SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 1, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Acosta, Andrias, Moskowitz, JJ.

16336-
16337N Carlos Rodriguez,
Plaintiff-Appellant-Respondent,

-against-

City of New York,
Defendant-Respondent-Appellant.

Index 109444/11

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Kelner & Kelner, New York (Joshua D. Kelner of counsel), for appellant-respondent.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 22, 2014, which, to the extent appealed from, denied plaintiff's motion for partial summary judgment on the issue of liability, affirmed, without costs. Order, same court and Justice, entered November 12, 2013, which, to the extent appealed from as limited by the briefs, denied defendant's motion to strike the claim for lost earnings or, in the alternative, to compel plaintiff to provide copies of his tax returns and/or authorizations for such returns, affirmed, without

costs.

In this case, we are revisiting a vexing issue regarding comparative fault: whether a plaintiff seeking summary judgment on the issue of liability must establish, as a matter of law, that he or she is free from comparative fault. This issue has spawned conflicting decisions between the judicial departments, as well as inconsistent decisions by different panels within this Department. The precedents cited by the dissent have, in fact, acknowledged as much. After a review of the relevant precedents, we believe that the original approach adopted by this Department, as well as that followed in the Second Department, which requires a plaintiff to make a prima facie showing of freedom from comparative fault in order to obtain summary judgment on the issue of liability, is the correct one.[1]

Under our comparative negligence system, a plaintiff's contributory fault may proportionally diminish his or her recovery, but will not preclude recovery unless the plaintiff was solely at fault (CPLR 1411). Such "culpable conduct" on the part

[1]The Fourth Department permits a plaintiff to obtain partial summary judgment on the issue of a defendant's negligence even if an open question exists regarding the plaintiff's comparative fault (*see Simoneit v Mark Cerrone, Inc.*, 122 AD3d 1246 [4th Dept 2014]).

of a plaintiff "shall be an affirmative defense to be pleaded and proved by the party asserting the defense" (CPLR 1412). The issue that arises in the context of a summary judgment motion brought by a plaintiff on the issue of liability is whether, as the dissent posits, the motion should be granted and the issue of contributory negligence considered during the damages portion of the case or where the defendant raises an issue of fact with respect to the plaintiff's negligence and the plaintiff fails to show the absence of negligence on his or her part, the motion must be denied and that issue considered during the liability phase of the trial. As discussed herein, the latter is the fairer, and therefore the proper way to proceed.

It is important to note at the outset that "CPLR 1411 pertains to the damages ultimately recoverable by a plaintiff. It has no bearing, procedurally or substantively, upon a plaintiff's burden of proof as the proponent of a motion for summary judgment on the issue of liability" (*Roman v A1 Limousine, Inc.*, 76 AD3d 552, 553 [2d Dept 2010]). Just what that burden of proof is has been the issue causing the present contradictory decisions within the judicial departments.

The starting point of this analysis must be our decision in *Thoma v Ronai* (189 AD2d 635 [1st Dept 1993], *affd* 82 NY2d 736

[1993]). The plaintiff in *Thoma* was lawfully in a crosswalk when she was struck by the defendant's van. She moved for summary judgment on the issue of liability, and the motion was denied. We affirmed the denial on the basis that the plaintiff's failure to demonstrate that she exercised reasonable care in crossing the street, by looking before she began crossing the intersection, created an issue of fact as to whether she was free from comparative negligence as a matter of law, and thus that she did not meet her burden of proof on the motion. In affirming our decision, the Court of Appeals agreed that the "plaintiff did not satisfy her burden of demonstrating the absence of any material issue of fact" on the question of her freedom from comparative negligence and therefore did not meet her burden on proof on the motion (82 NY2d at 737).

The clear direction of *Thoma* is that a plaintiff may not be awarded partial summary judgment on the issue of a defendant's negligence if the defendant has raised an issue of fact as to the plaintiff's comparative negligence.

We have followed that guidance repeatedly since *Thoma* was decided. For example, in *Tann v Herlands* (224 AD2d 230 [1st Dept 1996]), which involved a rear-end collision, the plaintiff moved for partial summary judgment on liability, and the motion was

granted. We found that the plaintiff did not eliminate all factual issues as to her freedom from comparative negligence. Significantly, we held that "defendants' liability should be considered and determined simultaneously with the material, and overlapping, issue of whether plaintiff was also culpable" (*id.* at 230-231), not, as the dissent contends herein, separately from defendants' liability.

In *Phillips v Cohn* (277 AD2d 40 [1st Dept 2000]), another rear-end collision case, we affirmed the denial of summary judgment based upon the fact that the plaintiff failed to eliminate issues of fact as to his comparative negligence.

In *Lopez v Garcia* (67 AD3d 558 [1st Dept 2009]), we reversed the grant of the plaintiff's motion for partial summary judgment on liability, finding that the plaintiff did not, as a matter of law, eliminate all issues of comparative negligence.

Most recently, in *Geralds v Damiano* (128 AD3d 550 [1st Dept 2015]), we affirmed the denial of the plaintiff's motion for partial summary judgment on the ground that the plaintiff did not eliminate issues with respect to whether he was stopped in a moving lane and whether his emergency flashers were engaged, i.e., his comparative negligence.

All of these cases were based on the guidance set out in

Thoma.

The dissent contends that our departure from *Thoma* began with *Perez v Brux Cab Corp.* (251 AD2d 157 [1st Dept 1998]). However, the facts of *Perez* are markedly different from those in this case. In *Perez*, the defendants' cab ran a red light and struck the plaintiff's vehicle which was being lawfully operated at the time of the accident. We noted the complete failure of the defendants to present *any* facts in opposition to the plaintiffs' motion for partial summary judgment that would warrant a finding of comparative negligence on the plaintiffs' part. That is not the case here, where, as the dissent has acknowledged, defendant has indeed presented issues of fact as to plaintiff's comparative negligence.

The dissent also cites *Tselebis v Ryder Truck Rental, Inc.* (72 AD3d 198 [1st Dept 2010]) in support of its position. *Tselebis* is also distinguishable from this case.

In *Tselebis*, the defendant truck driver admitted that he entered the intersection against a red light due to faulty brakes, and struck the plaintiff who was on a motorcycle. There was no proof offered that the plaintiff was negligent in the operation of his motorcycle or as to the cause of the accident, which was the reason that summary judgment on liability was

granted to the plaintiff. The plaintiff also suffered memory loss as a result of the accident.

By contrast, in the present case, plaintiff was injured when a sanitation truck backed into a Toyota Prius that then struck plaintiff. Defendant claims that plaintiff, an employee of defendant, while working outside the sanitation garage, was not supposed to walk behind a sanitation truck moving in reverse, and thus contributed to the cause of the accident. At his deposition, plaintiff testified that as the truck was backing up slowly, he was walking towards the front of the Prius, which was stationed behind the moving truck. Plaintiff stated that he took approximately 10 steps forward before the impact. It would appear that plaintiff was injured while walking behind a truck slowly moving backwards which he was not supposed to do. There is no evidence in the record that plaintiff was merely "standing" in front of the Prius when he was struck, as asserted by the dissent. Further, the evidence shows that the truck was moving in reverse at approximately five miles per hour when it skidded on snow/ice and struck the Prius. Under this factual scenario, the trier of fact could determine that defendant was free from negligence and that plaintiff was 100% at fault in causing his injuries.

