SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 27, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Renwick, Feinman, JJ.

11459 In re South Bronx Unite!, et al., Index 260462/12
Petitioners-Appellants,

-against-

New York City Industrial Development Agency, et al.,
Respondents-Respondents.

- - - - -

Natural Resources Defense Council,
Amicus Curiae.

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New York Lawyers for the Public Interest, New York (Gavin Kearney of counsel), for appellants.

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

Eric T. Schneiderman, Attorney General, New York (Valerie Figueredo of counsel), for State respondent.

NYS Urban Development Corp., New York (Simon D. Wynn of counsel), for Empire State Development Corporation, respondent.

Nixon Peabody LLP, New York (Laurie Styka Bloom of counsel), for Fresh Direct LLC and UTF Trucking, Inc., respondents.

Sive, Paget & Riesel, P.C., New York (Steven Barshov of counsel), for Harlem River Yard Ventures, Inc., respondent.

Natural Resources Defense Council, New York (Johanna Dyer of counsel), for amicus curiae.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-Hughes, J.), entered May 31, 2013, which, in this hybrid CPLR article 78/declaratory judgment proceeding, denied the petition challenging respondent New York City Industrial Development Agency's (IDA) decision to provide tax subsidies and financial assistance to respondent Fresh Direct LLC for the purposes of relocating its operation to the Harlem River Yards (HRY) in the Bronx without requiring a supplemental environmental impact study, dismissed the remaining causes of action, and dismissed the petition, unanimously modified, on the law, to the extent of declaring that IDA's issuance of a negative declaration did not violate the New York State Environmental Quality Review Act (SEQRA), was not arbitrary and capricious, and was not an abuse of discretion, and otherwise affirmed, without costs.

In 1982, respondent New York State Department of Transportation (DOT) acquired the HRY, a 96-acre waterfront industrial property located in the Port Morris area of the South Bronx. In 1990, Harlem River Yards Ventures, Inc. (HRYV) was selected to develop the HRY as an industrial park that included warehousing, manufacturing, and intermodal rail facilities, and in 1991, HRYV entered a 99-year lease with DOT.

DOT then retained TAM Consultants to conduct an

environmental review, pursuant to SEQRA.[1] In December 1993, TAM submitted its Final Environmental Impact Statement (1993 FEIS) reviewing HRYV's Land Use Plan (HRVY Land Use Plan), which contemplated construction of, among other things, an intermodal terminal, a solid waste transfer station, and various dry and refrigerated warehouses (including the New York Wholesale Flower Market). On May 13, 1994, DOT issued its Record of Decision approving the HRVY Land Use Plan based on the findings of the 1993 FEIS, which examined potential impacts on land use and zoning, urban design, socioeconomic conditions, community resources, cultural and archeological resources, traffic and transportation, air quality, noise, infrastructure, natural resources, and hazardous materials.

Following DOT's approval of the Land Use Plan, certain

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[1] SEQRA, which is codified at Environmental Conservation Law (ECL) § 8-0101 *et seq.* [McKinney 2005]), applies to all state and local agencies in New York. (§ 8-0105(3) [McKinney 1997]); 6 NYCRR [Department of Environmental Conservation] § 617.2[c], [v], [ah] [2000]). Each agency must review any proposed action that comes before it to determine whether or not it may have a significant adverse environmental impact (6 NYCRR 617.7[b][3] [1995]). If the agency determines that one or more significant adverse effects may occur, then the project proponent must prepare an environmental impact statement (EIS) before a decision to proceed with the action can be made (6 NYCRR 617.7[a][1]). If the agency finds that no significant adverse effects will occur, then it adopts a "negative declaration" and the SEQRA process comes to an end (*id.* § 617.2[y]).

infrastructure improvements relating to the intermodal terminal (tracks and concrete pads) and the solid waste transfer station were constructed on the western portion of HRY, but due to various factors (mainly lack of commercial interest), efforts to bring intermodal rail use to HRY were frustrated. At the same time, certain industrial and manufacturing companies sought to enter into sub-leases to construct new facilities at HRY. For example, in 1998, the Land Use Plan was modified, and IDA approved financial incentives to allow the installation of a New York Post printing and distribution facility, and in 2006, IDA approved a Federal Express distribution facility, both located in the area approved for the proposed recycling plant.[2] Both were the subject of SEQRA reviews by IDA as the lead agency for the environmental reviews. The SEQRA reviews resulted in "Negative Declarations" stating that no Supplemental Environmental Impact Statements (SEIS) were required.

On January 25, 2012, Fresh Direct, LLC, an on-line food and

[2] Respondent IDA is a public benefit corporation that offers financial incentive programs, including triple tax-exempt bond financing and/or tax benefits, to assist companies moving to or remaining in the City to acquire or create capital assets in an effort to retain existing jobs and create and attract new jobs.

grocery retailer,[3] then located in Long Island City, Queens, submitted an application to IDA for financial incentives to enable a relocation to HRY. Fresh Direct proposed the construction of a new facility in the western section of HRY (in place of the Flower Market) to serve as its primary warehouse, distribution, and vehicle maintenance center, as well as the acquisition and/or lease and installation of machinery, equipment, furniture, and fixtures necessary to operate the Fresh Direct facility.

To facilitate IDA's SEQRA review of the proposal, Fresh Direct submitted a State Environmental Assessment Form (2011 EAF). The 2011 EAF used the "net-increment" methodology, which analyzed the incremental differences between impacts of the development approved in 1993 and the proposed Fresh Direct facility. It also referenced the updated data on environmental impacts that were presented in connection with the approved New York Post and FedEx proposals. The 2011 EAF concluded that the project was materially similar to uses proposed in the original Land Use Plan, would generate less vehicular traffic, and did not have the potential to have new, additional, or increased

[3] The relocation also included Fresh Direct's trucking division, respondent UTF Trucking, Inc.

significant adverse environmental impacts.

After holding a public hearing, on February 14, 2012, IDA approved the Fresh Direct application and adopted an inducement resolution involving approximately $84 million in direct and indirect city tax subsidies and other financial assistance. IDA also issued a "Negative Declaration" stating that the Type I action[4] will not have a significant environmental impact under SEQRA or require further environmental review.

In June, 2012, petitioners commenced this proceeding challenging IDA's decision to approve the City subsidies and assistance to Fresh Direct, IDA's issuance of the Negative Declaration, and the Empire State Development Corporation's awarding of tax credits to Fresh Direct. When Supreme Court

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[4] Under SEQRA, actions are classified as Type I, Type II, or Unlisted. Type II actions are those that have been found not to have the potential for a significant impact, and thus are not subject to review under SEQRA (see 6 NYCRR 617.2 [2008]). Classes of actions identified as "Type I" or "Unlisted" must be reviewed further under SEQRA to determine the potential for significant adverse environmental impacts. A Type I action means an action or class of actions that is more likely to have a significant adverse impact on the environment than other actions or classes of actions. (6 NYCRR 617.4[a]). Type I actions are listed in the statewide SEQRA regulations (id. § 617.4(a), or listed in any involved agency's SEQRA procedures. The Type I list in 617.4 contains numeric thresholds; any actions that will equal or exceed one or more of the thresholds would be classified as Type I (id.).

dismissed the petition in its entirety, this appeal ensued.

We now find that respondent satisfied its obligations under SEQRA. "'[J]udicial review of a SEQRA determination is limited to determining whether the challenged determination was affected by an error of law or was arbitrary and capricious, an abuse of discretion, or was the product of a violation of lawful procedure'" (*Matter of C/S 12th Ave. LLC v City of New York*, 32 AD3d 1, 3 [1st Dept 2006], *quoting Matter of Village of Tarrytown v Planning Bd. of Vil. of Sleepy Hollow*, 292 AD2d 617, 619 [2nd Dept 2002], lv denied 98 NY2d 609 [2002]). "[T]he courts may not substitute their judgment for that of the agency for it is not their role to 'weigh the desirability of any action or [to] choose among alternatives'" (*Akpan v Koch*, 75 NY2d 561, 570 [1990], *quoting Matter of Jackson v New York State Urban Dev. Corp.*, 67 NY2d 400, 416 [1986]).

Our review of the record establishes that the determination of IDA not to require a Supplemental Environmental Impact Study (SEIS) was not affected by an error of law, arbitrary and capricious, or an abuse of discretion (*see Matter of Riverkeeper, Inc. v Planning Bd. of Town of Southeast*, 9 NY3d 219, 232 [2007]; *Matter of Kellner v City of N.Y. Dept. of Sanitation*, 107 AD3d 529 [1st Dept 2013]; *Matter of C/S 12th Ave. LLC*, 32 AD3d at 7.

Likewise, the record reflects that, as the lead agency, IDA identified the relevant areas of environmental concern related to the proposed action (including traffic, air quality and noise impact)[5], took the requisite "hard look" at them and, in its negative declaration, set forth a reasoned elaboration of the basis for its determination that a SEIS was not required (*id.*). Thus, Supreme Court should have declared that IDA's issuance of a negative declaration did not violate SEQRA, was not arbitrary and capricious, and was not an abuse of discretion.

We find that the court correctly dismissed petitioners' remaining causes of action seeking to invalidate the lease and sublease, and challenging Fresh Direct's admission into the Excelsior Jobs Program. Although the second cause of action, seeking to invalidate the lease between HRYV and Fresh Direct LLC, is timely, it fails to properly plead a cause of action under State Finance Law § 123-b which applies only to proceedings challenging the actions of a state officer or employee or the expenditure of state funds *(see Santora v Silver*, 61 AD3d 621 [1st Dept 2009]). Petitioners' allegations in the amended

[5] Petitioner primarily argued that the environmental review of the project remained deficient with regard to traffic, air quality and noise impact in and around HRY.

petition that the Department of Transportation was involved because it must pre-approve a modification of the Land Use Plan is insufficient to confer standing under the statute.

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

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

ENTERED: MARCH 27, 2014

CLERK

Gonzalez, P.J., Acosta, Saxe, Richter, Manzanet-Daniels, JJ.

12191-
12192 In re East 91st Street Crane Collapse Litigation: Index 117469/08, 117294/08, 771000/10

- - - - -

Maria Leo, etc.,
Plaintiff-Respondent,

-against-

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

Mattone Group Construction Co. Ltd., et al.,
Defendants-Appellants.

- - - - -

Leon D. DeMatteis Construction Corporation,
Third-Party Plaintiff,

-against-

Sorbara Construction Corp.,
Third-Party Defendant-Appellant.

- - - - -

In re East 91st Street Crane Collapse Litigation:

- - - - -

Xhevahire Sinanaj, et al.,
Plaintiffs-Respondents,

-against-

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

Mattone Group Construction Co. Ltd., et al.,
Defendants-Appellants.

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Garfunkel Wild, P.C., Great Neck (Roy W. Breitenbach of counsel),

for Mattone Group Construction Co., Ltd., Mattone Group Ltd. and Mattone Group LLC, appellants.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Glenn J. Fuerth of counsel), for New York Crane & Equipment Corp., James F. Lomma, James F. Lomma, Inc. and TES Inc., appellants.

