were required to prove (1) that defendant caused physical injury to the victim

by means of a dangerous instrument; and (2) that defendant did so with the intent to cause physical injury to the victim (CJI2d [NY] Penal Law § 120.05[2]).

Even if the court erred in denying defendant's request for a missing witness charge, we find that the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court properly declined to charge assault in the third degree as a lesser included offense, since there was no reasonable view of the evidence, viewed in the light most favorable to defendant, to support such a submission (*see People v James*, 11 NY3d 886 [2008]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 18, 2014

CLERK

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

11985 Lizabeth Levkoff, etc., Index 153719/12
Plaintiff,

349 Holdings, Inc.,
Plaintiff-Appellant,

-against-

Soho Grand-West Broadway, Inc.,
Defendant-Respondent.

_____

Vernon & Ginsburg, LLP, New York (Darryl M. Vernon of counsel) for appellant.

Cantor, Epstein & Mazzola, LLP, New York (Brett L. Carrick of counsel), for respondent.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered August 26, 2013, which, insofar as appealed from as limited by the briefs, denied plaintiff 349 Holdings, Inc.'s motion for a preliminary injunction, unanimously affirmed, without costs.

Contrary to plaintiff's contention, its request to stay the foreclosure and auction of one of its shares in defendant cooperative is governed by the standard for preliminary injunctions, and not the more lenient standard for a *Yellowstone* injunction. Accordingly, plaintiff had to "demonstrate a probability of success on the merits, danger of irreparable

injury in the absence of an injunction and a balance of equities in its favor" (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]), which it failed to do. As the motion court determined, plaintiff did not demonstrate a likelihood of success on the merits.

Plaintiff violated the so-ordered June 15, 2012 stipulation, requiring it to obtain defendant's permission to sublet its non-rent-regulated apartments *before* – not after – entering into a sublease. The stipulation did not have to specifically provide for the remedy of foreclosure.

Contrary to plaintiff's argument, the doctrine of unclean hands is inapplicable and does not warrant granting a preliminary injunction. Defendant's conduct was not immoral and unconscionable and plaintiff was arguably not injured by it since the motion court invalidated the complained-of resolution passed by defendant in violation of the stipulation (*National Distillers & Chem. Corp. v Seyopp Corp.*, 17 NY2d 12, 15 [1966]).

We have considered plaintiff's remaining arguments and find that they were either improperly raised for the first time on appeal or are unavailing.

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

ENTERED: MARCH 18, 2014

CLERK

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

11986 In re Orlando Centeno, Index 102145/12
Petitioner-Appellant,

-against-

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

_____

Rosenthal Law Firm, Spring Valley (Douglas Rosenthal of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Pamela Seider Dolgow of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered on or about October 18, 2012, granting respondents' cross motion to deny the petition seeking to annul a decision of New York City Civil Service Commission (CSC), dated November 30, 2011, which affirmed a determination by the New York City Department of Sanitation terminating petitioner's employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner concededly failed to timely serve CSC, which was a necessary party because it was the agency that made the decision challenged by the petition (*see Johnson v Scholastic Inc.*, 52 AD3d 375 [1st Dept 2008]). This failure to serve a

necessary party required the dismissal of the proceeding (*see Matter of Solid Waste Servs., Inc. v New York City Dept. of Envtl. Protection*, 29 AD3d 318 [1st Dept 2006], *lv denied* 7 NY3d 710 [2006]). The court properly declined to grant an extension of time, notwithstanding the apparent absence of prejudice, due to the petition's lack of merit (*see Pecker Iron Works, Inc. v Namasco Corp.*, 37 AD3d 367 [1st Dept 2007]). Were we to reach the merits, under the extremely narrow scope of review applicable, as petitioner administratively appealed to CSC, we would find that petitioner fails to demonstrate that CSC acted illegally, unconstitutionally, or in excess of its jurisdiction (*see Matter of New York City Dept. of Envtl. Protection v New York City Civ. Serv. Commn.*, 78 NY2d 318, 323-324 [1991]; *see also* Civil Service Law § 76[3]).

