SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MAY 5, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Sweeny, J.P., Saxe, Richter, Gische, JJ.

15946-
15947 The People of the State of New York,
Respondent,

Dkt. 46181C/11

-against-

Jay Jay Teron,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Jordan K. Hummel of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George R. Villegas, J. at plea and original sentencing), rendered January 17, 2012, as amended April 12, 2012 (John S. Moore, J. at resentencing), convicting defendant of unlicensed operation of a motor vehicle, and sentencing him to time served, unanimously affirmed.

Initially, we need not address the issue of whether defendant's challenge to his plea has been preserved, as we consider this claim pursuant to our interest of justice jurisdiction (CPL 470.15[3][c]).

Defendant was not informed by the court of any of the rights

he was waiving by pleading guilty (*see Boykin v Alabama*, 395 US 238 [1969]). While "the failure to recite the *Boykin* rights does not automatically invalidate an otherwise voluntary and intelligent plea . . . the record as a whole [must] affirmatively show [] that the defendant intentionally relinquished those rights" in order for the plea to be validly entered (*People v Conceicao*, 26 NY3d 375, 379 [2015]). In this case, since the record is devoid of any indicia that would meet this standard, we find that defendant's *Boykin* rights were violated.

Nevertheless, in cases where "the record fails to establish a knowing and intelligent waiver," dismissal may not be "the appropriate corrective action" (*id.* at 379, n1; *see also People v Allen*, 39 NY2d 916, 918 [1976]). The proper remedy should be either an affirmance of the conviction or a vacatur of the plea and remand for further proceedings.

Defendant has completed his sentence of time served and a fine but has not set forth sufficient grounds to dismiss the accusatory instrument. Additionally, defendant affirmatively states that he does not seek vacatur of his plea and a remand to the trial court.

Accordingly, the judgment of conviction is affirmed.

The Decision and Order of this Court entered herein on January, 21, 2016 is hereby recalled and vacated (*see* M-496 decided simultaneously herewith).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Mazzarelli, J.P., Renwick, Saxe, Moskowitz, JJ.

16082 The People of the State of New York Ind. 720/02
Respondent,

-against-

Ming Jian Huang,
Defendant-Appellant.

_____

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

Ming Jian Huang, appellant pro se.

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

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Judgment of resentence, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered August 21, 2012, resentencing defendant to an aggregate term of 50 years, with 5 years' postrelease supervision, unanimously affirmed.

The resentencing proceeding imposing a term of postrelease supervision was neither barred by double jeopardy nor otherwise unlawful (*People v Lingle*, 16 NY3d 621 [2011]).

We have considered and rejected defendant's pro se argument.

The Decision and Order of this Court entered herein on March 10, 2016 is hereby recalled and vacated (*see* M-1305 decided simultaneously herewith).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Mazzarelli, J.P., Acosta, Moskowitz, Gische, Webber, JJ.

825 Adaobi Kurylov, Index 162005/14
Plaintiff-Respondent,

-against-

Icahn School of Medicine
at Mount Sinai, et al.,
Defendants-Appellants.

_____

Blank Rome LLP, New York (Rory J. McEvoy of counsel), for appellants.

Giskan Solotaroff Anderson & Stewart LLP, New York (Jason L. Solotaroff of counsel), for respondent.

_____

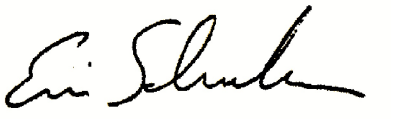
Order, Supreme Court, New York County (Debra A. James, J.), entered October 8, 2015, which, to the extent appealed from as limited by the briefs, denied defendants' (Mt. Sinai) motion to dismiss the complaint pursuant to CPLR 3211(c), unanimously affirmed, without costs.

Plaintiff, a black woman from Nigeria, alleges that she was terminated from Mt. Sinai's residency program in pathology because of her race and/or national origin. Mt. Sinai brought a motion to dismiss pursuant to CPLR 3211, seeking, alternatively, that the court convert the motion to one for summary judgment pursuant to CPLR 3211(c). The motion court expressly declined to treat the motion as one for summary judgment. Consequently, no

notice of any conversion was given, precluding our deciding this appeal under the summary judgment standard (see *Brathwaite v Frankel*, 98 AD3d 444 [1st Dept 2012]). This case does not pose any exception to the notice requirement under CPLR 3211(c), because the questions raised about whether plaintiff has any evidence of discrimination, are not solely ones of law or statutory interpretation. Nor did plaintiff ever indicate that she joined in deliberately charting a summary judgment course (*see Braithwaite*, at 444-445; *see Spilka v Town of Inlet*, 8 AD3d 812 [3d Dept 2004]). Viewing plaintiff's complaint under the liberal standard afforded to the pleader under CPLR 3211, we find that the complaint states a cause of action. We do not reach the merits of whether defendant is entitled to summary judgment.

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

ENTERED: MAY 5, 2016



DEPUTY CLERK

Friedman, J.P., Andrias, Moskowitz, Kapnick, Webber, JJ.

867 The People of the State of New York, Ind. 66965C/09
Respondent,

-against-

Leonardo Coronado,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Emily Anne Aldridge of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J. at suppression hearing; Denis J. Boyle, J. at nonjury trial and sentencing), rendered October 11, 2011, convicting defendant of operating a motor vehicle while under the influence of alcohol, and sentencing him to a conditional discharge for a period of one year and a $300 fine, unanimously reversed, on the law, defendant's suppression motion granted, and the accusatory instrument dismissed.

The court should have granted defendant's suppression motion. Two police officers testified that they saw defendant sitting in the driver's seat of a car, while he and a man standing outside the car but inside the driver's open door were pushing and pulling each other. The police also heard yelling

but could not understand what the men were saying. After defendant got out of the car, the two men walked together toward a nearby bar. The officers indicated that they suspected that the other man had been committing a crime against defendant, such as robbery, and had coerced him to walk away from the car. However, there is no testimony indicating that the officers believed that defendant was a perpetrator of a crime until after one of the officers forcibly stopped him, by grabbing him by the shoulder to stop him from moving away, and the police then observed signs that he was intoxicated, such as bloodshot, watery eyes and an odor of alcohol on his breath. The officers' reasonable belief that defendant might have been a crime victim "authorized the police to ask [him] questions ... and to follow [him] while attempting to engage him -- but not to seize him in order to do so" (*People v Moore*, 6 NY3d 496, 500 [2006]).