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for Leon D. DeMatteis Construction Corporation, appellant.

Cartafalsa Slattery Turpin & Lenoff, New York (Raymond Slattery of counsel), for Sorbara Construction Corp., appellant.

Andrea M. Arrigo, P.C., Brooklyn (Andrea M. Arrigo of counsel), for Maria Leo, respondent.

Susan M. Karten & Associates, LLP, New York (Susan Karten of counsel), for Sinanaj and Sinanovic respondents.

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Orders, Supreme Court, New York County (Manuel J. Mendez, J.), entered on or about April 26, 2013 and May 6, 2013, which, in these consolidated actions alleging wrongful death arising from a crane collapse, denied the motions of defendants Mattone Group Construction Co. Ltd., Mattone Group Ltd., and Mattone Group LLC (collectively Mattone) for, inter alia, summary judgment dismissing the complaints and all cross claims as against them, unanimously affirmed, with costs.

The court properly found triable issues of fact regarding whether Mattone may be held liable as, inter alia, a developer of the construction project (*see Thompson v St. Charles*

Condominiums, 303 AD2d 152, 155 [1st Dept 2003], *lv dismissed* 100 NY2d 556 [2003]). The evidence shows that Mattone and another company submitted a joint proposal in 2004 in response to a request for bids by defendant New York City Educational Construction Fund (ECF) to develop the property, and that Mattone subsequently held itself out to the public as one of the developers, including after the 2008 accident.

The court also properly found triable issues of fact as to whether the corporate veil of any of Mattone's alleged subsidiaries should be pierced to hold Mattone liable. Among other relevant factors, the companies had the same chief executive officer, who has not been deposed, at least some of the companies shared the same mailing address, and Mattone's deponent indicated that the alleged subsidiaries were created to distance Mattone from the subject construction project (*see Forum Ins. Co.*

v Texarkoma Transp. Co., 229 AD2d 341, 342 [1st Dept 1996]).

We have considered Mattone's remaining arguments for affirmative relief and find them unavailing.

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

ENTERED: MARCH 27, 2014

CLERK

Friedman, J.P., Freedman, Richter, Feinman, Gische, JJ.

10550-
10551 The People of the State of New York,
Appellant,

-against-

Thomas Bond, also known as Thomas Barnes, also known as Ali Achmed,
Defendant-Respondent.

Ind. 4505/07

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Richard Lee Price, J.), rendered October 12, 2012, resentencing defendant, as a second violent felony offender, to a term of seven years, and bringing up for review an order of the same court and Justice, entered on or about September 14, 2012, which granted defendant's CPL 440.20 motion to set aside his sentence as a persistent violent felony offender and directed that he be resentenced as a second violent felony offender, unanimously reversed, on the law, the judgment of resentence vacated, and the sentence imposed on July 13, 2010 reinstated.

In view of the Court of Appeals' recent decision in *People v Boyer* (22 NY3d 15, [2013]), defendant was not entitled to relief

under CPL 440.20 from his original sentencing as a persistent violent felony offender.

> The decision and order of this Court entered herein on December 31, 2013 (112 AD3d 547 [1st Dept [2013]) is hereby recalled and vacated (*see* M—65 decided simultaneously herewith).

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

ENTERED: MARCH 27, 2014

CLERK

Sweeny, J.P., Acosta, Andrias, Saxe, Clark, JJ.

10640-
10641-
10642 The People of the State of New York,
Appellant,

-against-

Anthony Gathor, also known
as Antwane McLeod,
Defendant-Respondent.

SCI. 1853/04

Robert T. Johnson, District Attorney, Bronx (Stanley R. Kaplan of counsel), for appellant.

Steven Banks, The Legal Aid Society, New York (Elon Harpaz of counsel), for respondent.

Judgment of resentence, Supreme Court, Bronx County (Patricia Anne Williams, J.), rendered August 14, 2012, resentencing defendant to a term of 5 years, and bringing up for review an order, same court and Justice, entered June 13, 2012, which granted defendant's CPL 440.20 motion to set aside his sentence as a second violent felony offender and directed that defendant be resentenced as a first violent felony offender, and order, same court and Justice, entered on or about July 11, 2012, which, upon reargument, adhered to the June 13, 2012 order, unanimously reversed, on the law, the judgment of resentence vacated, and the original sentence, rendered June 22, 2004, wherein defendant was adjudicated a second violent felony

offender and a determinate term of 5 years along with 5 years' postrelease supervision, reinstated.

In light of the Court of Appeals' recent decision in *People v Boyer* (22 NY3d 15 [2013]), we find that defendant was not entitled to relief under CPL 440.20 from his original sentencing as a second violent felony offender since the resentencing proceeding to correct the failure to impose postrelease supervision does not alter the original date of sentence. Here, defendant was sentenced to a term of 3½ years on February 20, 2001 upon a plea of guilty to robbery in the second degree. No term of postrelease supervision was imposed, and none was indicated in the sentence and commitment sheet. On May 26, 2004, defendant pleaded guilty to attempted robbery in the second degree. He was sentenced on June 22, 2004, and adjudicated a second violent felony offender based on the 2001 conviction for robbery in the second degree. On December 14, 2009, defendant was resentenced on his 2001 felony conviction.

In *Boyer*, the Court of Appeals explained as follows: "[A] resentencing to correct the flawed imposition of PRS does not vacate the original sentence and replace it with an entirely new sentence, but instead merely corrects a clerical error and leaves the original sentence, along with the date of that sentence, undisturbed" (*id.* at 24). Given this determination, we find that, notwithstanding the resentencing on December 14, 2009,

defendant's 2001 violent felony conviction qualifies as a predicate felony conviction at the time of his sentencing on June 22, 2004, which requires the imposition of second felony offender status.

The decision and order of this Court entered herein on January 16, 2014 (113 AD3d 478 [1st Dept[2014]) is hereby recalled and vacated (*see* M—389 decided simultaneously herewith).

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

ENTERED: MARCH 27, 2014

CLERK

Tom, J.P., Friedman, Andrias, Freedman, Clark, JJ.

10992-
10993 The People of the State of New York,
Appellant,

-against-

Terrance Wood, etc.,
Defendant-Respondent.

Ind. 6029/02

Robert T. Johnson, District Attorney, Bronx (Justin J. Braun of counsel), for appellant.

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

Judgment of resentence, Supreme Court, Bronx County (Michael A. Gross, J.), rendered September 28, 2012, resentencing defendant to a term of 13 years plus 5 years' postrelease supervision, and bringing up for review an order, same court and Justice, entered on or about June 1, 2012, which granted defendant's CPL 440.20 motion to set aside his sentence as a second violent felony offender and directed that he be resentenced as a first violent felony offender, and an order, entered on or about July 23, 2012, which, upon reargument, adhered to the June 1, 2012 order, same court and Justice, unanimously reversed, on the law, the motion denied, and the sentence imposed on October 4, 2004 reinstated.

Pursuant to *People v Boyer* (22 NY3d 15, 2013 Slip Op 07515 [2013]), the original date of a conviction is controlling for purposes of determining the sequence of current and prior convictions, not the date of resentencing to correct the error identified in *People v Sparber* (10 NY3d 457 [2008]). Because the date defendant received a lawful sentence on a valid conviction for criminal possession of a weapon in the third degree precedes the date of conviction for the instant offense, it qualifies as a prior felony conviction.

> The decision and order of this Court entered herein on December 31, 2013 (112 AD3d 549 [1st Dept [2013]) is hereby recalled and vacated (*see* M—63 decided simultaneously herewith).

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

ENTERED: MARCH 27, 2014

CLERK

Tom, J.P., Friedman, Renwick, Feinman, Clark, JJ.

11252- Index 114068/06
11253 Michael Olsen, 591072/08
Plaintiff,

-against-

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

Skanska USA Building, Inc.,
Defendant-Appellant,

The McKissack Group, Inc., et al.,
Defendants.

[And A Third-Party Action]
- - - - -
Michael Olsen,
Plaintiff-Respondent-Appellant,

-against-

Hudson River Park Trust, et al.,
Defendants-Appellants-Respondents,

The McKissack Group, Inc.,
Defendant-Respondent,

Alfred J. Lanfranchi, D.D.S.,
Defendant.
- - - - -
Skanska USA Building, Inc.,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Spearin Preston & Burrows, Inc.,
Third-Party Defendant-Respondent-Appellant.

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Appeals and cross appeals having been taken to this Court by

the above-named appellants from orders of the Supreme Court, New York County (Jeffrey Oing, J.), entered on or about September 24, 2012 and April 15, 2013,

And said appeals and cross appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto filed March 6, 2014 and March 11, 2014,

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

ENTERED: MARCH 27, 2014

CLERK

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

11557 Mattie Glispy, Index 306346/09
Plaintiff,

-against-

Riverbay Corporation,
Defendant-Respondent,

Perimeter Bridge & Scaffold Co. Inc.,
Defendant,

Proto Construction & Development Corp.,
Defendant-Appellant.

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Milber Makris Plousadis & Seiden, LLP, White Plains (David C. Zegarelli of counsel), for appellant.

Malapero & Prisco, LLP, New York (Glenn E. Richardson of counsel), for respondent.

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Order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered October 5, 2012, which denied defendant Proto Construction & Development Corp.'s (Proto) motion for summary judgment dismissing the complaint and cross claims against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff was injured on July 10, 2009 when she tripped over a piece of wood blocking or "mud sill" under a support column of a sidewalk shed (a scaffold erected over a walkway to protect pedestrians). The structure was purchased by the property owner,

defendant Riverbay Corporation, and installed under contract by Proto in front of Building 8 of the Co-op City housing complex in February 2002. There is no evidence that Proto inspected or performed any maintenance or repair work on the subject sidewalk shed thereafter. Nor is there any indication that the structure was in any way defective during the ensuing seven years so as to afford a basis for contribution or common-law indemnification predicated on liability arising under *Espinal v Melville Snow Contrs.* (98 NY2d 136 [2002]) and its progeny (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]; *Cahn v Ward Trucking, Inc.*, 101 AD3d 458 [1st Dept 2012]).

Plaintiff has not filed a brief. In controversy is whether Proto is obligated to indemnify Riverbay for plaintiff's injuries pursuant to another series of contracts entered into by the parties in 2005. At issue is whether the contract documents contemplate a single performance, as Riverbay contends, or a series of performances under separate contracts (designated "bidding packages") governing work to be performed at different sites, each of which is comprised of several buildings. At the time of the accident, work was under way on other buildings, but the work to be performed on Building 8 had not yet commenced. Thus, Proto argues that its contractual obligation to maintain

the sidewalk shed had not yet arisen under the terms of the applicable bidding package.

The general conditions governing work on all of Riverbay's buildings provide that the contractor "shall maintain fences, sheds, guards, barricades, warning lights, etc.," and because Riverbay would continue to occupy the premises "during the entire period of construction," Proto was to avoid interference with Riverbay's use of the premises and "[c]onfine operations at the site to the areas permitted under the Contract."