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

ENTERED: MARCH 18, 2014

CLERK

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

11987 The People of the State of New York, Ind. 3256/07
Respondent,

-against-

Ronald Shanks,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at hearing; Bruce Allen, J. at plea and motion to withdraw plea; Maxwell Wiley, J. at sentencing), rendered September 23, 2009, convicting defendant of criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony drug offender previously convicted of a violent felony, to a term of six years, with 1½ years' postrelease supervision, unanimously reversed, on the law, the plea vacated, the full indictment reinstated, and the matter remanded for further proceedings.

Defendant's plea agreement provided that he would receive a sentence of six years. During the plea allocution, the court noted that defendant would also receive a term of postrelease

supervision in addition to the six-year prison term. The court did not, however, specify the length of the term of PRS to be imposed. The first time the court ever informed defendant of the length of the term of PRS was when it actually imposed sentence.

Although defendant moved to withdraw his plea, he did so on grounds unrelated to PRS, and, for the first time on appeal, he now challenges the voluntariness of his plea on the ground of the court's failure to advise him of the length of the PRS term. Nevertheless, defendant was not required to preserve this issue. Since the plea court "failed to advise defendant of the specific term of PRS. . . a postallocution motion was not required to challenge the sufficiency of the plea" (*People v Boyd*, 12 NY3d 390, 393 [2009]; *see also People v Louree*, 8 NY3d 541, 545-546 [2007]). The prosecutor's remarks made moments before sentencing did not constitute the type of advice to defendant of the PRS term that would trigger a duty to preserve the issue (*see People v Rivera*, 91 AD3d 498 [1st Dept 2012], *appeal withdrawn* 18 NY3d 961 [2012]).

Because PRS is a direct consequence of a conviction *(People v Catu*, 4 NY3d 242, 244 [2005]), the failure of the court to specify the length of the PRS term renders the plea allocution defective (*see People v Boyd*, 12 NY3d at 393; *see also People v*

McAlpin, 17 NY3d 936 [2011]).

In view of this determination, we find it unnecessary to reach any other issues, except that we find that defendant's suppression motion was properly denied (*see e.g. People v Dickerson*, 20 AD3d 359 [1st Dept 2005], *lv denied* 5 NY3d 852 [2005]).

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

ENTERED: MARCH 18, 2014

CLERK

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

11988 DirectTV Latin America, LLC, Index 651824/11
Plaintiff-Respondent,

-against-

RCTV International Corp.,
Defendant-Appellant.

_____

Smith, Gambrell & Russell, LLP, Atlanta, GA (Colin R.P. Delaney of the bar of the State of Georgia, admitted pro hac vice, of counsel), for appellant.

Mintz & Gold LLP, New York (Terence William McCormick of counsel), for respondent.

_____

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered January 16, 2013, which granted plaintiff's motion to dismiss defendant's amended counterclaims pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

This declaratory judgment action arises out of a contract, entered into effective July 1, 2007 (the Transport Agreement), pursuant to which, among other things, plaintiff (DTV) was to distribute defendant's (RCTV) programming, in exchange for a license to distribute RCTV's programming in Latin America. The parties entered into the agreement after the Venezuelan government declined to renew RCTV's license to broadcast

television programs, an action alleged to have been politically motivated. This dispute arises out of DTV's suspension and/or termination of distribution of RCTV's signal.

The court properly dismissed RCTV's counterclaims for, among other things, breach of contract and breach of the covenant of good faith and fair dealing, with regard to both the Transport Agreement and an agreement referred to as the Restoration Memorandum. DTV's exercise of its discretionary right to suspend and/or terminate the broadcast of RCTV's signal, in the face of allegations that RCTV violated Venezuelan law, was not invalidated by the failure to provide prior written notice. Section 7(a) of the Transport Agreement provided that "[i]f," among other things, DTV determined that distribution of RCTV's signal may violate the law or be politically inadvisable, "then, . . . immediately following written notice," DTV could cease distributing the signal or terminate the agreement.