The officers' testimony indicated that they did not perceive signs that defendant had committed the crime of operating a motor vehicle while under the influence of alcohol until after defendant was seized while walking away from the officers and then turned toward them. Thus, the officers' observations did not provide reasonable suspicion to stop defendant, in the absence of "a particularized and objective basis for suspecting

the particular person stopped of criminal activity" (*United States v Cortez*, 449 US 411, 417-418 [1981] [emphasis added]; *see also People v DeBour*, 40 NY2d 210, 223 [1976]). This case is distinguishable from *People v Jones* (118 AD2d 86 [1st Dept 1986], *affd* 69 NY2d 853 [1987]) and *People v Woods* (281 AD2d 570 [2d Dept 2001], *affd* 98 NY2d 627 [2002]), where, in each case, the police officers' belief that the defendant might have been a crime victim initially justified asking questions of the defendant, and the officers stopped the defendant only after his ensuing conduct gave rise to reasonable suspicion to believe that he had committed or was committing a crime.

Because proof of defendant's intoxication depended on the fruits of the unlawful stop, we dismiss the accusatory instrument (*see e.g. People v Diaz*, 107 AD3d 401, 402 [1st Dept 2013], *lv dismissed* 22 NY3d 996 [2013], *lv dismissed* 22 NY3d 1137 [2014]). In light of this disposition, we do not reach defendant's other arguments.

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1055-
1056 The People of the State of New York,
Respondent,

-against-

Fred Nelson,
Defendant-Appellant.

Ind. 1379/10
1177/08

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Lee M. Pollack of counsel), for respondent.

_____

Judgments, Supreme Court, New York County (Michael R. Sonberg, J.), rendered December 23, 2013, convicting defendant, after a jury trial, of assault in the second degree, tampering with physical evidence and criminal possession of a weapon in the fourth degree, and upon his plea of guilty, of bail jumping in the second degree, and sentencing him to an aggregate term of five years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). With regard to the assault conviction, the evidence amply established that defendant caused physical injury to a police officer (*see e.g. People v Martinez*,

90 AD3d 409 [1st Dept 2011], *lv denied* 18 NY3d 960 [2012]). With regard to the tampering conviction, the evidence supports an inference that defendant destroyed his own phone because he believed it contained evidence that would be used against him (*see People v Atkins*, 95 AD3d 731 [1st Dept 2012], *lv denied* 19 NY3d 994 [2012]). With regard to the weapon conviction, the evidence established that defendant constructively possessed the gravity knife found near his feet in the car he had been driving for 3 days when arrested, regardless of the ownership of the car (*see People v Soto*, 69 AD3d 531 [1st Dept 2010], *lv denied* 14 NY3d 893 [2010]). We perceive no basis for reducing the sentence.

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1057 In re Manuel Gomez, Index 113832/11
Petitioner,

-against-

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

_____

Nwokoro & Scola, New York (Chukwuemeka Nwokoro of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Ingrid R. Gustafson of counsel), for respondents.

_____

Determination of respondent Police Commissioner, dated August 8, 2011, which terminated petitioner's employment as a police officer, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Donna M. Mills, J.], entered May 1, 2012), dismissed, without costs.

The determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180-181 [1978]). Such evidence, including testimony of civilian witnesses and the police officers who responded to 911 calls for assistance, showed that petitioner brandished his gun during the course of a violent off-duty domestic dispute (*see Matter of Cortez v Safir*, 278 AD2d 5, 6 [1st Dept 2000]).

Petitioner also pointed the firearm at the civilians who were attempting to assist the victim, failed to comply with the responding police officers' instructions, and resisted being handcuffed. There exists no basis to disturb the credibility determinations of the Hearing Officer (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Under the circumstances presented, the penalty of dismissal does not shock our sense of fairness (*see Cortez* at 6). Petitioner's argument that dismissal was improper in light of his excellent service record in the department and in the military is unavailing in light of his disciplinary history (*see Matter of Gomez v Kelly*, 55 AD3d 305 [1st Dept 2008], *revd* 12 NY3d 883 [2009] [Appellate Division confirmed findings of petitioner's misconduct but found penalty of one-year dismissal probation and 30-day vacation forfeiture excessive. Court of Appeals reversed to the extent of reinstating the penalty that was imposed]).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1058-
1059 In re Jonathan M.,

A Child Under Eighteen
Years of Age, etc.,

Gilda L.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Kenneth M. Tuccillo, Hastings on Hudson, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), attorney for the child.

_____

Order of disposition, Family Court, New York County (Clark V. Richardson, J.), entered on or about August 13, 2014, to the extent it brings up for review a fact-finding order, same court and Judge, entered on or about June 9, 2014, which determined that the respondent mother neglected the subject child, unanimously affirmed, without costs.

The finding of neglect was supported by a preponderance of the evidence that the mother's paramour, who took care of the child during the day, had inflicted excessive corporal punishment

against the child, and that the mother knew or should have known about the corporal punishment but failed to take any steps to protect the child from the continued physical abuse (*see Matter of Jayden R. [Jacqueline C.]*, 134 AD3d 638 [1st Dept 2015]).

The evidence further supports a finding of educational neglect since the child, who was demonstrating significant academic delays in all subject areas, had missed an excessive number of days of school to his detriment and his promotion seemed doubtful (*see Matter of Naqi T. [Marlena S.]*, 129 AD3d 444, 445 [1st Dept 2015]; *Matter of Teresa L. [Tina L.]*, 106 AD3d 1008, 1009 [2d Dept 2013]). Moreover, the mother's engagement with the school in response to its numerous outreach efforts was minimal.