The term "contract" is defined in the individual packages, which list the contract documents (including the general conditions). Each package also contains an indemnification clause providing, in material part, that "the Contractor shall defend, indemnify and hold harmless Riverbay . . . against all claims . . . arising out [of] Contractor's performance of the services it provides under . . . this Agreement." Reflecting the terms of the general conditions, each package states, "The Contractor shall provide and maintain all temporary protection for his work areas," and "The Contractor and its employees shall not have access to or be admitted into any area of the premises outside the site except with the written permission of Riverbay." As Riverbay concedes, "work on individual sets of buildings was

to be performed in stages," and the listing of the documents comprising the contract, together with the inclusion of an indemnification provision in each of the 10 packages corresponding to those stages, demonstrates that the scope of its indemnity provision is limited to the particular job site covered by the individual package.

That Proto's contractual duty was confined to the work to be performed in respective designated areas during specified time periods is clear from several other provisions contained in the several packages. First, commencement of work at a particular site requires notice from Riverbay: "No work shall commence until Riverbay issues an Order to Proceed in writing which will set forth the date upon which work is to commence." Second, the time within which the work is to be completed is measured "from the date of the Order to Proceed by Riverbay Corporation." In addition, the definitions section of each package provides, "Whenever used in this contract . . . [,t]he term 'Work' means the work, supplies, equipment, labor and materials specified and the obligations imposed upon the Contractor under this contract." The use of the "this contract" language in each of the 10 packages and the measurement of timely completion from the date of the Order to Proceed indicates that performance is divisible

and governed by a series of discrete contracts (*see Rentways, Inc. v O'Neill Milk & Cream Co.*, 308 NY 342 [1955]). The contrary assertion that the work was a "single undertaking" imposing liability on Proto for the maintenance of all sidewalk sheds on Riverbay's property from the time the contract was awarded in 2005 would require the anomalous conclusion that Proto was responsible for the condition of a structure at a location to which it was denied access and where it was forbidden to perform any work because the requisite order to proceed had not yet been issued.

Because Proto received the notice to proceed with the work encompassing Building 8 on May 26, 2010, well after plaintiff was injured on July 10, 2009, it had no duty to inspect or repair the sidewalk shed that she alleges was negligently maintained, and there is no basis for contractual indemnification. Whether, as Riverbay alleges, Proto may earlier have undertaken repairs on

other sidewalk sheds on Riverbay's property — gratuitously or otherwise — has no bearing on its obligation to indemnify Riverbay for damages arising out of the accident involving the subject sidewalk shed.

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

ENTERED: MARCH 27, 2014

CLERK

Acosta, J.P., Renwick, Feinman, Clark, JJ.

11960-
11961 Index 651762/12

Getty Properties Corp., et al.,
Plaintiffs-Respondents,

-against-

Getty Petroleum Marketing Inc.,
Defendant,

1314 Sedgwick Ave. LLC, et al.,
Defendants-Appellants.

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White & Wolnerman, PLLC, New York (Randolph E. White of counsel), for appellants.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of counsel), for respondents.

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Judgment, Supreme Court, New York County (Melvin Schweitzer, J.), entered July 23, 2013, inter alia, awarding plaintiffs $260,657.58, plus interest to be paid from funds held in escrow, awarding $10,000 in sanctions against the LLC defendants and Robert G. Del Gadio jointly, directing that a hearing be conducted to ascertain plaintiffs' damages, expenses and attorneys' fees, and enjoining defendants or any attorney acting on their behalf from making any motions or commencing any action in any court relating to the subject matter of this litigation without prior approval of the court, unanimously affirmed, without costs, and the matter is remitted to Supreme Court for

further proceedings consistent herewith. Appeals from order, same court and Justice, entered June 17, 2013, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In this action for, inter alia, use and occupancy, contractual indemnification, and breach of guarantee, the motion court properly granted summary judgment to plaintiffs in light of this Court's resolution of the issues on a prior appeal (*see Getty Props Corp. v Getty Petroleum Mktg. Inc.*, 106 AD3d 429 [1st Dept 2013]). To the extent that some of defendants' claims were not resolved on the prior appeal, the motion court properly rejected them.

The record filed by defendants' attorney was so deficient as to amount to frivolous conduct (*see* 22 NYCRR 130-1.1[c][3]; *Rogovin v Rogovin*, 27 AD3d 233 [1st Dept 2006]). By order entered December 12, 2013, we granted plaintiffs leave to file a supplemental appendix without prejudice to seeking costs and/or sanctions directly on the appeal. We remit the matter to Supreme Court to determine plaintiffs' actual expenses of printing the supplemental appendix (*see* CPLR 5528[e]; *Fidelity N.Y. v Madden*, 212 AD2d 572, 573-574 [2nd Dept 1995]; *Mandell v Grosfeld*, 65 AD2d 743 [1st Dept 1978]), as well as reasonable attorneys' fees

incurred in connection with plaintiffs' motion to dismiss the appeal for the deficient appendix (*see* 22 NYCRR 130-1.1[c][3]; *Rogovin*, 27 AD3d at 235).

Finally, there is no reason to disturb the aforementioned sanctions.

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12070 The People of the State of New York, Ind. 410/09
Respondent,

-against-

Johntel Richardson,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (David Crow of counsel), and Shearman & Sterling LLP, New York (Andrew Z. Lipson of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Deborah L. Morse of counsel), for respondent.

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Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 30, 2009, convicting defendant, after a jury trial, of criminal possession of a weapon in the third degree and menacing in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court properly declined to instruct the jury on the defense of justification with regard to the weapon possession count, in which it was alleged that defendant possessed a pipe with intent to use it unlawfully. "[B]ecause possession of a weapon does not involve the use of physical force, there are no circumstances when justification can be a defense to the crime of

criminal possession of a weapon" (*People v Pons*, 68 NY2d 264, 267 [1986] [citations omitted]).

Nevertheless, defendant asserts that the court should have instructed the jury, in essence, that an intent to use a weapon justifiably is not an intent to use it unlawfully. However, defendant made no such request. The difference is not merely a matter of semantics; we note that the relevant CJI charge, which defendant cites with approval, clearly distinguishes between justification as a defense (which is inapplicable to possessory crimes) and justification as a factor bearing on the lawfulness of intent (*see* CJI2d[NY] Penal Law art 265, Intent to Use Unlawfully and Justification). Accordingly, we find that defendant did not preserve his claim that the court should have charged the jury along the lines of the cited CJI charge, and we decline to review it in the interest of justice.

As an alternative holding, we find no basis for reversal. The court clearly instructed that possession of the pipe was a crime only if the People proved beyond a reasonable doubt that defendant intended to use it unlawfully. Furthermore, it was clear to the jury, from the context of the entire trial, that the lawfulness of defendant's intent was to be determined on the basis of his assertion that he possessed the pipe solely for the

purpose of defending himself. There is no reasonable possibility that the court's charge misled the jury to believe that a guilty verdict would be proper even if the People failed to disprove defendant's claim of justifiable intent.

The court properly declined to charge the justification defense as to the menacing count. There was no reasonable view of the evidence, viewed most favorably to defendant, to support such a charge. Nothing in either the prosecution nor defense versions of the incident could support a reasonable view that defendant committed the acts constituting menacing, but did so with justification.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). The only aspect of defendant's *Batson* claim that is arguably preserved is his claim that when the prosecutor cited a particular panelist's recent relocation to New York County and prior service on a trial that allegedly resulted in an acquittal or hung jury, those explanations were pretextual. However, we find that the record, viewed as a whole, supports the court's finding to the contrary. Such a finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]). At worst, the prosecutor was honestly mistaken about the facts

surrounding the panelist's prior jury service, and we do not find any disparate treatment by the prosecutor of similarly situated panelists.

Defendant failed to preserve his claims that the prosecutor's reasons for challenging other panelists were pretextual (*see People v Allen*, 86 NY2d 101, 111 [1995]), or any of his challenges to the procedures employed by the court in resolving the *Batson* application (*see People v Richardson*, 100 NY2d 847, 853 [2003, and we decline to review them in the interest of justice.

As an alternative holding, we reject them on the merits.

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12071 In re Anonymous, Index 102121/12
Petitioner-Respondent,

-against-

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

_____

Michael A. Cardozo, Corporation Counsel, New York (Keith M. Snow of counsel), for appellants.

Chet Lukaszewski, P.C., Lake Success (Chet Lukaszewski of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Alice Schlesinger, J.), entered November 26, 2012, to the extent appealed from as limited by the briefs, annulling the determination of respondent Board of Trustees, dated November 9, 2011, which denied petitioner's application for accidental disability retirement benefits, and remanding the matter for a determination awarding petitioner accidental disability retirement benefits, unanimously reversed, on the law, without costs, the petition denied, and the proceeding brought pursuant to CPLR article 78 dismissed.

The article 78 court incorrectly found that petitioner was entitled to the presumption of General Municipal Law § 207-p, thereby improperly shifting the burden of proof as to causation

to respondents. General Municipal Law § 207-p provides, in pertinent part, that "any paid member of a . . . police department . . . who successfully passed a physical examination upon entry into the service of such department who contracts HIV [parenthetical omitted], tuberculosis or hepatitis, will be presumed to have contracted such disease as a natural or proximate result of an accidental injury received in the performance and discharge of his or her duties . . ., unless the contrary be provided by competent evidence." Petitioner does not suffer from any of the three diseases named in the statute; yet, the court found that his "illness was the type that the 207-p presumption was intended to cover." However, the plain language of the statute makes it clear that the presumption is only applicable to the three named diseases. Thus, it was petitioner's burden to prove that his condition was caused by an accidental line-of-duty injury, not respondents' burden to demonstrate that petitioner's condition was not caused by an accidental line-of-duty injury (*see Matter of Evans v New York*, 145 AD2d 361 [1st Dept 1988]).

The Medical Board found that the cause of petitioner's nystagmus could not be determined and that the opinion of some of petitioner's doctors that the cause was a virus that petitioner

contracted during undercover work was speculative. As a result of a tie vote, the Board of Trustees determined that petitioner was not entitled to accidental disability retirement benefits. The determinations of both boards are supported by the requisite credible evidence of lack of causation (*see Matter of Borenstein v New York City Employees' Retirement Sys.*, 88 NY2d 756, 760-761 [1996]; *Matter of Meyer v Board of Trustees of N.Y. City Fire Dept., Art. 1-B Pension Fund*, 90 NY2d 139, 144-145, 148 [1997]). Neither board was required to identify the cause of petitioner's disability.

Although we are sympathetic to petitioner's plight, his remedy lies with the legislature.

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

ENTERED: MARCH 27, 2014

CLERK

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

12072 Estate of Florence M. Lawler, etc., Index 115959/09
Plaintiff-Respondent,

-against-

The Mount Sinai Medical
Center, Inc., et al.,
Defendants-Appellants.

_____

LeClair Ryan, A Professional Corporation, New York (Deborah I. Meyer of counsel), for appellants.