Given the absence of clear language indicating the parties' unmistakable intent to make the provision of written notice a condition precedent to DTV's exercise of its rights under section 7(a) of the Transport Agreement, no such duty will be construed (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 691 [1995]; *Unigard Sec. Ins. Co., Inc. v North River Ins.*

Co., 79 NY2d 576, 581 [1992]). Indeed, the notice requirement is not preceded by the tell-tale signs of a condition precedent, such as the words "if," "until," and "unless" (*see MHR Capital Partners LP v Presstek, Inc.*, 12 NY3d 640, 645 [2009]; *401 W. 14th St. Fee LLC v Mer Du Nord Noordzee, LLC*, 34 AD3d 294 [1st Dept 2006]). Although the words "if" and "then" appear in the termination clause, they refer to the conditions under which DTV may terminate or suspend performance of the agreement and the consequences of the existence of such conditions. At most, the use of the words "if" and "then" is ambiguous and therefore insufficient to create a condition precedent.

The Restoration Memorandum subsequently entered into by the parties, which contemplated a resumption of services, lacks the definiteness as to material terms required in order to be a legally enforceable contract (*see* C*obble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]; *Joseph Martin, Jr. Delicatessen v Schumacher*, 52 NY2d 105, 109-111 [1981]). The Restoration Memorandum provides for a "per-subscriber payment from DirecTV," but fails to identify the payment amount or provide a method to calculate that amount. The memorandum also requires DTV to "invest in advertising or . . . buy commercial advertising time," but fails to identify an amount

of advertising time to be purchased or the cost of that time. Likewise, no guidance is provided as to DTV's obligation to "make a proposal to raise capital for, or invest in, RCTV Mundo."

Even if the Restoration Memorandum were viewed as a modification of the Transport Agreement and found to incorporate its terms, the Restoration Memorandum would still fail for lack of definiteness. While reference to extrinsic standards or documents may, at times, supply the detail necessary to render an agreement sufficiently definite (*see Cobble Hill Nursing Home*, 74 NY2d at 483-484), the Transport Agreement lacks such guidance.

Moreover, RCTV's claims independently fail in the absence of any recoverable damages, as section 10 of the Transport Agreement bars recovery for incidental and consequential damages. RCTV is not entitled to recover the value of the lost advertising revenue, which loss constitutes consequential damages (*see Aetna Cas. & Sur. Co. v Kidder, Peabody & Co.*, 246 AD2d 202, 209 [1st Dept 1998], *lv denied* 93 NY2d 805 [1999]). RCTV's characterization of its damages as the loss of the "general market value of having a television channel . . . reach a [larger] viewing audience," which could be measured by "reference" to lost advertising revenue, does not transform its consequential damages of lost revenue into a recoverable claim

for the lost value of performance. Indeed, the only lost value identified by RCTV is that of access to a larger audience, a value measured by reference to unrecoverable lost profits. Further, the loss here does not involve the actual diminution in value of real property as a result of the failure to improve that property (*cf. Latham Land I, LLC v TGI Friday's, Inc*, 96 AD3d 1327, 1331 [3d Dept 2012]).

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

ENTERED: MARCH 18, 2014

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Manzanet-Daniels, Kapnick, JJ.

12126N John M. Ferolito, et al., Index 600396/08
Plaintiffs-Respondents, 100568/11

-against-

Domenick J. Vultaggio, et al.,
Defendants-Appellants.

- - - - -

[And a Related Action and Proceeding]

_____

Cadwalader Wickersham & Taft LLP, New York (Louis M. Solomon of counsel), for appellants.