The Second Department has consistently applied *Thoma* to deny partial summary judgment to a plaintiff who fails to establish that he or she was free from negligence (*Roman v A1 Limousine, Inc.*, *76 AD3d 552*; *Derieux v Apollo New York City Ambulette, Inc.* 131 AD3d 504 [2d Dept 2015]; *Jones v Pinto*, 133 AD3d 634 [2d Dept 2015]). The Court stated in *Roman* that CPLR 1411 "has no bearing, procedurally or substantively, upon a plaintiff's burden of proof as the proponent of a motion for summary judgment on the issue of liability" (76 AD3d at 553), a statement with which we fully agree.

Significantly, as the Court in *Jones* noted, "The issue of comparative fault is generally a question for the trier of fact" (133 AD3d at 635); this supports the argument that the issue of comparative fault should not be considered separately as to the defendant and the plaintiff.

In *Calcano v Rodriguez* (91 AD3d 468, 468 [1st Dept 2012]), this Court held, "The plaintiff in a negligence action cannot obtain summary judgment as to liability if triable issues remain as to the plaintiff's own negligence and share of culpability for the accident" (citing *Thoma*, 82 NY2d at 737). We went on to state that "*Thoma* instructs us simply to deny summary judgment to a negligence plaintiff who cannot eliminate all issues as to his

or her comparative fault" (*id.* at 470).

In *Maniscalco v New York City Tra. Auth.* (95 AD3d 510 [1st Dept 2012]), the question before us was, "where there is evidence in the pretrial record that more than one party's negligence may have caused the injury, is it appropriate for a court to rule as a matter of law that one of the parties caused the injury? Under *Thoma*, the answer to the question is 'no'" (95 AD3d at 512-513). Significantly, we went on to state that, given the holding in *Thoma*, "the causal role of each party's conduct should not be determined in isolation" (*id.* at 513).

This makes sound legal and practical sense. As noted by Professor Alexander:

> "Conceptually, any amount of negligence by a defendant could trigger his or her liability, and CPLR 3212(e)allows for the entry of partial summary judgment as to any part of a cause of action. But few, if any, litigation efficiencies are achieved by the entry of partial summary judgment in this context because the defendant would still be entitled, at trial to present an all-out case on the plaintiff's culpable conduct. Furthermore, it is possible that a jury might find plaintiff's culpability to be the sole proximate cause of the accident if the issues of the defendant's liability and the plaintiff's comparative fault are seen, in the words of the dissent in *Johnson v New York City Tra. Auth.*, 88 AD3d 321, 332 [1st Dept 2011] "as an integrated whole.' (Vincent

C. Alexander, Practice Commentaries,
McKinney's Cons Laws of NY, Book 7B C1412).

The dissent's view that a plaintiff's negligence should be considered during a trial on damages is problematic in the sense that a defendant is essentially entering the batter's box with two strikes already called.[2] A jury would be instructed that the issue of a defendant's liability was settled and that it could only consider the plaintiff's conduct as it affected the amount of damages to be recovered. Even in the unlikely event that a defendant was allowed to, as Professor Alexander states, "present an all-out case on the plaintiff's culpable conduct," this would defeat the purpose of grantingsummary judgment on the issue of liability vis-a-vis CPLR 1411. This again highlights the problem created by conflating the comparative negligence statutory scheme with the procedural requirements of a motion for summary judgment.

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[2]The dissent contends that this is a misstatement of its position and that "the matter should be remanded first for a trial on *liability*, during which the jury would consider the conduct of both parties and apportion fault accordingly." However, under this scenario, a defendant's liability would already have been determined by the grant of partial summary judgment. A plaintiff's liability would be the only issue and that liability, under New York comparative negligence statutory scheme, merely affects the amount of damages to be awarded, if any.

Moreover, such bifurcation of resolutions of the issue of liability between the parties runs counter to the guidance given in the Pattern Jury Instructions. PJI 2:36 *et seq*., as well as the comments thereto, provide that, in either a bifurcated or a full trial on liability and damages in a comparative negligence case, a jury must be given instructions as to the defendant's liability and the plaintiff's liability at the same time (*see* 1A NY PJI3d 2:36 at 273 *et seq*.[2016]). This avoids a complicated jury instruction and allows the jury to consider the actions of both parties as a whole in making their determination (*see Tann v Herlands*, 224 AD2d 230).

We do not agree with our dissenting colleague that our decision today ignores the intent of CPLR article 14-A. It does not, as the dissent contends, bar recovery to a plaintiff who may have some liability for causing the incident in question. It is clear that the burden of proving the affirmative defense of comparative negligence at trial remains on the defendant. The dissent essentially acknowledges as much (*see Gonzalez ARC Interior Const*., 83 AD3d 419 [1st Dept 2011]). However, our colleague takes the curious position that here, "where plaintiff met his prima facie burden of establishing defendant's negligence as a proximate cause of the injury, and defendant failed to raise

triable issues of fact with respect to its own negligence, *but successfully raised triable issues of fact as to comparative negligence on the part of plaintiff*," summary judgment on the issue of liability should be granted as a matter of law to the plaintiff (emphasis added). Under this interpretation, any liability on the part of a defendant would be sufficient to warrant the granting of summary judgment to a plaintiff, with the issue of comparative negligence to be addressed at a trial on damages only. As discussed above, such a procedure is contrary to the concept set forth in the PJI, Professor Alexander's commentaries, and our holdings in *Johnson v New York City Tr. Auth.* (88 AD3d 321 [1st Dept 2011]) and *Maniscalco v New York City Tr. Auth.* 95 AD3d 510) that "the causal role of each party's conduct should not be determined in isolation" (*id. at 513*). In this regard, Professor Alexander's observation bears repeating, that "a jury might find plaintiff's culpability to be the sole proximate cause of the accident" where the issues are tried as a whole. By finding, as a matter of law, that a defendant is at fault, the court denies the jury the opportunity to determine the issue of proximate cause.

We agree that the concepts of comparative negligence and sole proximate cause are two distinct defenses which must be

pleaded and proved. However, where, as here, an issue of fact as to the plaintiff's comparative negligence has been raised, and the plaintiff has not negated the presence of comparative liability on his or her part, the plaintiff's motion for summary judgment must be denied. This does not prevent a plaintiff from establishing the degree of defendant's liability at a trial; nor does it prevent the plaintiff from minimizing his or her own liability. Rather, it gives both parties a fair opportunity to present their evidence in a unified manner in order to give the jury a complete picture of the incident, the facts of which it must determine.