John E. Lawler, Yonkers, for respondent.

_____

Order, Supreme Court, New York County (Joan B. Lobis, J.), entered December 18, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

On May 1, 2007, the decedent, Florence Lawler, was admitted to Mt. Sinai Hospital with a brain hemorrhage and fell into a coma. Mrs. Lawler had received an artificial mitral valve replacement (MVR) some 17 years earlier, for which she was taking Coumadin. According to plaintiff and his expert, Mrs. Lawler took the antibiotic ampicillin prior to any procedure, to prevent infections, due to the MVR.

On or about May 10, 2007, an unidentified physician advised Mrs. Lawlers's husband, now the administrator of plaintiff estate

(plaintiff), that Mrs. Lawler needed a percutaneous endoscopic gastronomy procedure (PEG), the insertion of a feeding tube through the abdomen into the stomach, so that she could receive nutrients. On May 10, 2007, plaintiff, assured that he would be able to speak to the doctor in more detail later, signed a "permission sheet" form. The form stated that the treatment/operation/procedure was to include a "PEG." However, the patient's name, the name of the doctor who was to perform the procedure, and the name of the doctor who was to explain the procedure were left blank.

On May 14, 2007, the PEG procedure was performed. Plaintiff claims that, had he been advised what "PEG" was, what it entailed, and when the procedure was to take place, he would have alerted the surgeon as to the ampicillin required before Mrs. Lawler's procedure. Mt. Sinai's medical records conflict with respect to whether ampicillin and/or other antibiotics were given timely before the procedure.

Three days after the PEG procedure, Mrs. Lawler contracted a Methicillin Resistant Staphylococcus Aureus (MRSA) infection. After suffering several more strokes while at Mt. Sinai, on June 6, 2007, Mrs. Lawler died.

Mt. Sinai demonstrated its prima facie entitlement to

summary judgment. Its expert reviewed the medical records, and opined that the medical staff at Mt. Sinai did not depart from the standard of care, in that a strong antibiotic, vancomycin, the standard for treating a MRSA infection was provided to Mrs. Lawler for the first two days of her stay at Mt. Sinai, and again after she acquired MRSA (*see Scalisi v Oberlander*, 96 AD3d 106, 120 [1st Dept 2012]).

However, plaintiff raised a triable issue of fact as to departure from the standard of care and lack of informed consent. At the outset, plaintiff's expert, a neuroradiologist, was qualified to render an opinion as to Mt. Sinai's standard of care and treatment of Mrs. Lawler. Contrary to Mt. Sinai's assertion, plaintiff's expert "'need not be a specialist in a particular field if he nevertheless possesses the requisite knowledge necessary to make a determination on the issues presented,'" the issue of his or her qualifications to render such opinion must be left to trial, as this goes to the weight rather than the admissibility of his testimony (*Limmer v Rosenfeld*, 92 AD3d 609, 609 [1st Dept 2012]; *Williams v Halpern*, 25 AD3d 467 [1st Dept 2006]).

Plaintiff relied on the evidence that, while Mt. Sinai's records stated that ampicillin was given "prior to procedure,"

its records also stated that ampicillin was administered only 11 minutes before the procedure, and another antibiotic, gentamicin, was administered 20 minutes after the procedure. Plaintiff's expert opined that since ampicillin would not achieve its salutary effect until after one hour, good practice required giving the antibiotic an hour before incision, and that the timing resulted in infection and contributed to the subsequent conditions, thus raising an issue of fact as to whether the PEG procedure caused the MRSA infection (*see Masucci v Feder*, 196 AD2d 416, 421-422 [1st Dept 1993]).

While plaintiff's expert did not specifically address lack of informed consent in his affidavit, the opinions made therein concerning proximate causation, combined with plaintiff's testimony and the plain insufficiency of the "permission form," demonstrate a showing of the "insufficiency of the information

disclosed to [] plaintiff" (*see Orphan v Pilnik*, 15 NY3d 907, 908 [2010]; Public Health Law § 2805-d [1], [3]).

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12073 In re Sylvester W.,

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

_____

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

Jeffrey D. Friedlander, Acting Corporation Counsel, New York (Allen Shoikhetbrod of counsel), for presentment agency.

_____

Order, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about July 16, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of criminal mischief in the fourth degree, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly denied that portion of appellant's suppression motion that sought a hearing under *Dunaway v New York* (442 US 200 [1979]) concerning the legality of appellant's arrest, which led to an identification. The allegations in appellant's moving papers, when considered in the context of the information provided to appellant concerning the basis for his

arrest, were insufficient to create a factual dispute requiring a hearing (*see People v Mendoza*, 82 NY2d 415 [1993]). By way of the petition and other documents, appellant was clearly placed on notice that the reason for his arrest was an alleged criminal mischief incident that had occurred before the arrest. Appellant did not specifically deny those allegations or assert any other basis for suppression (*see People v Jones*, 95 NY2d 721, 728-729 [2001]).

The record supports the court's finding that, notwithstanding a suggestive identification procedure, the complainant had an independent source for her in-court identification of appellant (*see People v Williams*, 222 AD2d 149, 153-154 [1st Dept 1996], *lv denied* 88 NY2d 1072 [1996]). The complainant had multiple opportunities to observe appellant, before, during and after his act of criminal mischief.

The court's fact-finding determination was based on legally

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

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

ENTERED: MARCH 27, 2014

CLERK

CORRECTED ORDER - MARCH 27, 2014

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12074 In re John Francis Deneny, etc., Index 113205/10
Petitioner-Respondent,

-against-

Barbara Van Rossem, etc.,
Respondent-Appellant.

Harris Beach PLLC, Uniondale (William J. Garry of counsel), for appellant.

Cuddy & Feder LLP, White Plains (Thomas A. Cunnane, Jr. of counsel), for respondent.

Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered May 9, 2012, granting the petition to remove respondent (Van Rossem) as co-trustee of the 518 Trust and denying her cross motion for an accounting and to terminate the trust, unanimously reversed, on the law, without costs, the **judgment vacated**, and the matter remanded for proceedings consistent herewith.

It was not a proper exercise of discretion for the court to remove Van Rossem as co-trustee without a hearing (*see Hoopes v Bruno*, 128 AD2d 991 [3rd Dept 1987]). Sharp factual disputes exist as to who was responsible for the finances of the building and whether Van Rossem interfered with the proper administration of the trust. Thus, a hearing is required on the issues raised both in the petition and Van Rossem's cross motion to terminate

the trust.

Since petitioner acknowledged that Van Rossem was entitled to an accounting, so much of her cross motion as sought such relief should have been granted.

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12076 The People of the State of New York, Ind. 47/12
Respondent,

-against-

Robinson Cordell,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered February 20, 2013, convicting defendant, upon his plea of guilty, of conspiracy in the third degree and attempted criminal sale of a controlled substance in the third degree, and sentencing him to concurrent terms of 3½ to 7 years and 5 years, unanimously affirmed.

Although we do not find that defendant made a valid waiver of his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12077 Elissa Abreu, Index 603992/06
Plaintiff-Respondent,

-against-

Barkin and Associates
Realty, Inc., et al.,
Defendants-Appellants.

_____

Schlam Stone & Dolan LLP, New York (David J. Katz of counsel), for appellants.

Morris Duffy Alonso & Faley, LLP, New York (Barry M. Viuker of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered August 13, 2013, which, following a nonjury trial, granted judgment in favor of plaintiff on her breach of contract claim against defendant Barkin Associates Realty, Inc., and denied defendant Susan Barkin's motion for attorney's fees pursuant to CPLR 3220, unanimously modified, on the law, to direct a hearing on the amount of legal fees, if any, to which Susan Barkin, individually, is entitled under CPLR 3220, and otherwise affirmed, without costs.

In reviewing a judgment from a bench trial, especially where credibility played an important role, the judgment should only be set aside where it is not supported by any fair interpretation of

the evidence (*Nightingale Rest. Corp. v Shak Food Corp.*, 155 AD2d 297 [1st Dept 1989], *lv denied* 76 NY2d 702 [1990]). Applying that standard here, the court's finding that an oral contract existed for plaintiff to receive 50% of commissions on the transaction at issue should not be disturbed. The finding was supported by defendants' own testimony, as well as by the course of dealing between defendants and their brokers. The same is true for the court's finding that defendants failed to establish their faithless servant defense. There was no evidence that plaintiff's husband actively solicited defendants' former clients, or that plaintiff personally knew of the alleged solicitations.

However, Susan Barkin is entitled to a hearing on the amount of her individual fees, if any, under CPLR 3220. Defendant made an offer to liquidate. Plaintiff then withdrew her claims against Barkin, in a stipulation on the record at trial. Having failed to obtain a more favorable judgment than the offer, plaintiff became liable for costs and fees. This is true even though there was no payment of the offer amount into court. Such payment is not required by CPLR 3220 (*see* David D. Siegel,

Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3221:3; *but see Deck v Chautauqua County Patrons' Fire Relief Assn.*, 73 Misc 2d 1048 [Sup Ct, Chatauqua County 1973] [CPLR 3220 requires payment of the offered amount into court]).

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12078- Dkt. 23115C/11
12078A The People of the State of New York, 34449C/11
Respondent,

-against-

Gerard Matthews,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Marc I. Eida of counsel), for respondent.

_____

Judgments, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered December 14, 2011, convicting defendant, upon his pleas of guilty, of public lewdness (two counts), exposure of a person (two counts) and resisting arrest, and sentencing him to an aggregate term of 90 days, unanimously reversed, on the law, the judgments vacated, and the informations dismissed.

Based on *People v McNamara* (78 NY2d 626 [1991]), we are constrained to conclude that the informations charging defendant with public lewdness (Penal Law § 245.00[a]) and exposure of a person (Penal Law § 245.01) were jurisdictionally defective, because they failed to establish the statutory element that defendant's acts were committed in a public place. As in

McNamara, the lewd acts here were allegedly committed in a parked car, but the informations did not allege objective circumstances to establish that the car was situated in a place where it was likely that the acts would be observed by casual passersby, which is an essential allegation under these circumstances (*id.* at 634). This deficiency was not cured by the informations' conclusory allegations that the lewd acts occurred in public places, or the allegations that they took place in front of specific addresses, which "could as readily refer to a private driveway as to a residential street" (*id.*).

We have considered and rejected the People's remaining arguments on this issue. Because the information failed to allege sufficient facts to support the underlying charges, it was also insufficient to allege that defendant's arrest on those

charges was "authorized," as required by Penal Law § 205.30, and thus defendant is entitled to dismissal of the resisting arrest charge (*see People v Jones*, 9 NY3d 259, 263 [2007]).

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12082 The People of the State of New York, Ind. 5224/07
Respondent,

-against-

Keith Lopez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Michael C. Taglieri of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered May 8, 2008, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of three to six years, unanimously affirmed.