Boies, Schiller & Flexner LLP, New York (Nicholas A. Gravante, Jr. of counsel), for respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered June 25, 2013, which, insofar as appealed from, granted plaintiffs' motion and defendants' cross motion for consolidation to the extent of consolidating claims for corporate dissolution under Business Corporation Law (BCL) § 1104, currently being heard in a matter *Ferolito v Vultaggio* (Index No. 600396/08, Sup Ct NY County) (the BCL Dissolution Action) and a common-law dissolution action entitled *Ferolito v Vultaggio* (Index No. 100568/11, Sup Ct NY County) (the Common Law Dissolution Action) with an LLC dissolution action entitled *Ferolito v AriZona Beverages USA, Inc.* (Index No. 4058/12, Sup Ct Nassau County, Comm. Div. [Timothy S. Driscoll, J.]) and, as an incident to

consolidation, changed the venue of the BCL and Common-Law Dissolution Actions from Supreme Court, New York County, to Supreme Court, Nassau County, unanimously affirmed, without costs.

The motion court providently exercised its discretion in conferring with the Justice presiding over the related action pending in Supreme Court, Nassau County, and, upon such consultation, in consolidating the actions and placing venue for the consolidated matters in Supreme Court, Nassau County (*see River Bank Am. v Daniel Equities Corp.*, 205 AD2d 476, 476 [1st Dept 1994]; *Williams v City of New York*, 191 AD2d 217, 218 [1st Dept 1993]). "Although as a general rule the venue of the action first commenced should be deemed the place of joint trial" (*Fields v Zweibel*, 36 AD2d 808, 809 [1st Dept 1971] [internal punctuation omitted]; *see Ali v Effron*, 106 AD3d 560, 560 [1st Dept 2013]), "special circumstances" here warrant departure from this general rule (*Fields*, 36 AD2d at 809; *see Yasgour v City of New York*, 169 AD2d 673, 674-675 [1st Dept 1991]). Among the circumstances warranting placing venue in Nassau County were the fact that it is the site of the headquarters of the subject entities (*see Williams*, 191 AD2d at 217; *Pipitone v Zweig*, 163 AD2d 4, 4 [1st Dept 1990]) and, most critically, the fact that,

upon consultation with the potentially receiving Justice, the motion court determined that the consolidated matters could be most efficiently handled and tried in Nassau County (*see Yasgour*, 169 AD2d at 675; *Fields*, 36 AD2d at 809).

Defendants have failed to establish that they will suffer any substantial prejudice as a result of consolidation in Nassau County (*see Ali*, 106 AD3d at 560; *Williams*, 191 AD2d at 218).

Defendants point to a never-appealed order entered in Supreme Court, New York County, in November 2010 (the 2010 Consolidation Order), which transferred the BCL Dissolution Action from Nassau County and consolidated it with the first-filed action between the parties in New York County. Defendants argue that, under the law of the case doctrine, the 2010 Consolidation precludes plaintiffs from seeking to venue the consolidated matters here in Nassau County. This argument is without merit. Mechanically the law of the case doctrine is similar to collateral estoppel, in that both require that an issue have been actually decided in order to pose a bar in a later proceeding (*see Scofield v Trustees of Union Coll.*, 288 AD2d 807, 808 [3d Dept 2001]). The issue of whether the BCL and Common-Law Dissolution Actions should be consolidated with the LLC Dissolution Action in Nassau County was not decided in the

2010 Order, since the latter two actions had not yet been commenced. Accordingly, the 2010 Consolidation Order does not have any application here under the law of the case doctrine.

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

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

ENTERED: MARCH 18, 2014

CLERK

Tom, J.P., Acosta, Andrias, Freedman, Feinman, JJ.

11553 Philips International Investments, LLC,
Plaintiff-Respondent,

-against-

Louis Pektor, et al.,
Defendants,

3174 Airport Road, LP, et al.,
Defendants-Appellants.

Index 651526/11

Keane & Beane, P.C., White Plains (Edward J. Phillips of counsel), for appellants.