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

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1060 Lorenzo Almonte, Index 304912/11
Plaintiff-Respondent,

-against-

638 West 160 LLC,
Defendant-Appellant.

_____

Rubin, Fiorella & Friedman LLP, New York (Leila Cardo of counsel), for appellant.

Budin, Reisman, Kupferberg & Bernstein, LLP, New York (Gregory C. McMahon of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered September 18, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant failed to make a prima facie showing of its entitlement to judgment as a matter of law (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiff testified at his deposition that he slipped due to a loose step on a stairway in a building owned by defendant. Any ambiguity in his testimony as to the cause of his fall is attributable to his attempt at humor and to the fact that he was testifying through an interpreter (*see Rodriguez v Leggett Holdings, LLC*, 96 AD3d 555, 556 [1st Dept 2012]). Moreover, defendant's superintendent

testified that a step was loose on that stairway, and that it was repaired on the same day that plaintiff fell. The superintendent's uncertain testimony failed to eliminate any issue of fact as to which step was repaired or the time of the repair. The affidavit of defendant's managing member differed from the superintendent's testimony as to, among other things, the time and location of the repair. In any event, the managing member's affidavit cannot be considered in support of the motion, because he did not indicate that the affidavit is based on his personal knowledge of the facts (*see JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373, 384-385 [2005]).

Given the foregoing determination, we need not consider the sufficiency of plaintiff's opposing papers (*Winegrad*, 64 NY2d at 853). In any event, plaintiff's submissions, particularly the affidavit of a nonparty witness, raised an issue of fact as to both actual and constructive notice. Any discrepancy between that affidavit and the nonparty's prior unsworn statement raises a credibility issue not properly resolved on a motion for summary

judgment (*see S.J. Capelin Assoc. v Globe Mfg. Corp.*, 34 NY2d 338, 341 [1974]).

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

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1061 Charles Wong, etc., et al., Index 17475/05
Plaintiffs-Respondents,

-against-

Riverbay Corporation,
Defendant-Appellant.

_____

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for appellant.

McGovern, Connelly & Davidson, New Rochelle (Frank H. Connelly, Jr., of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about August 7, 2015, which denied defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendant established entitlement to judgment as a matter of law by showing that it owed no duty to protect plaintiff Charles Wong's decedent, Malachi Wong, and his brother, plaintiff Timothy Wong, from the shootings that occurred in the public vestibule of their building. A landowner's duty to take minimal security precautions does not extend to exterior public areas, including walkways and vestibules (*see Novikova v Greenbriar Owners Corp.*, 258 AD2d 149, 155 [2d Dept 1999]; *see also Williams v New York*

City Hous. Auth., 56 AD3d 361 [1st Dept 2008]; *Ward v New York City Hous. Auth.*, 18 AD3d 391, 392 [1st Dept 2005]). Contrary to the motion court's finding, plaintiffs' evidence failed to raise a triable issue of fact as to whether the shootings were foreseeable. The article in the Co-op City Times, expressing the need for a greater police presence in Co-op City, and defendant's public safety records, indicating 24 reports of gunshots fired on the premises, were insufficient, since they did not indicate that any of the reported shootings occurred in the vicinity of plaintiffs' building (*see Novikova*, 258 AD2d at 152-153). The location of where the shots were fired is relevant, in light of the fact that Co-op City spans two-square miles and is comprised of approximately 200 residential buildings (*see Florman v New York*, 293 AD2d 120, 127 [1st Dept 2002]; *Leyva v Riverbay Corp.*, 206 AD2d 150, 152-153 [1st Dept 1994]).

The affidavit of plaintiffs' security expert in which he states that defendant's reduction of its security officers at midnight proximately caused decedent's and Timothy Wong's injuries is insufficient to raise a triable issue of fact as to whether defendant breached its duty to provide minimal precautions against the foreseeable criminal acts of third parties (*see Villa v Paradise Theater Prods., Inc.*, 85 AD3d 402

[1st Dept 2011]). Furthermore, defendant did not proximately cause the injuries, since the record shows that the assailant specifically targeted Malachi and Timothy (*see Flores v Dearborne Mgt., Inc.*, 24 AD3d 101 [1st Dept 2005]).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1064 Deborah Raffa, Index 307519/11
Plaintiff-Appellant,

-against-

Vito R. Verni, et al.,
Defendants-Respondents,

Jen-Joe Corp.,
Defendant.

_____

Spinak Law Office, White Plains (Robert Spinak of counsel), for appellant.

Law Office of James J. Toomey, New York (Eric P. Tosca of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered March 19, 2015, which granted the motion of defendants Vito R. Verni, Paul Properties, Inc., and Verco Properties, LLC (collectively Paul Properties) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Dismissal of the complaint as against out-of-possession landlords Paul Properties was proper in this action where plaintiff alleges that she was injured when, while exiting a restaurant located on premises owned by Paul Properties, she turned to the right of the sidewalk and tripped over an open

cellar door and fell down the stairs leading to the basement of the premises. Although Paul Properties reserved the right to re-enter the leased premises for purposes of inspection and repair, the properly functioning cellar door, left open by someone within the tenant's control, was not a significant structural or design defect, and plaintiff did not allege a violation of a specific statutory provision in order to impose liability upon Paul Properties. Indeed, the record shows that the door was unsafe solely because it was improperly kept open by the restaurant (*see Yuying Qiu v J&J Grocery & Deli Corp.*, 115 AD3d 627 [1st Dept 2014]; *Almanzar v Picasso's Clothing*, 281 AD2d 341 [1st Dept 2001]).

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

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1066 In re Damaris Medina, Index 400732/14
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

_____

Damaris Medina, appellant pro se.

David I. Farber, New York (Laura R. Bellrose of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered December 17, 2014, denying the petition to annul respondent New York City Housing Authority's (NYCHA) determination dated February 4, 2014, which denied, after a hearing, petitioner's remaining family member grievance, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Respondent's determination has a rational basis in the record, and was not arbitrary and capricious. Petitioner admitted that she did not receive NYCHA's written consent to rejoin the apartment leased by her mother and had lived there for less than one year prior to her mother's death (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694, 695 [1st Dept

2012], *lv dismissed* 20 NY3d 1053 [2013]). Petitioner's mitigating circumstances do not provide a basis for annulling NYCHA's determination (*see Matter of Firpi v New York City Hous. Auth.*, 107 AD3d 523, 524 [1st Dept 2013]).