The court properly declined to submit to the jury the issue of whether a prosecution witness was an accomplice, whose testimony would thus require corroboration (*see* CPL 60.22). The testimony of the victim as well as the surveillance video provided no reasonable basis to find that the witness, who denied any involvement, acted as an accomplice in the robbery (*see People v Sweet*, 78 NY2d 263, 266 [1991]). Defendant's theory that the witness acted as a lookout or played some other

role in the robbery is both speculative and contradicted by the evidence (*see e.g. People v Martinez*, 59 AD3d 361 [1st Dept 2009], *lv denied* 12 NY3d 917 [2009]

In any event, any error in failing to deliver an accomplice corroboration charge was harmless (*see id.*). There was ample evidence to meet the standard for corroboration of accomplice testimony (*see People v Breland*, 83 NY2d 286, 293 [1994]), and there is no reasonable possibility that an accomplice-in-fact charge would have affected the verdict.

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12084 Donette Kingston, Index 400756/12
Plaintiff-Appellant,

-against-

New York City Department
of Homelessness Services,
Defendant-Respondent.

_____

Donette Kingston, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Ellen Ravitch of counsel), for respondent.

_____

Order, Supreme Court, New York County (Arthur F. Engoron, J.), entered November 16, 2012, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, who commenced an action against defendant alleging, among other things, that defendant failed to maintain the shelter where she resided in a safe and sanitary condition, failed to exhaust her administrative remedies prior to commencing this action, inasmuch as she was entitled to request a fair hearing to challenge the adequacy of the shelter's services, but failed to do so (*see* 18 NYCRR 358-3.1[b][6]; 18 NYCRR 358-3.2[b][3]; *see also Jenkins v State of N.Y. Div. of Hous. & Community Renewal*, 264 AD2d 681, 682 [1st Dept 1999]).

Plaintiff's action is also barred by the doctrine of collateral estoppel. Plaintiff previously commenced an action in Housing Court seeking correction of alleged violations of the Administrative Code by defendant, and the issues raised in that action, which plaintiff had a full and fair opportunity to litigate, and which were decided against her, are the same issues she raises in this action (*see Ventur Group, LLC v Finnerty*, 80 AD3d 474, 475 [1st Dept 2011]; CPLR 3211[a][5]).

Plaintiff's retaliation claim, based on the allegation that the director of the shelter where plaintiff resided encouraged other residents to fight with her, was also properly dismissed. Even assuming the allegation to be true, such action on the part of the director cannot be said to be committed in furtherance of defendant's business, and within the scope of the director's employment (*see N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]).

Furthermore, plaintiff lacked standing to bring a cause of action on behalf of the New York City Human Resources Administration, since she does not have the authority to act on

the agency's behalf (*see e.g. Hill v Coates*, 78 AD3d 439, 440 [1st Dept 2010], *lv denied* 16 NY3d 712 [2011]).

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12085 Yuying Qiu, Index 111285/09
Plaintiff-Respondent,

-against-

J&J Grocery & Deli Corp., et al.,
Defendants-Respondents,

98 Rivington Realty Corp.,
Defendant-Appellant.

_____

Law Offices of Michael E. Pressman, New York (Robert S. Bonelli of counsel), for appellant.

Steven Louros, New York, for Yuying Qiu, respondent.

Law Office of Steven G. Fauth, LLC, New York (Scott S. Levinson of counsel), for J&J Grocery & Deli Corp. and Rajeh Jawad, respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 28, 2012, which denied defendant 98 Rivington Realty Corp.'s motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed as against 98 Rivington Realty Corp. The Clerk is directed to enter judgment accordingly.

Although the motion court properly found that the issue of whether a dangerous or defective condition exists which is sufficiently hazardous to create liability is generally a

question of fact, to be resolved by a jury (*Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]), we find that the out-of-possession landlord was entitled to summary judgment where the plaintiff fell through an open trap door in the tenant's store. Even though the landlord reserved the right to reenter the leased premises for purposes of inspection and repair, the properly functioning trap door that was left open by someone within the tenant's control did not constitute "'a significant structural or design defect'" (*see Bing v 296 Third Ave. Group, L.P.*, 94 AD3d 413, 414 [1st Dept 2012], *lv denied* 19 NY3d 815 [2012]; *Baez v Barnard Coll.*, 71 AD3d 585 [1st Dept 2010]) and plaintiff failed to show a violation of a specific statutory provision, as required to impose liability upon the out-of-possession landlord (*see Centeno v 575 E. 137th St. Real Estate, Inc.*, 111 AD3d 531 [1st Dept 2013]). A general "non-specific safety provision" such as Administrative Code of City of NY § 28-301.1 is insufficient to impose liability on an out-of-possession owner (*see id.*).

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

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

ENTERED: MARCH 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12087 The People of the State of New York, Ind. 5337/10
Respondent,

-against-

Dimitris Smith, etc.,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Richard D. Carruthers, J.), rendered on or about April 25, 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 27, 2014

CLERK

Moskowitz, J.P., Richter, Manzanet-Daniels, Clark, Kapnick, JJ.

12088N Hermitage Insurance Company, Index 106830/10
Plaintiff-Respondent,

-against-

Athena Management Corp.,
Defendant,

Ricardo Wilshire, etc.,
Defendant-Appellant.

_____

Rosenbaum & Rosenbaum, P.C., New York (Matthew T. Gammons of counsel), for appellant.

Law Office of Steven G. Fauth, LLC, New York (Suzanne M. Saia of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Carol R. Edmead, J.), entered December 17, 2012, which, upon reargument, granted the motion of plaintiff Hermitage Insurance Company for a default judgment as against defendant Athena Management Corp. (Athena) and for summary judgment as against defendant Wilshire, and declared that Hermitage had no duty to defend or indemnify Athena in the underlying personal injury action, unanimously affirmed, without costs.

The excuse proffered by Athena that it was unable to afford an attorney was not a reasonable excuse for its default. The record shows that Athena failed for over two years to take any

steps to protect its interests even though it knew it had to answer the complaint (*Gerlin v Homann Trucking*, 303 AD2d 262 [1st Dept 2003]). Accordingly, having defaulted, Athena "is deemed to have admit[ted] all traversable allegations in the complaint, including the basic allegations of liability" (*Al Fayed v Barak*, 39 AD3d 371, 372 [1st Dept 2007] [internal quotation marks omitted]).

The argument that Hermitage failed to show that it was prejudiced by Athena's three-month delay in notifying it of the accident, is unavailing. The notice provision in the subject policy operates as a condition precedent to coverage, and late notice of an occurrence, absent a valid excuse, vitiates coverage as a matter of law, regardless of any prejudice (*see Rivera v Core Cont. Const. 3, LLC*, 106 AD3d 636 [1st Dept 2013]).

Furthermore, even considering the affidavit of Athena's owner, the standard is not whether the insured will be ultimately liable, but whether the insured should reasonably have anticipated a claim, whether meritorious or not (*see Tower Ins. Co. of N.Y. v Lin Hsin Long Co.*, 50 AD3d 305, 308 [1st Dept 2008]). Here, Athena's owner admitted her immediate knowledge of the incident involving a burn to a child, and that the media had been at the building (*see Ferreira v Mereda Realty Corp.*, 61 AD3d

463 [1st Dept 2009]). While Athena's owner stated that she had her superintendent investigate, and that the cause of the accident was allegedly a faulty thermostat that had been broken by the tenants, the owner could have easily questioned Wilshire about the particular facts of the occurrence, which would have informed her that the thermostat was not the exclusive cause of the accident. The owner could have also questioned Wilshire about whether he intended to make a claim, but she failed to do so (*see Tower Ins. Co. of N.Y. v Classon Hgts., LLC*, 82 AD3d 632 [1st Dept 2011]; *SSBSS Realty Corp. v Public Serv. Mut. Ins. Co.*, 253 AD2d 583 [1st Dept 1998]).

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

ENTERED: MARCH 27, 2014

CLERK

Tom, J.P., Friedman, Freedman, Feinman, JJ.

10360-
10361 Paula Scher,
Plaintiff-Respondent-Appellant,

-against-

Stendhal Gallery, Inc., et al.,
Defendants-Appellants-Respondents.

Index 650598/10

Wollmuth Maher & Deutsch LLP, New York (Michael C. Ledley of counsel), for appellants-respondents.

Carter Ledyard & Milburn LLP, New York (Judith M. Wallace of counsel), for respondent-appellant.

Amended interlocutory judgment, Supreme Court New York County (Melvin L. Schweitzer, J.), entered May 9, 2012, modified, on the law, to adjudge and declare that plaintiff is entitled to full list price for all prints that the Gallery sold after May 11, 2010, and all prints that are missing or believed to have been disposed of through undocumented sales, and otherwise affirmed, with costs to plaintiff. Appeal from order and interlocutory judgment, same court and Justice, entered October 19, 2011, as amended by an order, same court and Justice, entered May 7, 2012, dismissed, without costs, as subsumed in the appeal from the amended judgment.

Opinion by Friedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David Friedman
Helen E. Freedman
Paul G. Feinman, JJ.

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Paula Scher,
Plaintiff-Respondent-Appellant,

-against-

Stendhal Gallery, Inc., et al.,
Defendants-Appellants-Respondents.

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Cross appeals from the amended interlocutory judgment of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 9, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment declaring her the owner of and entitled to immediate possession of approximately 320 unsold prints of her artwork being held in escrow and ruling that defendant gallery owes her a $45,000 commission on the sale of her painting "Long Island," and denied defendants' cross motion for partial summary judgment on their claim to be the owners of the unsold prints or, in the alternative, entitled to 90% of the resale value of the prints, and from so much of an order and interlocutory judgment, same court and Justice, entered October 19, 2011, as amended by an order, same court and

Justice, entered May 7, 2012, as denied plaintiff's motion for partial summary judgment.

Wollmuth Maher & Deutsch LLP, New York (Michael C. Ledley and Melissa A. Finkelstein of counsel), for appellants-respondents.

Carter Ledyard & Milburn LLP, New York (Judith M. Wallace, Jeffrey L. Loop and Michael H. Bauscher of counsel), for respondent-appellant.

FRIEDMAN, J.

The primary issue on this appeal is whether plaintiff Paula Scher, an artist, or defendant Stendhal Gallery, Inc. (the Gallery), Scher's former exclusive agent, owns 320 fine-art silk-screen prints made from Scher's paintings that remained unsold upon the termination of the parties' relationship.[1] Pursuant to an oral agreement between the parties, the prints had been fabricated, with Scher's close collaboration, by a printer hired and paid by the Gallery. Although the motion court adopted Scher's contention that the question of the ownership of the prints is resolved in her favor by Arts and Cultural Affairs Law § 12.01, as construed in *Wesselmann v International Images* (172 Misc 2d 247 [1996], *affd* 259 AD2d 448 [1st Dept 1999], *lv dismissed* 94 NY2d 796 [1999]), we affirm the declaration that Scher owns the prints on a different ground. Specifically, the parties' initial written agreement provided that the Gallery would act as Scher's "exclusive agent" in matters relating to, inter alia, any future deal "for the exhibition and sales of . . . limited edition prints published exclusively by [the] [G]allery" during the term of the agreement. Thus, when the

[1]In this action, Scher is suing the Gallery along with several of its predecessors-in-interest, as well as Harry Stendhal, the Gallery's principal. All defendants are referred to collectively in this writing as "the Gallery."