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Russell L. Penzer of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered June 11, 2013, affirmed, without costs.

Opinion by Acosta, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Richard T. Andrias
Helen E. Freedman
Paul G. Feinman, JJ.

11553
Index 651526/11

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Philips International Investments, LLC,
Plaintiff-Respondent,

-against-

Louis Pektor, et al.,
Defendants,

3174 Airport Road, LP, et al.,
Defendants-Appellants.

_____x

The partnership defendants appeal from an order of the Supreme Court, New York County (Eileen Bransten, J.,) entered June 11, 2013, which denied their motion to renew so much of their prior motion as sought to dismiss the unjust enrichment claim as against them.

Keane & Beane, P.C., White Plains (Edward J. Phillips of counsel), for appellants.

Lazer, Aptheker, Rosella & Yedid, P.C., Melville (Russell L. Penzer and Giuseppe Franzella of counsel), for respondent.

ACOSTA, J.

The extent of the relationship between parties to support the equitable remedy of unjust enrichment has been the focus of several recent Court of Appeals cases. The latest of these cases, *Georgia Malone & Co., Inc. v Rieder* (19 NY3d 511 [2012]), held that although a plaintiff is not required to allege privity, the pleadings must "assert a connection between the parties that [is] not too attenuated" (*id.* at 517). At issue in this case is whether *Georgia Malone* changed the law on unjust enrichment sufficient to support a motion to renew pursuant to CPLR 2221. Specifically, one month after the motion court denied that portion of defendants' motion to dismiss the unjust enrichment claim, the Court of Appeals decided *Georgia Malone*. The appealing defendants contend that *Georgia Malone* made clear for the first time that, in order to state a claim for unjust enrichment, a plaintiff must plead facts sufficient to show a relationship between itself and the defendant that would make the retention of the enrichment unjust or inequitable. Plaintiff argues that prior cases, in particular *Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173, 182-183 [2011]) and *Sperry v Crompton Corp.* (8 NY3d 204, 215-216 [2007]), each discussed in *Georgia Malone*, demonstrate that the proposition was the law of New York prior to *Georgia Malone*. As such, *Georgia Malone* was not a

change in the law. We agree with plaintiff.

The law of unjust enrichment was not changed by *Georgia Malone*. Rather, the Court, by engaging in a detailed discussion of the relevant cases, merely added clarity to the law, which Court of Appeals cases often do. Accordingly, the motion court properly denied defendants' motion to renew the portion of their motion that sought dismissal of the unjust enrichment claim. In any event, plaintiff properly alleged a "relationship between the parties that could have caused reliance or inducement" to support an unjust enrichment claim (*id.* at 517 [internal quotation marks omitted]).

Plaintiff investment company entered into a joint venture with defendants Louis and Lisa Pektor to purchase a portfolio of commercial properties from nonparty Liberty Property. During due diligence, plaintiff discovered that one of the properties had a critical flaw that made its purchase or inclusion in the sale unviable. The venture then entered into discussions with Liberty to purchase the remaining properties (the viable properties). The deal with the venture did not go forward. Subsequently, however, plaintiff learned that the Pektors had created a series of limited partnerships (the partnership defendants) to act as vehicles to purchase the viable properties from Liberty, cutting the venture out of the transaction.

Plaintiff brought suit against, inter alia, the Pektors and the partnership defendants. The complaint included a claim for unjust enrichment against the partnership defendants. All defendants moved to dismiss. The motion court granted the motion to dismiss in part, and granted leave to amend to replead the dismissed claims. One of the claims that was not dismissed was the unjust enrichment claim against the partnership defendants.

Approximately one month after the court's denial of dismissal of the unjust enrichment claim, the Court of Appeals handed down *Georgia Malone*. There, the Court stated that a plaintiff alleging unjust enrichment must plead some relationship with the defendant sufficient to give rise to a finding that retention of the benefits are unjust (19 NY3d at 519).