This, of course, is not to say that under appropriate facts, a plaintiff would not be entitled to summary judgment on the issue of liability (*see e.g. Perez v BruxCap Corp.*, 251 AD2d 157). The facts of this case, however, do not warrant such a result.

Defendants' moved to strike plaintiff's claim for lost earnings for failing to provide authorizations for and copies of his tax returns or in the alternative, to compel plaintiff to respond to defendant's demand and provide it with copies of his tax returns and authorizations therefor for the period from two years preceding the date of the accident until the present.

However, defendant has made no showing that the information it seeks is not available from alternative sources, even though it does not dispute that plaintiff provided it with authorizations for his employment, pension, and medical records (*see Tullett & Tokyo Forex v Linker*, 226 AD2d 182 [1st Dept 1996]).

All concur except Acosta and Moskowitz, JJ. who dissent in part in a memorandum by Acosta, J. as follows:

ACOSTA, J. (dissenting in part)

This appeal calls upon us to define the parameters of a negligence plaintiff's prima facie burden as the movant for partial summary judgment on the issue of liability, and to decide whether partial summary judgment may be granted as to liability where the defendant fails to raise issues of fact regarding its own negligence, but raises issues of fact regarding the plaintiff's comparative negligence. As I stated in *Capuano v Tishman Constr. Corp.* (98 AD3d 848 [1st Dept 2012] [Acosta, J., concurring]), "I would hold that a plaintiff does not have th[e] burden [of disproving the affirmative defense of comparative negligence]. Once a prima facie showing [of defendant's negligence] is made, the burden shifts to the defendant to raise issues of fact, such as by submitting evidence in support of an affirmative defense" (*id.* at 852). The affirmative defense of comparative negligence is a partial defense that does not bar a plaintiff's recovery, but merely reduces the amount of damages in proportion to the plaintiff's culpable conduct, if any, that contributed to causing the injury (CPLR 1411; 1412). That is, the comparative negligence doctrine does not bear upon *whether* a defendant is liable; rather, it bears upon the extent of the defendant's liability, where both the defendant and the plaintiff

engaged in culpable conduct resulting in the injury. This is distinct from other complete defenses, such as the sole proximate cause defense, through which a defendant may be entirely absolved of liability.

Therefore, where a defendant raises issues of fact as to the plaintiff's prima facie showing of defendant's negligence - for example, by presenting facts from which a jury could reasonably conclude that the plaintiff's conduct was so egregious or unforeseeable as to constitute the sole proximate cause of the injury - the plaintiff will not be entitled to partial summary judgment, because the defendant might be absolved of liability. However, where a defendant fails to raise issues of fact as to his or her own negligence, but succeeds in raising issues of fact as to the plaintiff's comparative negligence, partial summary judgment on liability with respect to *defendant's* negligence is warranted, because the defendant will be liable to the extent his or her misconduct proximately caused the injury (*see Calcano v Rodriguez*, 91 AD3d 468, 472 [1st Dept 2012] [Catterson, J., concurring). Nevertheless, the affirmative defense of comparative negligence will remain at issue, so the defendant should be permitted to argue for an apportionment of liability during a subsequent trial on liability and damages (*cf. Gonzalez*

v ARC Interior Constr., 83 AD3d 418 [1st Dept 2011]).

In this case, where plaintiff met his prima facie burden of establishing defendant's negligence as a proximate cause of the injury, and defendant failed to raise triable issues of fact with respect to its own negligence, but successfully raised triable issues of fact as to comparative negligence on the part of plaintiff, I would grant plaintiff's motion for partial summary judgment on the issue of liability (finding defendant negligent as a matter of law) and remand for a jury to determine (1) the percentage of liability attributable to each party, if it finds that plaintiff engaged in any culpable conduct that proximately caused the injury and (2) the total amount of damages (which the court would then reduce in proportion to plaintiff's share of liability, if any, as previously determined by the jury).

This result is warranted by the comparative fault provisions of the CPLR, the case law, the Pattern Jury Instructions, and the record evidence. I therefore part company with the majority's view that plaintiff had the prima facie burden of proving freedom from comparative negligence, and that he was not entitled to partial summary judgment on the issue of liability. However, in recognition of the "discrepant decisions in this Department, [and] concomitant confusion to the bar" (*Capuano*, 98 AD3d at 854

[Acosta, J., concurring]), I agree that the issue "calls for resolution by the Court of Appeals" (*Maniscalco v New York City Tr. Auth.*, 95 AD3d 510, 514 [1st Dept 2012]).[1]

I. Facts and Background

On a snowy day in January 2011, plaintiff and two coworkers, employees of defendant New York City's Department of Sanitation (DOS), were tasked with placing tire chains on sanitation trucks to provide better traction in the snow. While plaintiff was waiting for his coworkers to bring another truck into the garage for outfitting with chains, he walked towards the garage, between a parked car and a rack of tires. Plaintiff allegedly suffered injuries when his coworkers backed the truck into the parked car, which was propelled into him. The driver testified that, as he moved the truck in reverse, the "guide man" stood on the driver's side (he should have been guiding from the passenger's side, according to an accident report by a DOS safety officer) and gave an abrupt signal to stop, at which point the driver hit the brakes hard enough that he "jerked the truck" and slid into the

[1] For the reasons stated by the majority, I agree that the motion court properly denied defendant's motion to strike plaintiff's claim for lost earnings or, alternatively, to compel plaintiff to provide copies of his tax returns and/or authorizations for such returns.

car. The guide man testified that he started signaling from the passenger's side, as required, and moved to the driver's side only after it appeared that the driver was unable to see him signaling to stop. The guide man further testified that he signaled several times to stop, but the driver did not brake until the guide man moved to the driver's side and began waving his arms and yelling.

Plaintiff testified that he was walking between the rack of tires and the front of the parked car as the truck was backing up, and that he heard the truck beeping as it did so. He did not, however, attempt to keep the truck in view because he could not see it as he was walking towards the garage and in front of the parked car. When the driver hit the brakes, the truck slid and struck the rear of the parked car, which slid into plaintiff, pinning him between the front of the car and a rack of tires. He landed with his back on the hood of the car, and suffered resulting injuries.

Plaintiff commenced this action and, after discovery, moved for partial summary judgment on the issue of liability, arguing that the record established that defendant's employees were solely responsible for the accident and that their failure to maintain control of the truck constituted a prima facie case of

negligence. Plaintiff also argued that there was no evidence indicating that he was comparatively negligent, because at the time of the accident he was standing in an area where he was permitted to be and was in a position of ostensible safety (according to an affidavit by plaintiff's expert, a retired DOS safety officer). Defendants opposed the motion, arguing, inter alia, that there were triable issues of fact as to whether plaintiff was free from comparative fault. The motion court denied plaintiff's motion for partial summary judgment on the issue of liability, finding, inter alia, that, even if the evidence established defendant's negligence, the question of plaintiff's comparative fault "must be resolved at trial." As authority for this conclusion, the court cited *Thoma v Ronai* (82 NY2d 736, 737 [1993]).