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

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1067 Steven L. Kessler doing business as Law Offices of Steven L. Kessler, Plaintiff-Appellant, Index 652156/12

-against-

Regina Surgent, Defendant-Respondent.

_____

Michael A. Rosenberg, New York, for appellant.

Ateshoglou & Aiello, P.C., New York (Steven D. Ateshoglou of counsel), for respondent.

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 30, 2015, which, in an action seeking to recover attorneys' fees and expenses, denied plaintiff's motion for summary judgment, unanimously reversed, on the law, with costs, and the motion granted. The Clerk is directed to enter judgment in favor of plaintiff for the full amount of the invoices.

Plaintiff satisfied the requirements of CPLR 3016(f) by setting forth a fully itemized list of unpaid charges. It was therefore incumbent on defendant to deny each specifically in her answer (*see O'Callaghan v Republic W. Ins. Co.*, 269 AD2d 114 [1st Dept 2000], *lv denied* 95 NY2d 758 [2000]). Instead, defendant relied solely on her defense that the retainer agreement was actually meant to be contingent on plaintiff making a successful

fee application to the court, and that this was the only source of funds to which plaintiff would look for his fees. Where a defendant raises a defense that goes to the entire transaction, she need not make specific denial to the scheduled items (*see Green v Harris Beach & Wilcox*, 202 AD2d 993 [4th Dept 1994]). However, the defense asserted here fails as a matter of law.

The retainer agreement contained an integration clause and a clause barring modifications other than in writing. As such, defendant had to make her argument based on the text of the agreement, and she has not established an exception to that rule (*see Schron v Troutman Sanders LLP*, 20 NY3d 430 [2013]; *Joseph P. Day Realty Corp. v Lawrence Assoc.*, 270 AD2d 140, 141 [1st Dept 2000]). The agreement unambiguously provides that defendant is liable to plaintiff for his hourly fees plus disbursements. Because the agreement is not ambiguous, it is not necessary to give any more favorable reading to defendant (*see Shaw v*

Manufacturers Hanover Trust Co., 68 NY2d 172, 177 [1986]). Accordingly, because defendant's general denial fails and she did not offer specific denials of the itemized charges, plaintiff is entitled to summary judgment (*see O'Callaghan* at 114).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1068 In re The 111 Condominium, et al., Petitioners-Appellants, Index 100198/14

-against-

Board of Standards and Appeals of the City of New York, et al., Respondents-Respondents.

Nixon Peabody LLP, New York (James Michael Smith of counsel), for appellants.

Zachary W. Carter, Corporation Counsel, New York (Jonathan Popolow of counsel), for Board of Standards and Appeals of the City of New York, respondent.

Greenberg Traurig, LLP, New York (Deirdre A. Carson of counsel), for Dalton Schools, Inc., respondent.

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered May 1, 2015, denying the petition to annul a determination of respondent Board of Standards and Appeals of the City of New York (Board), dated January 14, 2014, which, as subsequently amended on February 5, 2014, granted, upon certain conditions, respondent Dalton Schools, Inc.'s application to amend a previously approved variance and special permit, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

The Board's grant of a variance allowing Dalton to build an

addition to its building does not constitute an ultra vires rezoning, since the variance would not change the essential character of the neighborhood (*cf. Matter of Held v Giuliano*, 46 AD2d 558, 559-560 [3d Dept 1975] [zoning board exceeded its authority in granting a variance permitting residential construction of lots with a greater density than allowed under a zoning ordinance]; *Van Deusen v Jackson*, 35 AD2d 58 [2d Dept 1970] [zoning board exceeded its powers when granting a variance permitting an individual to develop his land as a subdivision at odds with a zoning ordinance], *affd* 28 NY2d 608 [1971]). Both the Board and Supreme Court correctly applied the standard set forth in *Cornell Univ. v Bagnardi* (68 NY2d 583 [1986]). The Board providently exercised its discretion in granting the variance and special permit, and its determination has a rational basis in the record and was not arbitrary and capricious (*Matter of SoHo Alliance v New York City Bd. of Stds. & Appeals*, 95 NY2d 437, 440 [2000]).

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

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1069 The People of the State of New York, Respondent, Ind. 47/12 SCI 4536/12

-against-

Cathleen Torres, Defendant-Appellant.

_____

Mitchell Dranow, Sea Cliff, for appellant.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about November 14, 2012, unanimously affirmed.

Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant'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: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1073 Oorah, Inc., doing business as Cucumber Communications, Plaintiff-Appellant, Index 652316/11

-against-

Covista Communications, Inc., Defendant,

Birch Telecom, Inc., doing business as Birch Communications, Defendant-Respondent.

_____

Storch Amini & Munves PC, New York (Noam M. Besdin of counsel), for appellant.

Kane Kessler, P.C., New York (Gerard Schiano-Strain of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 26, 2014, which granted the motion of defendant Birch Telecom, Inc. d/b/a Birch Communications to dismiss the second amended complaint as against it pursuant to CPLR 3211(a)(1) and (7), unanimously affirmed, with costs.

In 2004, plaintiff entered into an agreement with defendant Covista Communications, Inc., whereby Covista was supposed to pay it commissions. By a contract dated November 30, 2012, and in a transaction that closed in March 2013, Birch Communications, Inc. purchased certain assets of Covista and related companies for $4

million[1]. In the instant action, plaintiff seeks to hold Birch liable as Covista's successor.

In general, a corporation that acquires the assets of another is not liable for its predecessor's breaches of contract (*see Schumacher v Richards Shear Co.*, 59 NY2d 239, 244 [1983]; *Kretzmer v Firesafe Prods. Corp.*, 24 AD3d 158 [1st Dept 2005]). Exceptions exist where the corporation impliedly assumed its predecessor's liability, "there was a consolidation or merger of seller and purchaser" (*Schumacher*, 59 NY2d at 245), or "the transaction is entered into fraudulently to escape" the predecessor's obligations (*id.*).