Gallery purchased the finished prints from the printer, it did so as Scher's agent. Accordingly, the parties' written agreement establishes as a matter of law that the prints are to be treated as Scher's property.

In the 1990s, Scher, a nationally known graphic designer, began to create fine-art paintings. Between 1998 and 2005, she produced a series of 12 map-based acrylic-on-canvas paintings known as the Map I paintings. Scher and the Gallery entered into a written agreement, dated October 18, 2005 (the 2005 agreement), that provided for the consignment and sale of the Map I paintings and any future works Scher might create during its term, as well as a broader "exclusive agen[cy]" relationship between the parties encompassing, inter alia, any publication of limited-edition prints of Scher's paintings during the agreement's term. In 2006 and 2007, while the 2005 agreement was in effect, Scher produced seven additional map-based paintings (the Map II paintings), which were consigned to the Gallery pursuant to the 2005 agreement.

Section 1 of the 2005 agreement provides in pertinent part (emphases added):

> "1. Scope of Agency. The Artist [Scher] appoints the Gallery *to act as Artist's* [X] *exclusive agent* in the following geographic area: Exclusive worldwide *for the exhibition and sales of* artworks in the following media: original paintings/ Works on Paper /*limited*

> *edition prints published exclusively by [G]allery* and Digital / electronic art for computers.
>
> "Publishing. The [G]allery will publish a full color catalogue to accompany the exhibit and will act as the [A]rtist's agent to put forth a book deal based on 'The Maps.' In the event of a publishing deal, a separate agreement will be furnished to the artist."

Pursuant to section 2 of the 2005 agreement, the agreement was to have a term of three years from its date, although it is undisputed that the parties continued to operate under it for about 4½ years, until May 11, 2010, when Scher's counsel sent the Gallery a letter terminating the relationship. Section 2 of the 2005 agreement also provides that, upon termination or expiration of the agreement, "all works consigned hereunder" are to be returned to Scher. Section 4 provides that the Gallery "shall receive a commission of 50% percent [*sic*] of the retail price of each work sold," a rate that, it is undisputed, applied to paintings but not to prints. Finally, section 11 provides: "All modifications of this Agreement must be in writing and signed by both parties. This Agreement constitutes the entire understanding between the parties hereto."

As noted, the 2005 agreement contemplated that, during its term, the scope of the Gallery's agency for Scher would extend to the production and sale of any "limited edition prints" based on Scher's works. It is undisputed that, while the 2005 agreement

was in effect, Scher reached an oral agreement with nonparty Maya Stendhal, then one of the Gallery's principals, concerning prints of Scher's paintings. Scher granted the Gallery an oral license to produce ink-on-paper silk-screen prints based on the Map I and Map II paintings, at the Gallery's expense, and to sell the prints, with the proceeds to be split 90% to the Gallery, 10% to Scher.[2]

The Gallery engaged a printing company headed by Alexander Heinrici, a prominent fine-art printer, to make the prints. Scher worked closely with the printer in the production of the prints, a process that the parties agree was not one of simple reproduction. The prints, which were much smaller in size than the original paintings, were the result of what Scher described at her deposition as "a back and forth collaborative process" between herself and the printer, involving the fabrication of printing plates based on the original paintings and the choice of ink colors to approximate the paint colors of the original works.

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[2]Notwithstanding the absence of any written modification of the 2005 agreement's provision that the Gallery would receive a 50% commission on "the retail price of each work sold," Scher admits in her complaint and other submissions that the share of print sales to which she is entitled is 10%. On appeal, neither side challenges the motion court's determination that a triable issue of fact exists as to whether Scher's 10% share of print sales is based on gross revenue or on revenue net of production costs.

Ultimately, Scher approved and signed each numbered individual print to be sold.[3] Scher, however, admittedly had no contractual relationship with the printer; the Gallery hired and paid the printer and took delivery of the finished prints from the printer. In January 2012, the Gallery claimed that it had incurred costs of $299,163 in producing and selling the prints, which by that time had generated sales of $1,388,680.[4] Nonetheless, as of the time this action was commenced, the Gallery had paid Scher only $15,000 on account of print sales.[5]

By letter dated May 11, 2010, Scher's counsel notified the

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[3]It appears from the record that the prints were advertised for sale at prices ranging from $3,500 to $15,000 each.

[4]In a June 2011 affidavit, the Gallery's principal, Harry Stendhal, estimated that the total costs incurred in producing and marketing the prints were "likely more than $500,000."

[5]Scher disparages the Gallery's claim to have paid for the production of the prints and to have borne the risk of financial loss in the event the prints did not sell well. She points out that the production costs were financed, at least in substantial part, by pre-release sales. She also argues that the Gallery's claim to have paid for the prints is inconsistent with its position that Scher's 10% royalty should be calculated based on sales net of production costs. These arguments do not seem to us to negate entirely the Gallery's claim to have incurred financial risk in producing the prints, but this dispute does not in any event influence our resolution of the issue of the ownership of the unsold prints. We also fail to see the relevance of the fact, highlighted by Scher, that two checks the Gallery issued to the printer were returned dishonored. In the end, the printer (which is not a party to this action) delivered the prints in question.

Gallery that both the 2005 agreement and the oral license to create and sell prints of the Map I and Map II paintings were terminated, and demanded, among other things, that the Gallery return to Scher all of her unsold paintings and prints. The following month, Scher commenced this action against the Gallery and its principal, Harry Stendhal, in Supreme Court, New York County. Scher's complaint asserts numerous causes of action, seeking, among other relief, recovery of Scher's unpaid share of the sales of her paintings and prints, replevin of the unsold prints, and an accounting. In January 2011, Supreme Court ordered that the unsold prints be placed in the possession of an independent escrow agent pending determination of which party owns them.

In April 2011, after the parties had conducted discovery, Scher moved for partial summary judgment declaring, inter alia, that she is the owner of the unsold prints and that she is entitled to recover "the full list price for all Scher Prints sold by the Gallery after May 11, 2010 [the date Scher terminated her agreements with the Gallery] and for all undocumented transfers and missing prints." Scher's motion also sought a ruling on a claim (not pleaded in the complaint) concerning one of the Map I paintings (*Long Island*), and a declaration that she

was entitled to an accounting.[6] The Gallery opposed the motion and cross-moved, in pertinent part, for partial summary judgment declaring that "the Gallery is the owner of the unsold Prints or, in the alternative, is entitled by contract to 90% of the resale value of the Prints."

By order and interlocutory judgment entered October 19, 2011 (the initial judgment), the motion court granted in part and denied in part both Scher's motion and the Gallery's cross motion. Regarding the ownership of the unsold prints, the court granted Scher's motion to the extent of declaring that Scher "is the owner of and entitled to immediate possession of all of the approximately 320 unsold prints of her artwork." At the same time, the court granted the Gallery's cross motion "to the extent of ruling that [the Gallery] is entitled by contract to 90% of the re-[sale] value of the unsold prints, either gross or net of expenses, and the amount, if any, owed to [the Gallery] shall be determined at the plenary trial of this action."

In determining that Scher owns the prints, the motion court adopted Scher's argument that this result is compelled by Arts

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[6]Since the dispute concerning the *Long Island* painting is discrete from the other issues raised on this appeal, we shall address the *Long Island* matter separately, at the conclusion of this writing. Scher's entitlement to an accounting is not at issue on this appeal.

and Cultural Affairs Law § 12.01 ("Artist-art merchant relationships") as construed by this Court and Supreme Court in *Wesselmann v International Images* (172 Misc 2d 247 [1996], *affd* 259 AD2d 448 [1st Dept 1999], *lv dismissed* 94 NY2d 796 [1999], *supra*), an earlier case concerning ownership of unsold prints from an artist's paintings that were commissioned and paid for by an art dealer. As in effect at all relevant times (which were before the effective date of a 2012 amendment),[7] § 12.01(1) provided in pertinent part:

> "1. Notwithstanding any custom, practice or usage of trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary:
>
> "(a) Whenever an artist [as defined in § 11.01(1)] . . . delivers or causes to be delivered a work of fine art, craft or a print [as defined in § 11.01(14)] of his own creation to an art merchant [as defined in § 11.01(2)] for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist . . . and such art merchant with respect to the said work, and;
>
> "(I) such consignee shall thereafter be deemed the agent of such consignor with respect to the said work;
>
> "(ii) such work is trust property in the hands of the consignee for the benefit of the consignor;

[7]An amendment to § 12.01 enacted by L 2012, ch 450, does not apply to the relationship between Scher and the Gallery, which had terminated before the amendment's effective date (November 6, 2012).

> "(iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor;
>
> "(iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor . . . ; and
>
> "(v) no such trust property or trust funds shall be subject or subordinate to any claims, liens or security interest of any kind or nature whatsoever."

The motion court read *Wesselmann* and a number of nisi prius decisions construing § 12.01 to establish that Scher was the owner of the prints because they were works "of h[er] own creation" (§ 12.01[1][a]) that, by signing them as the *Wesselmann* artist had signed the prints in that case (*see id.*, 172 Misc 2d at 251), she "deliver[ed] or cause[d] to be delivered" (§ 12.01[1][a]) to the Gallery (an art merchant within the meaning of the statute; *see* Arts and Cultural Affairs Law § 11.01[2]) "for the purpose of exhibition and/or sale" (§ 12.01[1][a]). The Gallery contended that the statute applies only when the artist owns the work as a physical object in the first place and, therefore, did not apply to prints that were physically produced and delivered to the dealer by a third-party contractor that the dealer had commissioned and paid to produce

them.[8] In rejecting this argument, the motion court stated:

> "[T]he statute, by its terms, applies to 'prints' that the artist 'delivers or causes to be delivered.' In *Wesselmann v International Images, supra*, these terms were held to apply to signed prints of original works of art that, as here, were commissioned by and paid for by the art merchant. In that case, the art merchant argued that there had been no delivery of prints by the artist, but the court rejected that argument, finding that the artist's approval and signing of the finished prints before they were sold constituted delivery within the meaning of Section 12.01 [citing *Wesselmann*, 172 Misc 2d at 251]. The defendants in *Wesselmann* also argued unsuccessfully, as does the Gallery here, that their financial investment in publishing the prints renders the consignment and trust provisions of Section 12.01 inapplicable [citing *id.* at 251-252]."