Plaintiff appeals.

II. Discussion

A plaintiff's burden as the movant for summary judgment is to "make a prima facie showing of entitlement to judgment as a matter of law" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately

resulting therefrom" (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]). "[I]t is not plaintiff's burden to establish defendants' negligence as the sole proximate cause of his injuries in order to make out a prima facie case" (*Pace v Robinson*, 88 AD3d 530, 531 [1st Dept 2011] [internal quotation marks omitted]). Rather, a plaintiff carries its burden by "'generally show[ing] that the defendant's negligence was a *substantial cause* of the events which produced the injury'" (*Tselebis v Ryder Truck Rental, Inc.*, 72 AD3d 198, 200 [1st Dept 2010], quoting *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980] [adding emphasis]; *see also Nallan v Helmsley Spear, Inc.*, 50 NY2d 507, 520 [1980], citing, inter alia, Restatement, Torts 2d, § 430).

If a plaintiff establishes a prima facie case of negligence, "the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*Alvarez*, 68 NY2d at 324). "It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial" (*Middle States*

Leasing Corp. v Manufacturers Hanover Trust Co., 62 AD2d 273, 276 [1st Dept 1978], quoting *Di Sabato v Soffes*, 9 AD2d 297, 301 [1st Dept 1959]). "It is not requisite for plaintiff in order to recover summary judgment to demonstrate the inadequacy of each and every defense raised. The burden of proving such defense rests with the defendant" (*id.*).

A. Comparative fault is an affirmative defense, not a part of plaintiff's prima facie burden as movant for summary judgment

With these principles in mind, I disagree with the majority's holding that, although comparative fault is an affirmative defense to be pleaded and proved by a defendant (CPLR 1412), a plaintiff must disprove that defense in order to obtain partial summary judgment on the issue of liability. The majority apparently believes that a substantive part of a plaintiff's prima facie case is to prove freedom from comparative negligence.[2] Yet the evolution of the doctrine proves otherwise.

[2] I use the interchangeable terms "comparative negligence" and "comparative fault" herein, as those terms have been used in this Court's decisions on the issue (*see e.g. Maniscalco*, 95 AD3d 510; *see also* 1A NY PJI 3d 2:36 [2016]).

However, the Court of Appeals has noted that "what the statute requires comparison of is not negligence but conduct which, for whatever reason, the law deems blameworthy, in order to fix the relationship of each party's conduct to the injury sustained and the damages to be paid by the one and received by the other as recompense for that injury. Comparative causation

New York's comparative negligence statute was enacted in 1975 as article 14-A of the CPLR. The purpose of the article is "to permit partial recovery in cases in which the conduct of each party is culpable" (*Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 167 [1985], quoting Twenty-first Ann Report of NY Judicial Conference, 1976, at 241). To that end, CPLR 1411 provides that

> "[i]n any action to recover damages for personal injury . . . the culpable conduct attributable to the claimant . . ., including contributory negligence . . ., *shall not bar recovery*, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant . . . bears to the culpable conduct which caused the damages" (emphasis added).

CPLR 1412 makes comparative negligence "an affirmative defense to be pleaded and proved by the party asserting the defense."

The comparative negligence statute replaced the common-law rule of contributory negligence, under which plaintiffs (in negligence actions other than for wrongful death) were completely barred from recovery if their own negligence contributed to the injury even in the "slightest degree" (*Arbegast*, 65 NY2d at 165).

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is, therefore, the more accurate description of the process" (*Arbegast v Board of Educ. of S. New Berlin Cent. School*, 65 NY2d 161, 168 [1985]).

"The theory was that plaintiff's negligence was an intervening cause, which broke the causal connection between the defendant's negligent act and plaintiff's injury" (*id.*). Although "[t]he great majority of the courts [held] that the burden of pleading and proof of the contributory negligence of the plaintiff [was] on the defendant" (Restatement [Second] of Torts § 477, Reporter's Notes), New York had long been among the minority of jurisdictions that held otherwise (*see Arbegast*, 65 NY2d at 165; *Fitzpatrick v International Ry. Co.*, 252 NY 127, 133-134 [1929] [describing plaintiff's burden of proving freedom from contributory negligence as "more than a mere burden of proof" and instead "a substantive part of the plaintiff's right to recover"]; *Stone v Dry Dock, E. Broadway & Battery Ry. Co.*, 115 NY 104, 111 [1889]).

The Legislature's adoption of CPLR article 14-A changed that, placing the burden of proving comparative negligence on defendants (CPLR 1412; *see also* 1 Weinstein, Korn & Miller CPLR Manual § 11.06 at 11-9 [3d ed 2015] ["With the establishment of the doctrine of comparative liability, the rule that a plaintiff suing in negligence has the burden of proving freedom from contributory negligence no longer obtains"]). The new rule made New York a "pure comparative negligence" jurisdiction, in which

plaintiffs are entitled to damages reduced by their proportion of the fault that caused the accident; for example, even a plaintiff who is 99% at fault would theoretically be entitled to recover 1% of the damages.

In light of the overarching purpose of article 14-A, I adhere to the view that "the plaintiff never has the burden to demonstrate that he or she is free from negligence once a defendant asserts the defense [of comparative negligence]" (*Capuano*, 98 AD3d at 853 [Acosta, J., concurring]). A plaintiff's prima facie burden on summary judgment is to show the *defendant's* negligence; that burden does not require a showing of freedom from comparative fault. To place that burden on a plaintiff would be to revert to the days of contributory negligence, and to disregard the Legislature's adoption of article 14-A (*see id.* ["To require that a plaintiff demonstrate that he or she is free of comparative fault would render the statute meaningless and inconsistent with direct legislative guide"]).

Contrary to the majority's view, my position is consistent with the Court of Appeals' decision in *Thoma v Ronai*. In that 1993 case, the Court of Appeals affirmed this Court's denial of summary judgment to a plaintiff whose "concession that she did

not observe the vehicle that struck her raise[d] a factual question of her reasonable care" (82 NY2d at 737). But the Court of Appeals said nothing about whether a plaintiff's prima facie burden includes disproving the affirmative defense of comparative fault; nor did it address the import of CPLR 1411 and 1412. The Court simply held that the plaintiff was not entitled to summary judgment because the record presented issues of fact as to her own fault; it never ruled that she failed to satisfy her prima facie burden of establishing defendant's negligence (*see Capuano*, 98 AD3d at 852 [Acosta, J., concurring, discussing *Thoma*]).