The asset purchase agreement between Birch and Covista says that Birch is acquiring certain contracts listed on a schedule. The agreement between Covista and plaintiff is not on that schedule. Therefore, Birch did not impliedly assume Covista's obligations to plaintiff (*see Matter of TBA Global, LLC v Fidus*

[1]Counsel for defendant-respondent noted in the motion below and in its brief to this court that plaintiff sued only Birch Telecom, Inc., a Delaware corporation, which is a wholly owned subsidiary of Birch Communications, Inc., a Georgia corporation that entered into the asset purchase agreement with Covista. Accordingly, Birch Telecom, Inc., could have moved to dismiss on the basis that plaintiff sued the wrong party. However, since counsel did not raise this issue on its motion to dismiss, the court will deem it waived, and will refer to both entities as Birch.

Partners, LLC, 132 AD3d 195, 197, 202 [1st Dept 2015]; *Graham v Harris Corp.*, 289 AD2d 138 [1st Dept 2001]; *City of New York v Pfizer & Co.*, 260 AD2d 174, 175 [1st Dept 1999]).

Continuity of ownership is an essential element of de facto merger (*see e.g. TBA Global*, 132 AD3d at 209-210). "[C]ontinuity of ownership [] exists where the shareholders of the predecessor corporation become direct or indirect shareholders of the successor corporation" (*Matter of New York City Asbestos Litig.*, 15 AD3d 254, 256 [1st Dept 2005]). Plaintiff has not alleged this. The documentary evidence submitted by Birch shows that it paid cash for Covista's assets; hence, there was no continuity of ownership (*see e.g. id.*).

Plaintiff contends that it should be allowed discovery on de facto merger. However, it has not shown that discovery on continuity of ownership would be anything other than a fishing expedition (*see generally Fernandez v HICO Corp.*, 24 AD3d 110, 110-111 [1st Dept 2005]).

Assuming, arguendo, that concepts from the Debtor and Creditor Law should be imported into the fraud prong of successor liability (*see e.g. Staudiger+Franke GmbH v Casey*, 2015 WL 3561409, *14, 2015 US Dist LEXIS 73912, *39 [SD NY, June 8, 2015, No. 13 Cv 6124 (JGK)]), the IAS court properly dismissed so much

of plaintiff's claim against Birch as was based on fraud. Unlike the situation in the cases cited by plaintiff, Birch was not created to avoid Covista's obligations; on the contrary, Birch was formed one year before Covista. Moreover, plaintiff has not alleged overlapping owners or executives or offices; on the contrary, it alleges that Covista is a New Jersey corporation with its principal place of business in Tennessee and that Birch is a Delaware corporation with its principal place of business in Missouri.

The court properly dismissed the third cause of action, for lack of a contractual relationship between plaintiff and Birch (*see Sarachek v Fortgang*, 67 AD3d 887, 887-888 [2d Dept 2009]).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1074 The People of the State of New York, Ind. 4433/09
Respondent,

-against-

Rodney Harris,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Patricia Nunez, J.), rendered on or about September 19, 2013,

Said appeal having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed.

ENTERED: MAY 5, 2016

DEPUTY CLERK

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

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1075 Richard R. Pratt, et al., Index 306518/10
Plaintiffs-Appellants,

-against-

Elsa Jimenez, et al.,
Defendants-Respondents,

Elrac, Inc.,
Defendant.

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Law Offices of Alexander Bespechny, Bronx (Louis A. Badolato of counsel), for appellants.

Peknic, Peknic & Schaefer, LLC, Long Beach (Brian M. Peknic of counsel), for Elsa Jimenez, respondent.

Law Offices of John Trop, Yonkers (David Holmes of counsel), for Juan Roman Torres-Lopez, respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, J.), entered September 9, 2014, which granted the motion of defendant Jimenez for summary judgment dismissing the complaint and cross claim as against her, unanimously affirmed, without costs.

In a two-car accident in which the passengers of one of the alleged offending vehicles seek damages from both drivers, defendant Jimenez demonstrated her prima facie entitlement to judgment through her deposition testimony that she was traveling at a reasonable rate of speed under the prevailing conditions and

did not leave her lane of traffic. Plaintiffs' speculation that the moving defendant may have been negligent and may have traveled outside of her lane because of the absence of painted lane dividers failed to raise a material issue of fact in opposition. Their purely fact-based argument that such defendant failed to take reasonable measures to avoid the accident is improperly raised for the first time on appeal and we decline to consider it (*see HSBC Bank USA v Carvalho*, 128 AD3d 471 [1st Dept 2015]).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1076 The People of the State of New York, Ind. 334N/12
Respondent,

-against-

Edward Reid,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Laura A. Ward, J. at suppression motions; Melissa Jackson, J. at plea and sentencing), rendered March 12, 2014, convicting defendant of criminal possession of a controlled substance in the second degree, and sentencing him to a term of four years, unanimously affirmed.

The court properly denied defendant's initial suppression motion, in which he claimed that the search of his apartment unlawfully preceded the issuance of a search warrant. This claim was made in a conclusory affirmation by counsel, based on information and belief, and it was refuted by the People's submission of a detective's affidavit demonstrating, with specificity, that the search warrant was issued before the entry

into defendant's apartment. In connection with the original motion, defendant did not file a reply or make any attempt to contradict the timeline of events in response to the People's submission. Accordingly, there was no factual dispute warranting a hearing (*see generally People v Mendoza*, 82 NY2d 415 [1993]).

Defendant's remaining suppression claims were never raised before the motion court, and are therefore unpreserved, or were raised in successor counsel's supplemental motions, which the court properly rejected as untimely (*see* CPL 255.20[1],[3]). We decline to review any of these claims in the interest of justice. As an alternative holding, we reject each of them on the merits.

Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, concerning counsel's choice of suppression issues (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]), particularly in light of the lack of merit of the unpreserved and untimely

arguments. We reject defendant's ineffective assistance claim either as an excuse for untimeliness or lack of preservation, or as a separate basis for ordering new suppression proceedings.