The Gallery sought to distinguish *Wesselmann* on the ground that the relationship between the artist and the dealer in that case was described by this Court, in the decision affirming Supreme Court's determination that the artist owned the prints, as "most closely approximat[ing] a joint venture" (259 AD2d at 449-450). The Gallery contended that the finding in *Wesselmann* that the parties' relationship resembled a joint venture was the basis for the determination that the artist owned the prints (*see Matter of Steinbeck v Gerosa*, 4 NY2d 302, 318 [1958], *appeal dismissed* 358 US 39 [1958] [property contributed to a joint

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[8]On this point, the Gallery relied on Uniform Commercial Code § 2-401(2), which provides in pertinent part: "Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods . . . ."

venture is deemed to be held "jointly" by the venturers]), thereby rendering the case distinguishable from this one, in which both Scher and the Gallery strongly deny that their relationship could be characterized as a joint venture. The motion court rejected this argument, pointing out that neither the Appellate Division nor the Supreme Court in *Wesselmann* expressly connected the finding that the artist owned the prints to the finding that the parties' relationship was akin to a joint venture. The motion court further opined that "the particular terms of the parties' agreement is irrelevant" to its determination of the ownership issue because § 12.01(1) provides that it applies in pertinent part "[n]otwithstanding . . . any agreement, note, memorandum or writing to the contrary."

Although it found that Scher owned the prints, the motion court further held in the initial judgment that Scher's ownership "does not defeat the Gallery's contract right to 90% of their re-sale value." In support, the motion court relied on *Wesselmann*, which held that, notwithstanding the determination that the artist owned the prints, the dealer's "claim for its share of the profits upon the sale of the prints still remains to be determined" (172 Misc 2d at 252). In so holding, the motion court rejected Scher's argument that Arts and Cultural Affairs Law § 12.01 barred enforcement of any contractual right that the

Gallery might otherwise have to recover any portion of the value of the prints that remained unsold when the parties' relationship terminated.

Scher moved for reargument and renewal of the initial judgment, seeking to have the judgment amended

> "to (1) eliminate the Stendhal Gallery's right to any portion of any sale proceeds for the Scher Prints sold after May 11, 2010 and for unsold Scher Prints currently being held in escrow; and (2) require the Stendhal Gallery to pay its share of the Court-ordered escrow costs to the escrow agent forthwith."

The latter relief, for which renewal was sought, was rendered moot when the Gallery voluntarily paid its share of the escrow costs while the motion was pending.[9]

The motion court granted Scher's motion for reargument and,

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[9]After Scher's motion for reargument and renewal was fully briefed, the Gallery produced the accounting that the motion court had ordered in the initial judgment. Thereafter, Scher made sur-reply filings, apparently without the court's permission, purportedly in further support of the motion for reargument and renewal, placing the Gallery's accounting before the court on the motion and arguing that the accounting was deficient in various ways. The relevance of the material relating to the accounting to any relief sought either in the original motion and cross motion or in the subsequent reargument and renewal motion is at best dubious. To the extent Scher argues that the accounting material demonstrates that the Gallery committed breaches of contract that justified Scher's termination of the parties' agreements, the Gallery apparently does not dispute that Scher was entitled to terminate the agreements when she did. In any event, contrary to the Gallery's contention, it does not appear that the motion court was significantly influenced by the accounting material in deciding the reargument motion.

upon reargument, directed that the initial judgment be amended to deny the Gallery's cross motion and to declare that the Gallery "is not entitled by contract or otherwise, to any portion of the value of the 320 unsold prints except for the Gallery's printing costs." The initial judgment was amended accordingly on or about May 9, 2012 (the amended judgment). In its decision granting reargument, the motion court, while it continued to reject Scher's argument that Arts and Cultural Affairs Law § 12.01 bars recognizing any right of the Gallery to a portion of the value of unsold prints, found that the parties' oral agreement concerning the prints "established nothing more than a split of sales proceeds at such time as prints were sold pursuant to the [2005 agreement]." Because it was undisputed that both the 2005 agreement and the oral agreement concerning the prints were terminated on May 11, 2010, the court found that Scher was "entitled to the full list price for all prints sold after May 11, 2010," and that the Gallery was not entitled to any share of the value of the prints that remained unsold at the termination of the relationship. Without explanation, however, the court directed that the amended judgment permit the Gallery to recover from Scher "the Gallery's printing costs," presumably meaning the

costs of printing the 320 unsold prints as proven at trial.[10]

The Gallery appeals from the amended judgment, arguing, with respect to the unsold prints, that: (1) the Gallery owns the unsold prints by normal operation of commercial law, and nothing in Arts and Cultural Affairs Law § 12.01 is to the contrary; and (2) in the alternative, the Gallery is entitled, by virtue of the oral agreement concerning the prints, to recover from Scher 90% of the resale value of the unsold prints. Scher has also appealed from the amended judgment to the extent (as stated in her notice of appeal) that it "den[ies] Plaintiff's Motion for Partial Summary Judgment, misconstrue[s] New York Arts and Cultural Affairs Law § 12.01 and binding precedent of the Appellate Division, First Department, and fail[s] to grant Plaintiff's Motion to Renew." Upon review of Scher's appellate briefs, it appears that her chief complaint is not about the particular results the motion court reached but about some of the reasoning it employed, which is not a proper basis for an appeal. However, Scher identifies one aspect of the amended judgment by which she arguably is aggrieved, namely, the failure of the amended judgment, apparently inadvertent on the part of the motion court, to specify that Scher is entitled to recover the

[10]On appeal, Scher does not challenge the amended judgment's provision allowing the Gallery to recover "printing costs."

full list price of prints that the Gallery sold after May 11, 2010, and of prints that are missing or were disposed of by undocumented sales.[11]

We turn first to the Gallery's argument that it owns the 320 unsold prints. The Gallery, relying on Uniform Commercial Code § 2-401(2), contends that it owns the prints by normal operation of law. The Gallery points out that it engaged the printer, paid the printer, and took delivery of the prints from the printer, while Scher had no contractual relationship with the printer, never made any payment to the printer, and never had possession or control of the prints as physical objects. The Gallery further argues that nothing in Arts and Cultural Affairs Law § 12.01 compels a different result, since that statute says nothing about when an artist owns an artwork, as a physical object, that he or she has created.[12] The statute simply provides, the

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[11]Scher also complains that the motion court did not award her relief with regard to prints that the Gallery sold at unauthorized discounts. However, she never moved for relief on the issue of print sales at unauthorized discounts, and so this argument is improperly raised on appeal.

[12]In this connection, the Gallery directs our attention to the principle that "[o]wnership of a copyright . . . is distinct from ownership of any material object in which the work is embodied" (17 USC § 202). Thus, that Scher holds the copyright in the prints, and is deemed their creator under the Arts and Cultural Affairs Law (*see* Arts and Cultural Affairs Law § 11.01[1] ["'Artist' means . . . in the case of multiples, the person who conceived or created the image which is contained in

Gallery argues, that, when an artist *does* have title to an artwork he or she has created, and then delivers the piece to an art merchant for sale, a consignment relationship is created, with the artwork constituting trust property, as opposed to other kinds of commercial arrangements that would offer the artist less protection, such as a "sale or return" or a "sale on approval" under Uniform Commercial Code § 2-326 (*see* Atty General's Mem to Gov, July 21, 1966 at 1, Bill Jacket, L 1966, ch 984). Indeed, Attorney General Louis J. Lefkowitz, the proponent of the 1966 bill that enacted the predecessor of current Arts and Cultural Affairs Law § 12.01, stated in the above-cited July 21, 1966 memorandum urging approval of the bill that the legislation "clearly spells out that misappropriation of *an artist's property* entrusted to his dealer-agent under the conditions outlined above is unlawful and constitutes larceny in the degree as provided by the Penal Law" (*id.* [emphasis added]).

The foregoing argument seemingly has some cogency, as it would appear anomalous for the law to designate property that did not belong to the artist in the first place as "trust property" for the artist's benefit. The Gallery offers hypothetical

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or which constitutes the master from which the individual print was made"]), does not necessarily mean that she owns the prints as physical objects.

examples in which an artist delivers artwork that she created, but clearly did not own, to an art merchant, arguing that to construe the mere act of delivery to trigger § 12.01's application in these situations would lead to absurd results.[13] *Wesselmann*, which presented a limited-edition print scenario similar to the one at issue here, poses obvious difficulties for this approach. As previously noted, however, the Gallery argues that *Wesselmann* can be distinguished based on the fact that the artist and art merchant in that case were found to have had a relationship akin to a joint venture (259 AD2d at 449-450). Since joint venturers own property committed to the enterprise "jointly" (*Steinbeck*, 4 NY2d at 318), the *Wesselmann* artist's property interest in the prints as physical objects arose from the joint venture, not from the statute. So the Gallery argues.[14]

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[13]The hypothetical examples are: (1) an artwork that the artist created, sold directly to a third party, and then delivered to an art merchant at the direction of the third party owner; and (2) an artwork that an employee-artist created as a work-for-hire for her employer and then delivered to an art merchant at the employer's direction.

[14]Similarly, the provision of section 2 of the 2005 agreement that, upon termination of the agreement, the Gallery is to return to Scher "all works consigned hereunder" (an undefined term) does not provide a way of determining whether the prints were deemed to be Scher's property so as to constitute "works consigned hereunder." If the Gallery owned the prints upon taking delivery of them from the printer, the prints would not

We need not determine whether the Gallery's interpretation of the statute is correct because we find that the written 2005 agreement between Scher and the Gallery specifies that the Gallery was acting with regard to the prints as Scher's "exclusive agent." While the parties agree that the 2005 agreement does not set forth all of the terms of the print deal (in particular, the 90/10 split of the print sales was orally agreed upon at a later time), section 1 of the 2005 agreement ("Scope of Agency") expressly provides that Scher was appointing the Gallery "to act as [her] exclusive agent . . . for the exhibition and sales of . . . limited edition prints published exclusively by [the] [G]allery," among other kinds of artwork, for the duration of the agreement. Thus, when the Gallery commissioned the printer to produce the prints, paid the printer for the prints, and took delivery of the prints, it did so as Scher's agent and, hence, fiduciary (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 416 [2001]).[15] Accordingly, the

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have been "consigned" by Scher at all.

[15]*See also* 1 Ralph E. Lerner & Judith Bresler, Art Law at 25 (4th ed 2012)(an agreement establishing a principal-agent relationship between an artist, as principal, and a gallery, as agent, "calls forth the fiduciary responsibility of the gallery to the artist within the context of their relationship; the gallery has the legal obligation to act only in the artist's interest and to forgo all personal advantage aside from the agreed compensation for its services as agent").

prints must be deemed to be Scher's property (*see Sweet v Jacocks*, 6 Paige Ch 355, 364 [NY Ch Ct 1837] [an agent "cannot be permitted to deal in the matter for that agency upon his own account and for his own benefit"]; *Reed v Warner*, 5 Paige Ch 650, 656 [NY Ch Ct 1836] [same]; 2A NY Jur 2d, Agency § 232 [same]; Restatement (Third) of Agency § 8.02 ["An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position"]).[16]

As Scher's fiduciary, the Gallery was obligated to disclose to her in plain terms all material facts within the scope of the agency, obviously including any understanding the Gallery had, upon entering with Scher into the oral print deal, that it would own the prints and any intention it entertained to treat the prints as its own property (*see Greenberg, Trager & Herbst, LLP v*

[16]In view of the 2005 agreement's express provision that any deal for "limited edition prints" would be within the scope of the Gallery's "exclusive agen[cy]" for Scher, the Gallery's contention that the 2005 agreement is completely irrelevant to the print deal is untenable. Moreover, the sentence at the end of the second paragraph of section 1 of the agreement ("In the event of a publishing deal, a separate agreement will be furnished to the artist"), when read in the context of the preceding sentence (stating that the Gallery "will act as the artist's agent to put forth a book deal based on 'The Maps'"), plainly refers to a book publishing deal, not a print deal.