Moreover, the majority's continued reliance on this Court's decision in *Thoma* (189 AD2d 635 [1st Dept 1993], *affd* 82 NY2d 736 [1993]) to hold that it is a plaintiff's burden to establish freedom from comparative fault is unfounded. First, like the Court of Appeals in *Thoma*, this Court did not consider the statutory provisions of article 14-A. It therefore misconstrued plaintiffs' prima facie burden on summary judgment, and instead held that "summary judgment was properly denied since a failure to yield the right of way does not ipso facto settle the question of whether the other party was herself guilty of negligence" (*id.* at 635-636). For that holding, the Court relied on the Third Department case of *Schmidt v Flickinger Co.* (88 AD2d 1068 [3d

Dept 1982], *appeal withdrawn* 58 NY2d 655 [1982]) and the First Department case of *Pecora v Marique* (273 App Div 705 [1st Dept 1948]), both of which are problematic.

The problem with the *Thoma* Court's reliance on *Schmidt* is that *Schmidt* based its reasoning on *contributory* negligence cases, thereby improperly placing the burden of proving freedom from comparative negligence on the plaintiff (88 AD2d at 1069, citing *Wartels v County Asphalt*, 29 NY2d 372 [1972]; *Cosentino v Consolidated Edison Co. of N.Y.*, 62 AD2d 1028 [2d Dept 1978]).[3] Similarly, the problem with the *Thoma* Court's reliance on *Pecora* is that the case was decided in 1948, long before the comparative negligence statute was adopted, so it too applied the outdated contributory negligence standard.

By 1998, this Court had apparently recognized the error of its decision in *Thoma*, and it began to apply the proper burden-shifting comparative negligence standard, as evidenced in *Perez v Brux Cab Corp.* (251 AD2d 157 [1st Dept 1998]). In that case, a unanimous panel of this Court reversed a denial of partial

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[3] Although *Cosentino* was decided in 1978, the Court noted that the "[p]laintiff was injured on November 2, 1972" (62 AD2d at 1029). Thus, the Court would have applied the old contributory negligence standard, since the doctrine of comparative negligence applies to causes of action accruing on or after September 1, 1975 (CPLR 1413).

summary judgment on the issue of liability, where the plaintiffs established a prima facie case of negligence, and the defendants "presented only unsubstantiated assertions and speculation that plaintiffs may have breached a duty of care" (251 AD2d at 159). Several of our subsequent decisions have also applied the comparative negligence standard and reached the same or a similar result (*see e.g. Tselebis*, 72 AD3d at 201 [reversing denial of plaintiff's motion for partial summary judgment on liability where record established defendant's negligence and defendant offered "only speculation" regarding comparative negligence]; *Pace v Robinson*, 88 AD3d 530 [1st Dept 2011]; *Gonzalez v ARC Interior Constr.*, 83 AD3d 418; *Strauss v Billig*, 78 AD3d 415 [1st Dept 2010], *lv dismissed* 16 NY3d 755 [2011]). The majority's attempt to distinguish *Perez* and *Tselebis* on their facts does not alter the fact that, in those cases, this Court recognized that a plaintiff's prima facie burden does not encompass the issue of comparative negligence.

Although some of our recent decisions have gone backwards, relying on *Thoma* to place the prima facie burden on plaintiffs to establish their freedom from comparative fault (*see e.g. Maniscalco*, 95 AD3d 510; *Calcano v Rodriguez*, 91 AD3d 468 [1st Dept 2012]), in other recent decisions this Court has continued

to apply the correct standard, recognizing that proof of freedom from comparative fault is not part of plaintiffs' prima facie burden (*see e.g. Santos v Booth*, 126 AD3d 506 [1st Dept 2015] [affirming grant of summary judgment as to liability where plaintiff established prima facie negligence and defendants "failed to come forward with an adequate nonnegligent explanation for the accident" or "raise[] a triable issue of fact as to comparative negligence"]).

In any event, *Thoma* has not received the widespread reliance that the majority suggests. *Tann v Herlands* (224 AD2d 230 [1st Dept 1996]), for example, did not "follow[] [*Thoma*'s] guidance," as the majority would have it. In fact, *Tann* did not mention or cite *Thoma*. Rather, the *Tann* Court cited a pre-comparative negligence Second Department case from 1970, stating that "defendants' liability should be considered and determined simultaneously with the material, and overlapping, issue of whether the plaintiff was also culpable" (*id.* at 230-231, citing *Enker v Slattery Constr. Co.*, 34 AD2d 673 [2d Dept 1970]). *Phillips v Cohn* (277 AD2d 40 [1st Dept 2000]) did not mention *Thoma* either, and instead cited the unhelpful *Tann*. Nor does *Lopez v Garcia* (67 AD3d 558 [1st Dept 2009]) stand for the proposition that a plaintiff's prima facie case requires freedom

from comparative negligence; in that case, the Court "assum[ed], arguendo, that plaintiff satisfied her initial burden on the motion" (at 558) for summary judgment and (like the Court of Appeals in *Thoma*) denied the motion because "[i]ssues of fact as to plaintiff's comparative negligence [were] raised by" the record evidence (*id.*).

Similarly, in the recent case of *Geralds v Damiano* (128 AD3d 550 [1st Dept 2015]), in a split decision, the Court denied the plaintiff's motion for summary judgment, but said nothing about whether that result was due to the plaintiff's failure to establish prima facie entitlement to judgment. It only said that summary judgment was unwarranted because "issues of fact exist[ed] regarding plaintiff's comparative negligence and whether his acts also proximately caused the accident" (*id.* at 551). Justice Moskowitz dissented, writing that "[d]espite the majority's finding otherwise, the record contains no issues of material fact sufficient to defeat plaintiff's motion for summary judgment" (*id.* at 552). The dissent's analysis in *Geralds* also appears to recognize that a plaintiff's prima facie burden does not encompass comparative negligence: It stated initially that the "plaintiff's moving papers amply demonstrate[d] [the] defendant['s] negligence," and then that the "defendant's

opposition papers d[id] not present any genuinely conflicting evidence regarding" the plaintiff's negligence (*id.*).

The majority fails to address the above analysis showing that many of the cases on which it relies do not discuss or even cite *Thoma*. Nor could it do so in good faith, because the fact remains that *Thoma* has not been followed to the extent indicated by the majority.

Thus, I would reject the reasoning of the *Thoma*/*Tann*/*Calcano* line of First Department cases and instead follow the guidance of *Perez*, which appropriately recognized that a plaintiff's prima facie burden on summary judgment does not include a showing of freedom from comparative negligence. It is incorrect to say, as the majority does, that CPLR 1411 has "no bearing" on a plaintiff's burden of proof as a proponent of summary judgment on liability (quoting *Roman v A1 Limousine, Inc.*, 76 AD3d 552, 553 [2d Dept 2010]).[4] CPLR 1411 must be read together with CPLR 1412, which states that comparative negligence is an affirmative defense to be pleaded and proved by the defendant. As with

[4] I would not follow the Second Department's reasoning in *Roman*. The Court's decision not to follow *Tselebis* was based on its reading of the Court of Appeals' decision in *Thoma*, which, as discussed above, was silent on whether a plaintiff's prima facie burden includes disproving the affirmative defense of comparative negligence.

affirmative defenses in general, the defendant bears the burden of raising triable issues of fact in response to a plaintiff's prima facie showing of entitlement to summary judgment (*see Capuano*, 98 AD3d at 853 [Acosta, J., concurring]; *Bercy Invs. v Sun*, 239 AD2d 161 [1st Dept 1997]).