We perceive no basis for reducing the sentence.

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1077-
1078 The People of the State of New York,
Respondent,

-against-

Jose Ortiz,
Defendant-Appellant.

Ind. 5788/12
3245/13

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

Jose Ortiz, appellant pro se.

Cyrus R. Vance, Jr., District Attorney, New York (Diane N. Princ of counsel), for respondent.

Appeals having been taken to this Court by the above-named appellant from the judgments of the Supreme Court, New York County (Michael Obus, J.), rendered on or about April 22, 2014,

Said appeals having been argued by counsel for the respective parties, due deliberation having been had thereon, and finding the sentence not excessive,

It is unanimously ordered that the judgments so appealed from be and the same are hereby affirmed.

ENTERED: MAY 5, 2016

DEPUTY CLERK

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

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1079 Fred Simcha Wang, Index 652460/14
Plaintiff-Appellant,

-against-

UBS AG,
Defendant-Respondent,

John Does 1-10, et al.,
Defendants.

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Fred Simcha Wang, appellant pro se.

Katten Muchin Rosenman, LLP, New York (Tenley Mochizuki of counsel), for respondent.

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Order, Supreme Court, New York County (Robert Reed, J.), entered May 7, 2015, which, on the record of the hearing dated April 30, 2015, granted defendant USB AG's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff's claim must be brought in a different forum in accordance with the forum selection clause contained in the account agreement entered into by the parties, and plaintiff failed to meet his burden of showing that the forum selection clause should not be enforced (*see Braverman v Yelp, Inc.*, 128 AD3d 568 [1st Dept 2015], *lv denied* 26 NY3d 902 [2015]; *British W. Indies Guar. Trust Co. v Banque Internationale A Luxembourg*, 172 AD2d 234 [1st Dept 1991]). The forum selection clause

applies to the fraud claims, as they arise out of and in connection with the parties' account agreement (*see Zachariou v Manios*, 50 AD3d 257 [1st Dept 2008]).

The court, as an alternative basis for dismissal, properly found that the complaint should be dismissed based on the ground of forum non conveniens (CPLR 327; *Peters v Peters*, 101 AD3d 403 [1st Dept 2012]).

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Manzanet-Daniels, Gische, Gesmer, JJ.

1080N China Privatization Fund (Del.), L.P., Plaintiff-Appellant, Index 650587/11

-against-

Galaxy Entertainment Group Limited, Defendant-Respondent.

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Weil, Gotshal & Manges LLP, New York (Irwin H. Warren of counsel), for appellant.

Hodgson Russ LLP, New York (S. Robert Schrager of counsel) ,for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered July 14, 2015, which, among other things, granted defendant's motion to continue the deposition of plaintiff's former deal counsel, unanimously affirmed, without costs.

The motion court providently exercised its discretion in ordering the continued deposition of plaintiff's former deal counsel, William Barron, and requiring him to answer questions regarding the underlying transaction, to the extent he can do so without revealing attorney-client privileged communications (*see Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190 [1st Dept 2005]).

Barron's deposition testimony established that he led the

team which primarily drafted the indenture at issue, and that he was familiar with the intended structure of the indenture and its conversion price provisions, which are the heart of the parties' dispute in the underlying breach of contract lawsuit (*see China Privatization Fund [Del], L.P. v Galaxy Entertainment Group Ltd.*, 95 AD3d 769, 770 [1st Dept 2012]). He thus possesses information that is "material and necessary" to the prosecution and defense of the action (CPLR 3101[a]; *see 305-7 W. 128th St. Corp. v Gold*, 178 AD2d 251, 251 [1st Dept 1991]).

Plaintiff bears the burden of establishing any right to protection on attorney-client privilege grounds (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377 [1991]; *Miranda v Miranda*, 184 AD2d 286, 286 [1st Dept 1992]). Barron's conclusory and speculative assertions during his initial deposition, that he did not recall any specific conversations but did not "feel confident" that he could answer "without potentially revealing" privileged communications, did not suffice to meet that burden (*Miranda*, 184 AD2d at 286; *see also Coastal Oil N.Y. v Peck*, 184 AD2d 241 [1st Dept 1992]). The motion court properly ordered Barron to specify the basis for his assertion of the privilege, such as by identifying specific conversations or communications with plaintiff.

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

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

ENTERED: MAY 5, 2016

DEPUTY CLERK

Mazzarelli, J.P., Renwick, Moskowitz, Kapnick, Kahn, JJ.

666-
667 Index 162187/14

Allied World National
Assurance Company,
Plaintiff-Appellant,

-against-

Great Divide Insurance Company, et al.,
Defendants-Respondents.

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Shaub, Ahmuty, Citrin & Spratt LLP, New York (Steven J. Ahmuty, Jr. of counsel), for appellant.

Coughlin Duffy LLP, New York (Justin N. Kinney of counsel), for Great Divide Insurance Company, respondent.

Finazzo Cossolini O'Leary Meola & Hager, LLC, Morristown, NJ (Robert F. Cossolini of the bar of the State of New Jersey, admitted pro hac vice, of counsel), for New York Marine and General Insurance Company, respondent.

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Order and judgment (one paper), Supreme Court, New York County (Arthur F. Engoron, J.), entered October 27, 2015, affirmed, with costs. Appeal from order, same court and Justice, entered on or about October 2, 2015, dismissed, without costs, as subsumed in the appeal from the judgment.

Opinion by Moskowitz, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Dianne T. Renwick
Karla Moskowitz
Barbara R. Kapnick
Marcy L. Kahn, JJ.

666-667
Index 162187/14

_____x

Allied World National
Assurance Company,
Plaintiff-Appellant,

-against-

Great Divide Insurance Company, et al.,
Defendants-Respondents.