HSBC Bank USA, 17 NY3d 565, 579 [2011]; *Rivkin v Century 21 Teran Realty LLC*, 10 NY3d 344, 355 [2008]; *Dubbs v Stribling & Assoc.*, 96 NY2d 337, 340 [2001]). If the Gallery did not wish to finance the production of prints that it would not own, it could have sought to reach an agreement with Scher specifying that prints made at the Gallery's expense would be the Gallery's property. Alternatively, if the Gallery merely wished to protect itself from being abruptly terminated as Scher's agent before it had a fair chance to sell the prints, it could have sought to reach an agreement with her on a minimum time-period it would have to sell each batch of prints during which the agency could not be terminated without cause. Instead, the Gallery left itself exposed by going forward with the print deal based on only a vague, unwritten agreement that left nearly all of the terms up in the air except for the basic 90/10 split of sales revenue (and even as to that, there is a dispute as to whether Scher's cut is calculated based on gross or net sales). We see no reason to relieve a fiduciary, such as this professional art merchant, of the consequences of its own carelessness in dealing with its principal.

Although we find that the 2005 agreement's designation of the Gallery as Scher's "exclusive agent" as to the prints suffices to resolve the dispute over the ownership of the unsold

prints, we observe that there is little in the record to cast additional light on the parties' specific intentions concerning ownership of the prints at the time of contracting. Scher testified at her deposition that she always believed that she owned the prints but admitted that she had never discussed ownership of the prints with any representative of the Gallery before this action was commenced. Harry Stendhal admitted in his affidavit that his former co-principal at the Gallery, Maya Stendhal, negotiated the agreements with Scher, but he claimed that, in the course of the relationship, Scher "repeatedly told me that the Prints were 'my thing' and that she was not interested in them," and that she also told him in one conversation that the print license "would be 'like a book deal.'"[17] These fuzzy recollections of alleged off-hand, vague and ambiguous comments cannot overcome the 2005 agreement's express provision that the prints were within the scope of the Gallery's "exclusive agen[cy]" for Scher, especially in view of the 2005 agreement's provision that any modification of its terms must be "in writing and signed by both parties."

Given that the prints are Scher's property, we find no merit

[17]At her deposition (which was conducted before the date of Stendhal's affidavit), Scher was asked: "Do you recall telling Mr. Stendhal . . . that the prints were his thing?" She answered, "No."

in the Gallery's argument that it is entitled to receive 90% of their resale value, however that value might be determined.[18] The agreement was that the parties would split sales revenue from the prints in a certain proportion. As to the unsold prints, there is no sales revenue to which to apply the parties' agreement (*see Indemnity Ins. Co. of N. Am. v Art Students League of N.Y.*, 225 AD2d 398, 399 [1st Dept 1996] [consignee "had only a conditional interest in the painting and would earn a commission only if a sale were consummated"]). The Gallery has made no argument that Scher breached either the 2005 agreement or the oral agreement concerning prints by terminating both agreements on May 11, 2010 (more than a year and a half beyond the stated term of the 2005 agreement), so there is no basis on which to award the Gallery damages for the loss of the benefit of any bargain.[19] Again, if the Gallery considers this situation

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[18]We agree with the motion court, however, that nothing in Arts and Cultural Affairs Law § 12.01 has a bearing on this issue. The statute designates consigned artwork and its proceeds as trust property, but does not generally address monetary rights and obligations between an artist and an art merchant, as we recognized in *Wesselmann*.

[19]Indeed, far from claiming that Scher's termination of the agreements was a breach, the Gallery expressly takes the position in its appellate reply brief that it "does not dispute [Scher's] right to terminate the [2005 agreement] any time after its term expired in October 2008 . . . or to terminate the [oral] License Agreement [concerning the prints] at any time whatsoever."

unfair, it has only itself to blame for failing to negotiate a more detailed written agreement to govern these matters. We note that Scher has chosen not to challenge on appeal the motion court's determination that she should compensate the Gallery for the production costs of the unsold prints. How such costs should be determined at trial is a question that is not before us.

We have considered the Gallery's remaining arguments concerning ownership of the unsold prints and its alleged right to compensation for those prints and find them unavailing.

Given the determination that Scher owns the unsold prints and has no obligation to reimburse the Gallery for their value, it follows that she is entitled to recover from the Gallery the full list price of any prints that the Gallery sold without authorization after May 11, 2010, as well as the full list price of any prints that are missing or are believed to have been disposed of through undocumented transactions. On Scher's appeal, we modify the amended judgment to provide accordingly. The remaining issues Scher raises on her appeal are matters as to which she is not aggrieved, and therefore lacks standing to appeal, because they involve either (1) disagreements with the motion court's reasoning rather than its result or (2) the motion court's failure to make findings that Scher did not request in her notices of motion.

Finally, we turn to the dispute over the painting *Long Island*, which the 2005 agreement provides was to have been sold for $90,000. As previously noted, section 11 of the 2005 agreement requires all modifications of the agreement to be "in writing and signed by both parties." The complaint, while it asserts a general claim for breach of contract (the fifth cause of action), does not allege that the Gallery sold *Long Island* in breach of the 2005 agreement. When Scher moved for partial summary judgment, however, she represented that she had learned from the Gallery's document production that the Gallery had sold *Long Island* in October 2007 for $50,000, not the contractually specified $90,000.[20] Scher asked the court to "conform the pleadings to the undisputed facts demonstrated by the Gallery's document production," and included in her notice of motion a request for a declaration that she "is entitled to a 50% commission on the agreed-upon price for the Gallery's sale of her painting *Long Island*." The court permitted the amendment, finding that the Gallery would not be prejudiced, and granted Scher summary judgment on this issue, holding that the Gallery

[20]At her deposition, Scher testified that she had assumed that she "had gotten *Long Island* back" at some point after the 2005 exhibition of the Map I paintings, and that she had not learned that the painting had been sold at all "until we were deep into the case," which had been commenced in June 2010.

owes Scher a $45,000 commission on the sale of *Long Island* because Scher had not agreed in writing to modify the agreed sale price for the painting. The motion court's ruling on this issue was correct.[21]

The Gallery argues that Scher is not entitled to summary judgment on the *Long Island* issue because an issue of fact exists as to whether she orally "waived" her right to have the painting sold at the $90,000 price specified by the 2005 agreement. This argument is based entirely on the following three sentences in Harry Stendhal's affidavit opposing Scher's summary judgment motion:

> "I discussed the sale of *Long Island* (including the sale price) with [Scher] shortly after it occurred [in 2007] and [she] did not object. In fact, [Scher] indicated that she believed *Long Island* was her 'worst painting' and she was relieved that it sold. The proceeds of the *Long Island* sale were used, in part, to finance th[e] [second] exhibition [of Scher's works], with [her] agreement."

As a matter of law, these allegations that Scher orally consented, after the fact, to the Gallery's sale of *Long Island* for $50,000, rather than for the contractually specified price of $90,000, cannot overcome the requirement of the parties' written

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[21]We see no basis for disturbing the motion court's exercise of its discretion to permit the pleadings to be amended to conform to the proof to allow Scher to assert a claim for 50% of the price for *Long Island* stipulated by the 2005 agreement (*see* CPLR 3025[b]; *Weinstock v Handler*, 254 AD2d 165 [1st Dept 1998]).

agreement that "[a]ll modifications of this Agreement . . . be in writing and signed by both parties."

General Obligations Law § 15-301(1) provides that "[a] written agreement . . . which contains a provision to the effect that it cannot be changed orally, cannot be changed by an executory agreement unless such executory agreement is in writing and signed by the party against whom enforcement of the change is sought . . . ." The Court of Appeals has explained that, under this statute, "if the only proof of an alleged agreement to deviate from a written contract is the oral exchanges between the parties, the writing controls" (*Rose v Spa Realty Assoc.*, 42 NY2d 338, 343 [1977]). While the Court of Appeals also noted in *Rose* that, because § 15-301(1) "nullifies only 'executory' oral modification[,] [o]nce executed, the oral modification may be proved" (*id.*), and that partially performed oral modifications are provable "if the partial performance be unequivocally referable to the oral modification" (*id.*), these qualifications do not avail the Gallery because it alleges neither completed execution of, nor partial performance unequivocally referable to, the alleged oral modification. Since the oral modification of the sale price is alleged to have been agreed upon after *Long Island* had been sold, the modification could have been fully executed only by the Gallery's tender, and Scher's acceptance, of

payment of a commission for the painting based on the lesser, modified price. The Gallery, however, does not allege that it has made any payment to Scher based on the sale of this painting. Nor does the Gallery allege any other conduct by either party that is "unequivocally referable" (*id.*) to the alleged oral modification so as to constitute partial performance thereof. In particular, the Gallery's use, allegedly with Scher's consent, of some of the proceeds of the *Long Island* sale to finance Scher's second exhibition cannot be deemed unequivocally referable to the alleged oral modification of the painting's sale price.[22]

Accordingly, the amended interlocutory judgment of Supreme Court, New York County (Melvin L. Schweitzer, J.), entered May 9, 2012, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment declaring her the owner of and entitled to immediate possession of approximately 320 unsold prints of her artwork being held in escrow and ruling that defendant gallery owes her a $45,000 commission on the sale of her painting "Long Island," and denied

[22]The Gallery's reliance on *Nassau Trust Co. v Montrose Concrete Prods. Corp.* (56 NY2d 175 [1982]) is misplaced. *Nassau Trust* held that a unilateral oral waiver of a contractual right is outside the purview of General Obligations Law § 15-301(1) (56 NY2d at 186). Here, the Gallery is relying on an allegation, not of a unilateral waiver, but that the parties reached a bilateral oral agreement to modify a term of a written agreement.

defendants' cross motion for partial summary judgment on their claim to be the owners of the unsold prints or, in the alternative, entitled to 90% of the resale value of the prints, should be modified, on the law, to adjudge and declare that plaintiff is entitled to the full list price for all prints that the Gallery sold after May 11, 2010 and all prints that are missing or believed to have been disposed of through undocumented sales, and otherwise affirmed, with costs to plaintiff. To the extent an appeal is taken from so much of an order and interlocutory judgment, same court and Justice, entered October 19, 2011, as amended by an order, same court and Justice, entered May 7, 2012, as denied plaintiff's motion for partial summary judgment, such appeal should be dismissed, without costs, as subsumed in the appeal from the amended judgment.

All concur.

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

ENTERED: MARCH 27, 2014

CLERK