The partnership defendants moved to renew, arguing that *Georgia Malone* changed the law, which justified renewal (and excused their failure to make this argument on the original motion to dismiss). They also argued that were *Georgia Malone* applied to the complaint here, the unjust enrichment claim would have to be dismissed. Plaintiff opposed, arguing that *Georgia Malone* did no more than restate, albeit more clearly, settled precedent of the Court of Appeals on precisely this issue. The court denied the motion to renew and we now affirm. We agree with plaintiff that *Malone* merely clarified existing law.

Indeed, a review of *Sperry v Crompton Corp.* (8 NY3d 204 [2007]), *Mandarin Trading Ltd. v Wildenstein* (16 NY3d 173 [2011]), and *Malone* clearly indicate that the Court in *Malone* was merely restating that a plaintiff must plead some relationship between the parties that could have caused reliance or inducement and that the relationship cannot be too attenuated. In *Sperry*, the plaintiff -- the representative for a putative class action -- asserted antitrust claims against the manufacturers of chemicals for tires, claiming that the chemical manufacturers' price inflation was passed on by the tire manufacturers to consumers. The plaintiff also asserted unjust enrichment claims against the chemical makers.

The Court dismissed the unjust enrichment claim for lack of any allegation of a connection or relationship between the chemical maker and the plaintiff:

> "While we agree with Sperry that a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment, we nevertheless conclude that such a claim does not lie under the circumstances of this case. *Here, the connection between the purchaser of tires and the producers of chemicals used in the rubber-making process is simply too attenuated to support such a claim*" (8 NY3d at 215-216 [emphasis added]).

Likewise, in *Mandarin Trading*, the plaintiff sought to buy a famous painting for the purpose of selling it at auction. The plaintiff received an appraisal letter from a famous art expert

stating his opinion that the painting was worth some $17 or $18 million; the letter was addressed to a person whose role in the transaction was not explained by the parties, and the complaint did not indicate the purpose of the letter, who had requested it, or how the plaintiff purchaser had obtained it. The plaintiff purchased the painting for $11.3 million; but was unable to sell the painting for even the amount of the purchase price. Plaintiff subsequently learned that the art expert who wrote the appraisal letter had an ownership interest in the painting, and in fact received over $8 million of the $11.3 purchase price. The plaintiff sued the seller and the art expert for breach of contract, fraud, and unjust enrichment.

The Court upheld the dismissal of the unjust enrichment claim against the art expert. It noted that the letter was not addressed to anyone, and nothing indicated that it was for a particular purpose. Indeed, there was no allegation in the complaint of a relationship between the plaintiff and the expert, or that the expert was even aware of the plaintiff when he gave the letter. As the Court said:

> "Moreover, under the facts alleged, *there are no indicia of an enrichment that was unjust where the pleadings failed to indicate a relationship between the parties that could have caused reliance or inducement*. Without further allegations, the mere existence of a letter that happens to find a path to a prospective purchaser does not render this transaction one of

> equitable injustice requiring a remedy to balance a wrong. Without sufficient facts, conclusory allegations that fail to establish that a defendant was unjustly enriched at the expense of a plaintiff warrant dismissal" (16 NY3d at 182-183 [emphasis added]).

Georgia Malone merely restated the principles addressed in *Sperry* and *Mandarin*. There, the plaintiff was a real estate broker who introduced a seller of an apartment complex to a developer. The plaintiff entered into a contract with the developer that if the introduction led to a deal, the plaintiff would earn a commission of 1.25% of the sale price. In support of the deal, the plaintiff created substantial due diligence materials for the developer. At the eleventh hour, the developer walked away from the deal. It sold the confidential due diligence materials created by plaintiff to Rosewood, another real estate broker, for $150,000. That broker, using the materials, ultimately found another buyer and earned a $500,000 commission.