Here, plaintiff established a prima facie case of defendant's negligence by showing that his coworkers breached a duty of care owed to him and that their breach of that duty proximately caused his injuries (*see Solomon v City of New York*, 66 NY2d 1026. Based on the driver's testimony, the guide man was signaling from the wrong side of the truck, and abruptly signaled to stop, causing the driver to slam on the brakes and skid into the parked car. Based on the guide man's testimony, he was signaling from the correct side and only moved to the other side upon realizing that the driver was not responding to his repeated signals to stop, at which point it was too late, and the driver hit the brakes and skidded into the car. Despite apparent conflicts in the coworkers' testimonies, either account establishes a prima facie case of negligence. That each coworker essentially blames the other is insufficient to absolve defendant of negligence, where the coworkers (as defendant's employees) acted in tandem to cause plaintiff's injury. Since defendant

concedes that "collision with a parked vehicle does generally establish a prima facie case of negligence" and has failed to provide an adequate nonnegligent explanation for plaintiff's coworkers' failure to operate the truck safely while accounting for the weather and road conditions, plaintiff established prima facie his entitlement to summary judgment on the issue of defendant's liability (*see* Vehicle and Traffic Law § 1211[a]; *Williams v Kadri*, 112 AD3d 442, 443 [1st Dept 2013]; *Renteria v Simakov*, 109 AD3d 749 [1st Dept 2013]; *LaMasa v Bachman*, 56 AD3d 340 [1st Dept 2008]).

B. Plaintiff is entitled to summary judgment on liability as to defendant's negligence, notwithstanding issues of fact as to comparative negligence

In response to a plaintiff's prima facie showing of a defendant's negligence, the defendant may raise triable issues of fact by submitting evidence from which a jury could reasonably conclude (1) that the defendant was nonnegligent (either because there was no duty owed, no breach of duty, or no proximate causal relationship between the defendant's misconduct and the plaintiff's injury) and/or (2) that the plaintiff was comparatively negligent. If the defendant fails on both counts, there can be no doubt that the plaintiff is entitled to summary

judgment on liability, because the defendant's negligence has been established as a matter of law, and there is no triable question of comparative fault.

But what result should obtain where, in response to a plaintiff's prima facie showing, the defendant succeeds in raising triable issues of fact with respect to the plaintiff's culpable conduct? This is an issue that was not reached in *Capuano*. The majority in this case believes that the "clear direction of *Thoma* is that a plaintiff may not be awarded partial summary judgment on the issue of a defendant's negligence if the defendant has raised an issue of fact as to the plaintiff's comparative negligence." I disagree. As discussed above, *Thoma* did not address the import of CPLR article 14-A, and reading its holding so broadly would be contrary to the purpose of the statute, which is to permit partial recovery where both parties engaged in culpable conduct that caused the plaintiff's injury. Accordingly, I would hold that *partial* summary judgment on the issue of liability could be granted, i.e., the *defendant* could be found negligent as a matter of law, and the matter remanded for a jury to apportion fault and determine damages (*see Calcano v Rodriguez*, 91 AD3d at 472 [Catterson, J., concurring]). This result is appropriate where, as here, a jury could not reasonably

conclude that the plaintiff's culpable conduct, if any, was so egregious or unforeseeable as to constitute the sole proximate cause of the injury (*see Soto v New York City Tr. Auth.*, 6 NY3d 487, 492 [2006]).

The majority acknowledges that "[u]nder our comparative negligence system, a plaintiff's contributory fault may proportionally diminish his or her recovery, but will not preclude recovery unless the plaintiff was solely at fault" (citing CPLR 1411).[5] From this proposition it logically follows that, under CPLR 1411, a plaintiff who is not solely at fault must be entitled to some amount of recovery, albeit an amount that is diminished in proportion to his or her culpable conduct. Thus, partial summary judgment where the plaintiff is not solely at fault is warranted, because it prevents a jury from erroneously barring the plaintiff's recovery.

The sole proximate cause defense is a complete defense to a plaintiff's case in chief, whereby a defendant may be entirely absolved of liability if the plaintiff's conduct was "so

[5] There are a few other complete bars to recovery not applicable here, such as where a plaintiff's conduct constitutes a serious violation of law directly resulting in the injuries, and express and primary assumption of risk (1A NY PJI 3d 2:36 at 328-329 [2016]).

egregious or unforeseeable" as to break the causal nexus between defendant's breach of duty and the injury (*see Soto*, 6 NY3d at 492; Black's Law Dictionary [10th ed 2014], sole cause). That is, because the plaintiff's prima facie case of the defendant's negligence includes a showing of proximate causation (*see Solomon*, 66 NY2d at 1027), it would be better to evaluate at that point whether the plaintiff's culpable conduct (or some other cause) was the sole proximate cause of the injury. If the plaintiff's conduct were the *sole* proximate cause, the doctrine of comparative negligence would be inapplicable: There would be no basis on which to compare the parties' relative degrees of fault, and thus no need to charge the jury on comparative negligence (*see Exxon Co., U.S.A. v Sofec, Inc.*, 517 US 830, 837-838 [1996], quoting 1 T. Schoenbaum, Admiralty and Maritime Law § 5-3 at 165-166 [2d ed 1994] ["Superseding cause operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proximate causation"]; Black's Law Dictionary [10th ed 2014], sole cause ["(I)f something other than (defendant's) act was the sole cause of the harm there need be no further inquiry so far as he (or she) is concerned"] [internal quotation marks omitted]; Restatement [Third] of Torts:

Apportionment of Liability § 8, Comment *c* ["factors (in assigning percentages of responsibility) are irrelevant . . . to apportionment if there is no causal connection between the referenced conduct and the plaintiff's injuries"]).

By contrast, the affirmative defense of comparative negligence is a partial defense that does not excuse a defendant's liability, but reduces a plaintiff's damages where both parties are at fault (*see* CPLR 1411; Black's Law Dictionary [10th ed 2014], partial defense ["A defense going . . . toward mitigation of damages"]). Comparative negligence, therefore, operates only when the defendant's negligence is established (or conceded) and the plaintiff's fault is also at issue. It is not a defense by which a defendant can be absolved of liability. Once the plaintiff has successfully proven that the defendant's conduct was *a proximate cause* of the injury, any fault on the part of the plaintiff might be an *additional* proximate cause of the injury, but cannot logically be the sole proximate cause of it (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003] ["(I)f (an employer's) statutory violation (of Labor Law § 240[1]) is a proximate cause of an injury, the plaintiff cannot be solely to blame for it"]).