_____x

Plaintiff appeals from the order and judgment (one paper) of the Supreme Court, New York County (Arthur F. Engoron, J.), entered October 27, 2015, denying its motion for summary judgment, granting defendants' separate cross motions for summary judgment, and declaring that defendants had no duty to defend their insured IMG Worldwide Inc. or IMG Academies LLP (collectively, IMG) in an underlying arbitration proceeding, and that defendants have no duty to reimburse plaintiff for defense costs incurred in connection with its defense of IMG in that proceeding, and from the order of the same court and Justice, entered on or about October 2, 2015, which denied plaintiff's motion for summary judgment and granted defendants' cross motions for summary judgment.

Shaub, Ahmuty, Citrin & Spratt LLP, New York (Steven J. Ahmuty, Jr. and Tiffany A. Miao of counsel), for appellant.

Coughlin Duffy LLP, New York (Justin N. Kinney of counsel), for Great Divide Insurance Company, respondent.

Finazzo Cossolini O'Leary Meola & Hager, LLC, Morristown, NJ (Robert F. Cossolini of the bar of the State of New Jersey, admitted pro hac vice, and New York (Patrick A. Florentino of counsel), for New York Marine and General Insurance Company, respondent.

MOSKOWITZ, J.

In this appeal, we are called upon to decide whether claims asserted in an arbitration demand fell outside coverage provided under the insurer-defendants' policies, or fell within the scope of exclusions in those policies.

In December 2004, nonparty Hemisphere Resorts LLC, a real estate development firm, entered into a licensing agreement and a service agreement (together, the agreements) with nonparties IMG Worldwide Inc. and IMG Academies LLP, (Collectively, IMG). The agreements allowed Hemisphere to use IMG's trade names and trademarks, as well as its services, in connection with Hemisphere's development of a network of sports-oriented resort communities.

For consecutive policy periods from August 10, 2005 to August 10, 2012, plaintiff, Allied World National Assurance Company, and defendants, Great Divide Insurance Company, and New York Marine and General Insurance Company issued commercial general liability insurance policies to IMG with one-year policy periods. Each policy provided, among other things, coverage for personal and advertising injury liability; accordingly, each policy obligated the insurer to defend any "suit" (including an arbitration proceeding) seeking damages for a "personal and advertising injury." "Personal and advertising injury," in turn

was defined as injury arising out of, among other things, false arrest, malicious prosecution, publication of defamatory or disparaging material, publication of material constituting violation of the right to privacy, copyright or trade dress violations, and using another's intellectual property in an advertisement.

As relevant to this appeal, the policies contained exclusions of coverage for personal and advertising injury "caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict 'personal and advertising injury.'" The policies also excluded coverage for personal and advertising injury "arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity." Finally, the policies excluded coverage for personal and advertising injury "arising out of a breach of contract, except an implied contract to use another's advertising idea in your 'advertisement.'"

In July 2012, after disputes arose between Hemisphere and IMG with respect to the agreements, Hemisphere served IMG with a demand for arbitration. In the demand, Hemisphere sought a declaratory judgment as to the parties' rights and obligations under their agreements; specific performance of IMG's obligations

under the agreements; and money damages for injuries that Hemisphere claimed to have suffered through IMG's alleged wrongful conduct, including breaches of contract and various torts.

In the breach of contract allegations, Hemisphere alleged that IMG violated the exclusivity provisions of the agreements by entering into a partnership with another business that Hemisphere deemed to be a "competing business" under the terms of the agreements. Further, Hemisphere claimed that IMG breached the exclusivity provisions of the agreements by trying to create its own competitive business in New York City in an area geographically near to a Hemisphere project. Hemisphere also alleged that IMG breached the agreements by failing to promote Hemisphere's business with potential partners and by representing to those entities not only that IMG and Hemisphere were not pursuing business together, but also that IMG and Hemisphere were involved in a dispute over the agreements.

In the tortious interference claims, Hemisphere alleged that IMG "knowingly and intentionally" interfered with Hemisphere's business relationship by, among other things, trying to open a competing business – the same conduct Hemisphere claimed constituted a breach of the agreements. Hemisphere also claimed that IMG knowingly and intentionally interfered with other

business relationships by failing to promote Hemisphere's business with potential business partners, by stating that IMG and Hemisphere were not pursuing business together, and by revealing that IMG and Hemisphere were involved in a dispute concerning the agreements – again, the same conduct Hemisphere claimed constituted a breach of the agreements. As a result of IMG's conduct, Hemisphere claimed, it lost the opportunity to develop a resort property in New Jersey. Finally, Hemisphere alleged that IMG "knowingly and intentionally" represented that it intended to perform its obligations under the agreements when it did not, in fact, actually intend to do so.

In August 2012, IMG tendered the defense of the arbitration proceeding to Allied World, Great Divide, and New York Marine. By letter dated September 10, 2012, New York Marine disclaimed coverage for IMG's claim. In so doing, New York Marine primarily relied on the personal and advertising injury exclusion for "material published prior to policy period," stating that "disputes arose between the parties on or about February 2011 and that IMG sent a demand letter about the claimed breaches on February 15, 2011" and thus, were alleged to have occurred before August 10, 2011 – the inception of the New York Marine policy. New York Marine also specifically reserved all of its rights to further limit or disclaim any obligation to defend IMG based upon

all the terms, conditions, definitions, and exclusions of its policy.

Likewise, by letter dated September 27, 2012 Great Divide disclaimed coverage for IMG's claim. First, Great Divide declined coverage "to the extent the breach-of-contract exclusion applies [because] Hemisphere's initiation of arbitration stems from IMG's alleged breach of the [agreements]." Second, Great Divide contended that "some" of IMG's alleged violations occurred after August 10, 2010, the expiration date of Great Divide's final policy. Great Divide's disclaimer also reserved the right to rely on any other terms or conditions of its policies.

In October 2012, Allied World initially disclaimed coverage for IMG because the policy excluded advertising and personal injury coverage arising out of breach of contract. Further, Allied World also reserved its right to disclaim coverage on any of the exclusions for advertising and personal injury coverage. In November 2013, however, Allied World reconsidered its position and agreed to defend IMG under a reservation of rights. Specifically, Allied World reserved "the right to withdraw from [IMG's] defense, as well as the right to seek reimbursement of amounts incurred prior to such withdrawal, to the extent that the investigation reveals that there is no coverage for this matter."