The plaintiff sued Rosewood, the other broker, for unjust enrichment. However, the Court, much as it had in *Sperry* and *Mandarin Trading*, focused on the lack of any allegation that the other broker knew the materials were confidential or that the developer had not paid the plaintiff for the materials. The Court further noted that there were no dealings between the plaintiff and the other broker:

> "Similar to *Sperry* and *Mandarin*, the relationship between Malone and Rosewood is too attenuated because they simply had no dealings with each other. . . . [T]he complaint does not contain sufficient allegations to support an unjust enrichment claim against Rosewood. In particular, the complaint does not assert that Rosewood and Malone had any contact regarding the purchase transaction. And, although the complaint states that Rosewood 'knew at all times' that Malone produced the due diligence reports and provided them to CenterRock with the expectation that it would be compensated in the event a purchase agreement was reached, there is no allegation that Rosewood was aware that Malone and CenterRock had agreed to the confidential nature of the due diligence information or that Rosewood knew that CenterRock had failed to pay Malone before the documents were conveyed to Rosewood. Indeed, Jungreis's [a broker in the Rosewood firm] e-mail communications submitted by Malone in opposition to the motions to dismiss allude to Rosewood's offer to pay the Rieders [Ralph Reider was CenterRock's managing member and Elie Rieder an officer] for the 'due diligence costs' they 'laid out,' suggesting that Rosewood believed that the Rieders had compensated Malone for its services" (19 NY3d at 517-518).

Thus, contrary to defendants' assertion, the Court of Appeals decision in *Malone* did not change the law. Its expansive discussion of its prior holdings in *Sperry* and *Mandarin* merely helped to add clarity with respect to the relationship between the parties necessary to support a claim for unjust enrichment (*see Georgia Malone*, 19 NY3d at 516-518) Accordingly, it is not a sufficient basis for renewal and defendants' motion was properly denied (CPLR 2221[e][2]).

Were we to reach the merits of the motion to dismiss, we would find that the motion court correctly denied that portion of the motion seeking dismissal of the claim for unjust enrichment

against defendants-appellants. It is well established that to successfully plead unjust enrichment "[a] plaintiff must allege 'that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered'" (*Georgia Malone* at 516, quoting *Mandarin Trading Ltd.*, 16 NY3d at 182 [2011] [internal quotation marks omitted]). A claim for unjust enrichment "is undoubtedly equitable and depends upon *broad* considerations of equity and justice" (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972], *cert denied* 414 US 829 [1973] [emphasis added]).

A plaintiff is not required to allege privity. It must, however, "assert a connection between the parties that [is] not too attenuated" (*Georgia Malone*, 19 NY3d at 517). Thus, although a plaintiff could satisfy this requirement by alleging that the benefit was conferred at the behest of the defendant (*see e.g. Kagan v K-Tel Entertainment,* 172 AD2d 375 [1st Dept 1991]), the Court of Appeals has never required such a relationship. Rather, the pleadings merely have to "indicate a relationship between the parties that could have caused reliance or inducement" (*Georgia Malone*, 19 NY3d at 517 [internal quotation marks omitted]).

Here, plaintiff alleged a sufficient relationship with the partnership defendants to survive a motion to dismiss, namely

that its joint venturers, the Pektors, created the partnership defendants as vehicles to appropriate the venture's business opportunity of buying the viable properties. All of the Pektors' knowledge and scheming is, under this theory, imputable to the partnership defendants. As such, there is far more of a relationship than in *Georgia Malone*, *Sperry* or *Mandarin*. Indeed, unlike *Georgia Malone*, here, the partnerships, through the Pektors, knew of the alleged wrong being done to plaintiff and of their essential role in the allegedly wrongful scheme.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.,) entered June 11, 2013, which denied the partnership defendants' motion to renew so much of their prior motion as sought to dismiss the unjust enrichment claim as against them, should be affirmed, without costs.

All concur.

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

ENTERED: MARCH 18, 2014

CLERK