Here, as discussed above, plaintiff made a prima facie

showing of defendant's negligence by demonstrating that his coworkers failed to properly account for the snowy conditions, disregarded proper signaling protocols, and backed a sanitation truck into a parked car, which slid into him. In response to plaintiff's prima facie showing, defendant failed to present evidence that would permit a rational jury to entirely exculpate it from liability by finding plaintiff to be the sole proximate cause of his injuries. There is no reasonable view of the facts in which plaintiff's conduct could be deemed "so unsafe and unreasonable as to constitute the sole cause of [the] accident" (*Thomas v City of New York*, 16 AD3d 203, 203-04 [1st Dept 2005]; *see also Soto*, 6 NY3d at 492 ["plaintiff's conduct, although a substantial factor in causing the accident, was not so egregious or unforeseeable that it must be deemed a superseding cause of the accident absolving defendant of liability"]). Indeed, plaintiff was permitted to be in the location where he was walking before the accident occurred – waiting outside the garage as the next truck was being brought in - so it was entirely foreseeable that he would be there. Plaintiff's coworkers - the driver and guide man - also testified that it was a normal occurrence for workers to walk around that area, and that they would not have been surprised to find plaintiff there. Moreover,

it was not so egregious for plaintiff to presume that, because he was walking behind the opposite end of a parked car, he was in a place of apparent safety.

To be sure, defendant raised triable issues of fact with respect to plaintiff's comparative fault. It pointed out, for example, that plaintiff heard the truck beeping but did not attempt to observe it as it backed up. From this evidence, a jury could reasonably conclude that plaintiff bears *some* responsibility for the accident. But a reasonable jury could not find that he bears 100% of the fault.

It is fiction to suggest that plaintiff's conduct could be deemed the sole proximate cause in this case. In fact, plaintiff's conduct, while perhaps culpable to some extent, is surely less culpable than the conduct of plaintiffs who have been found to be the sole proximate cause of their injuries (*see e.g. Thomas*, 16 AD3d at 203 ["attempt at a one-legged vault over (sizeable, water-filled) depression," given the "existence of a safe alternative route around (it)," was "so unsafe and unreasonable" as to constitute sole cause]). His culpability even falls below that of the plaintiff in *Soto*, who the Court determined was *not* the sole proximate cause of his injuries (*see* 6 NY3d at 492 [plaintiff's "undeniably reckless" conduct of

entering subway catwalk after consuming several alcoholic beverages and running in attempt to catch train was "not so egregious or unforeseeable" as to constitute sole proximate cause, even where "jury appropriately . . . determined that (plaintiff) bore a far greater share of the fault"]). In short, the majority fails to adequately explain how a jury could reasonably determine that plaintiff's conduct - walking behind the opposite end of a parked car from a truck that was backing up in his direction - could be considered so unsafe, unreasonable, egregious, or unforeseeable as to constitute the sole proximate cause of his injuries.

Therefore, because defendant raised issues of fact regarding comparative negligence but cannot avail itself of the sole proximate cause defense, plaintiff's motion for partial summary judgment should be granted to the extent of finding defendant negligent as a matter of law, and a jury should determine (1) what proportion of causation is attributable to each party's culpable conduct, if it finds any on the part of plaintiff, and (2) the total amount of damages (without regard to the percentages of fault attributable to each party). The trial court should then reduce plaintiff's damages in proportion to the percentages of fault apportioned by the jury (*see* 1A NY PJI 3d

2:36 at 331, 340-341).

The majority repeatedly misstates my position as requiring comparative fault to be considered in a trial on damages. While that was the result reached in *Tselebis* - a decision in which two members of the majority joined - and in *Gonzalez*, I submit that the matter should be remanded first for a trial on *liability*, during which the jury would consider the conduct of both parties and apportion fault accordingly. A trial on damages would follow, during which the jury would determine the total amount of damages (to be reduced in proportion to the apportionment of fault).

Contrary to the majority, this result is consistent with the Pattern Jury Instructions, because we would only be settling as a matter of law one aspect of the liability issue (whether defendant is liable at all). The only difference is that the jury would be instructed in the liability portion of the trial that defendant's negligence had already been established as a matter of law, and that, therefore, in apportioning fault, it cannot completely absolve the defendant of liability or find plaintiff 100% liable. Thus, fault would still be "decided in the first stage of the trial; damages in the second" (1A NY PJI 3d 2:36 at 340, quoting *Greenberg v Yonkers*, 37 NY2d 907

[1975]).[6] Moreover, by not remanding for plaintiff's culpable conduct to be considered at a damages trial, we would ensure that the court "not combine the questions of plaintiff's percentage of fault and the monetary award to be made to plaintiff" (1A NY PJI 3d 2:36 at 341).

This would avoid jury confusion and promote fairness, insofar as the jury would have the opportunity to apportion the fault of both parties (considering the "integrated whole" that so concerns the majority), and then decide the total amount of damages. Furthermore, this result would increase judicial efficiency, in that the jury instructions as to defendant's negligence, while not overly complicated, would eliminate the danger of a jury apportioning plaintiff's liability at 100% or defendant's at 0%; that would require setting aside the verdict,

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[6] The majority mistakenly believes that, under my proposed result, "plaintiff's liability would be the only issue" on remand. Instead, while the issue of *whether* defendant is liable at all would have been decided as a matter of law, the issues going forward would be the *extent* of defendant's liability (as compared to plaintiff's liability, if any), and the total amount of damages.

While the debate over whether the proceedings after the grant of partial summary judgment should be termed a "liability trial" or a "damages trial" is largely semantic (*compare Tselebis*, 72 AD3d at 201, *with Calcano*, 91 AD3d at 472 [Catterson, J., concurring]), the point is that a jury would consider the issues of fault and damages seriatim, not concurrently, as recommended by the Pattern Jury Instructions.

since there are no circumstances in this case under which plaintiff's fault could be the sole proximate cause of his injury.

This is the approach that gives full effect to the comparative negligence statute (CPLR article 14-A), which was designed not to bar recovery entirely, but to provide a partial defense and reduce a plaintiff's damages where the culpable conduct of both parties proximately caused the injury[7]

III. Conclusion

Accordingly, the order of Supreme Court should be modified, to grant plaintiff's motion for partial summary judgment on liability (finding defendant negligent as a matter of law) and remand for a trial to determine, seriatim, (1) the extent, if any, to which plaintiff engaged in culpable conduct that caused the injury, and the percentage of liability attributable to each party, and (2) the total amount of damages (to be reduced by the

[7] As an alternative resolution of this matter, plaintiff's motion for summary judgment could be denied (or granted in part), and the matter remanded with a finding pursuant to CPLR 3212(g) that defendant's negligence was a proximate cause of plaintiff's injuries (*see* 242 Siegel's Prac Rev 1 [Feb. 2012] ["If the liability of the defendant is so clearly established by the record . . ., wouldn't CPLR 3212(g) be an appropriate way to handle things?"]; Siegel, NY Prac § 286 [5th ed]). The liability and damages trial would follow, including the issue of comparative negligence, as in the above analysis.

court in proportion to plaintiff's culpable conduct, if the jury finds any).