IMG ultimately settled the dispute by paying Hemisphere

$3,250,000 and waiving IMG's counterclaims. Between August and December 2014, Allied World reimbursed IMG for defense costs totaling $2,178,170.27 in connection with the arbitration proceeding.

Allied World then filed this action against Great Divide and New York Marine, seeking a declaration that they were obliged to defend IMG in the arbitration proceeding because the demand for arbitration, by its claim that IMG tortiously interfered with Hemisphere's business relationships, contained allegations that fit within the "personal and advertising injury" coverage of their respective policies. Allied World further sought an order compelling Great Divide and New York Marine, under principles of equitable contribution, to reimburse Allied World for their equitable share of the $2,178,170.27 in defense costs that Allied World paid in connection with its defense of IMG in the arbitration proceeding.

Allied World filed a prediscovery motion for summary judgment, seeking a declaration that Great Divide and New York Marine were obliged to each reimburse Allied World $726,056.75 in past defense costs incurred on behalf of IMG in connection with the settled arbitration proceeding. New York Marine and Great Divide filed cross motions for summary judgment dismissing the complaint, arguing that the arbitration claims against IMG either

did not fall within the applicable coverage or fell within various exclusions. The IAS court denied Allied World's motion and granted New York Marine's and Great Divide's separate cross motions.

IMG's headquarters are in Ohio, and therefore, no party disputes that Ohio law applies to this action. Therefore, we analyze the issues under the law of Ohio, not the law of New York. In so doing, we find that exclusions in Great Divide's and New York Marine did, in fact, preclude coverage to IMG, and now affirm.

Under Ohio law, a plaintiff has the burden of proving that the arbitration demand at issue "potentially or arguably" alleges an offense within the scope of coverage in a defendant's insurance policy for "personal and advertising injury" (*City of Willoughby Hills v Cincinnati Ins. Co.*, 9 Ohio St 3d 177, 180, 459 NE2d 555, 558 [1984]; *see Sharonville v American Empls. Ins. Co.*, 109 Ohio St 3d 186, 191, 846 NE2d 833, 838 [2006]). If the plaintiff is able to sustain that burden, then the burden shifts to the defendant to show that the alleged offense falls within a policy exclusion (*see Continental Ins. Co. v Louis Marx & Co., Inc.*, 64 Ohio St 2d 399, 401-402, 415 NE2d 315, 317 [1980]).

Here, the allegations of tortious interference on the part of IMG, whether through defamatory or disparaging statements, do

potentially or arguably state an offense within the scope of coverage for personal and advertising injury liability. However, even if the arbitration demand implied defamation or disparagement, the exclusion for "knowledge of its falsity" still presents a bar to coverage, as the arbitration demand specifically alleged that IMG acted "knowingly and intentionally." Indeed, Hemisphere's allegation that IMG acted "knowingly and intentionally" is consistent with the requirements of Ohio law. Specifically, Ohio courts do not recognize a cause of action for negligent interference with contract or business relations, holding instead that tortious interference requires intentional conduct (*see Bauer v Commercial Aluminum Cookware Co.*, 140 Ohio App 3d 193, 199, 746 NE2d 1173, 1177 [Ohio Ct App 2000] [under Ohio law, the tortious interference with a business relationship "must be intentional because Ohio does not recognize negligent interference with a business relationship"]). Hence, any allegations of tortious interference on the part of IMG, whether through defamatory or disparaging statements or otherwise, can only be read to encompass conduct that was performed "knowingly and intentionally."

As to the breach of contract exclusion, Ohio courts employ an "arising out of" approach that bars coverage for advertising injury "arising out of breach of contract" (*Westfield Ins. Co. v*

Factfinder Mktg. Research, Inc., 168 Ohio App 3d 391, 404, 860 NE2d 145, 154 [Ohio Ct App 2006]). In turn, the term "arising out of" has been interpreted under Ohio law to mean "flowing from," "having its origin in," or "growing out of" (*id.*) [internal quotation marks omitted]. Here, the alleged conduct supporting the tortious interference claim is the same alleged conduct supporting Hemisphere's breach of contract claim. Thus, when the arbitration demand is viewed in its entirety, the dispute between Hemisphere and IMG was a contractual dispute, as the "personal and advertising injury" Allied World claims Hemisphere suffered as a result of IMG's actions arose out of a breach of contract. Coverage for the dispute is therefore excluded under Great Divide and New York Marine's policies.

Finally, Allied World argues for the first time on appeal that Great Divide and New York Marine waived their rights to assert the exclusion for knowledge of falsity. Even assuming that we could consider this argument because it raises a purely legal argument that appears on the face of the record and could not have been avoided by the motion court (*see Vanship Holdings Ltd. v Energy Infrastructure Acquisition Corp.*, 65 AD3d 405, 408 [1st Dept 2009], the argument is without merit. Great Divide and New York Marine did not waive their rights to assert the "knowledge of falsity" exclusion, as their disclaimer letters

specifically reserved their rights as to all the terms and conditions of the policies (*see Insurance Co. of N. Am. v Travelers Ins. Co.*, 118 Ohio App 3d 302, 322, 692 NE2d 1028, 1040-1041 [1997]).

We have considered Allied World's remaining contentions and find that they are without merit.

Accordingly, the order and judgment (one paper), of the Supreme Court, New York County (Arthur F. Engoron, J.), entered October 27, 2015, denying plaintiff's motion for summary judgment, granting defendants' separate cross motions for summary judgment, and declaring that defendants had no duty to defend their insured, IMG, in an underlying arbitration proceeding, and that defendants have no duty to reimburse plaintiff for defense costs incurred in connection with its defense of IMG in that proceeding, should be affirmed, with costs. The appeal from the order of the same court and Justice, entered October 2, 2015,

which denied plaintiff's motion for summary judgment and granted defendants' cross motions for summary judgment, should be dismissed, without costs, as subsumed in the appeal from the judgment.

All concur.

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

ENTERED: MAY 5, 2016

DEPUTY CLERK