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

ENTERED: SEPTEMBER 1, 2016

DEPUTY CLERK

Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1208-
1208A Roger Ehrenberg, et al., Index 111964/07
590315/12
Plaintiffs-Appellants,

-against-

Hilda M. Regier,
Defendant-Respondent.

- - - - -

[And a Third Party Action]

_____

Cuomo LLC, New York (Konstantinos Kapatos of counsel), for appellants.

George S. Locker, P.C., New York (George S. Locker of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered December 22, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion for summary judgment dismissing the counterclaims, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 2, 2015, which upon renewal and reargument of defendant's cross motion, adhered to its original determination denying the cross motion, unanimously dismissed, without costs.

Plaintiffs Roger Ehrenberg and Carin Levine-Ehrenberg purchased a four-story townhouse on West 22nd Street in Manhattan in 2005 with the intention of converting it into a single family

home. The home shares a brick party wall with the adjacent four-story townhouse owned by defendant Hilda Regier. Both homes date to the 1840s. The party wall in question is 12 inches thick, consisting of three wythes, or layers, of "un-reinforced 163 year old common brick," interconnected to work as a single unit. After purchase and inspection it was discovered that there was a "bulge" in a section of the party wall where defendant Regier's chimney was located. Renovations to the Ehrenbergs' home included removing and rebuilding a staircase against the wall and rebuilding the party wall. After the party wall was removed, it was discovered that it had been supporting the bulging wall, and shoring was placed where the staircase had been. Where the Ehrenbergs' side of the party wall was damaged, two wythes of bricks were replaced with steel I-beams as shoring. The interconnection between the new and existing portions of the wall was apparently lost. It was submitted by Regier that an I-beam was inserted too deeply and penetrated through Regier's side of the wall, causing movement of her wall.

After discovering damage to the party wall, the Ehrenbergs commenced this action, alleging that Regier's negligent maintenance had caused damage to their side of the party wall. Regier counterclaimed for damages and injunctive relief, alleging

that reconstruction of, and repairs to, the party wall undertaken by the Ehrenbergs had damaged her side of the party wall and house. Regier also commenced a third-party action against the architect, engineer, and contractor hired by the Ehrenbergs to do the work.

The Ehrenbergs moved for summary judgment dismissing the counterclaims against them. Regier cross-moved for a declaration that the Ehrenbergs have a nondelegable duty to maintain the structural integrity of the party wall. By order entered December 22, 2014, Supreme Court denied the Ehrenbergs' motion and Regier's cross motion.

Supreme Court correctly denied plaintiffs' motion for summary judgment on the counterclaims, because there are issues of fact as to whether and to what extent the party wall between plaintiffs' and defendant's houses was weakened in its support of defendant's house by the work undertaken by plaintiffs.

While one who hires an independent contractor generally will not be liable for the contractor's negligence, an exception exists where the employer has a nondelegable duty to ensure the work is safely performed (*Kleeman v Rheingold*, 81 NY2d 270, 273-274 [1993]). With regard to two owners whose properties abut the same party wall, each owns so much of the wall as stands upon his

or her own lot, both "having an easement in the other strip for purposes of the support of his own building" (*Sakele Bros. v Safdie*, 302 AD2d 20, 25 [1st Dept 2002]). "Although the land covered by a party wall remains the several property of the owner of each half, . . . the title of each owner is qualified by the easement to which the other is entitled" (*5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d 49, 52 [Sup Ct, NY County 1959], *affd* 13 AD2d 764 [1st Dept 1961]). "[N]either owner may subject a party wall to a use for the benefit of its own property that renders the wall unavailable for similar use for the benefit of the other property" (*Sakele Bros. v Safdie*, 302 AD2d at 26).

Liability may also be imposed on a property owner where, during renovation, the party wall is altered to the detriment of the adjoining property owner (*Schneider v 44-84 Realty Corp.*, 169 Misc 249 [Sup Ct, Bronx County 1938], *affd* 257 App Div 932 [1st Dept 1939]). In *Schneider*, the court explained that the defendant who tore down its house on one side of the party wall "could not withdraw the wall or change its condition to the injury of plaintiffs or plaintiffs' property without being liable in damages for any injury that might accrue to the plaintiffs thereby" (*id.* at 252). Moreover, "[e]ven if the defendant proceeded with all skill and diligence it is still liable to the

plaintiffs for any injuries sustained in consequence of the intended alterations to the wall and to the support which the building on defendant's premises gave to the plaintiffs' property" (*id.* at 253).

While authority exists for the proposition that alterations to premises on one side of a party wall, if performed properly, will not result in a property owner's liability for incidental damages to the adjoining side (*see Alberti v Emigrant Indus. Sav. Bank*, 179 Misc 1021, 1022 [Sup Ct, Bronx County 1942], *affd* 265 App Div 1046 [1st Dept 1943]; *Bicak v Runde*, 78 Misc 358, 360-361 [App Term, 1st Dept 1912]), where, as in this case, it is asserted that the damage complained of was to the structural aspect of the party wall, the property owner could be liable for weakening the party wall, "regardless of any care in performing the work" (*Bicak*, 78 Misc at 360; *accord Alberti*, 179 Misc at 1022). Additionally, the property owner causing the alterations may be liable for trespass where, as here, the party wall is penetrated (*Bicak*, 78 Misc at 360).

The Ehrenbergs' argument that as the performance of the work was not dangerous or extraordinary, the remedy for any resulting damages from negligence would lie only as to the contractor, is without merit. While an owner altering a party wall will not be

absolutely liable for an uncontrollable accident or a third party's negligence, the owner must ensure that the wall will not pose a danger or nuisance to the adjoining landowner (*Negus v Becker*, 143 NY 303, 308 [1894]).

Finally, since we find that plaintiffs are not aggrieved by the order that granted defendant's motion for renewal and reargument, we dismiss the appeal therefrom (*see* CPLR 5511).

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

ENTERED: SEPTEMBER 1, 2016

DEPUTY CLERK

Mazzarelli, J.P., Andrias, Richter, Manzanet-Daniels, Kahn, JJ.

1256- Index 652273/13
1257 Sarah Weinberg,
Plaintiff-Appellant,

-against-

Leslie Sultan, et al.,
Defendants-Respondents.

_____

Amed Marzano & Sediva, PLLC, New York (Naved Amed of counsel), for appellant.

Braverman Greenspun, P.C., New York (Dennis P. Kisyk, Jr. of counsel), for Leslie Sultan, respondent.

Paduano & Weintraub, LLP, New York (Meredith Cavallaro of counsel), for Jeffrey Asher and Robinson Brog Leinwand Greene Genovese & Gluck, P.C., respondents.

Gordon Rees Scully Mansukhani, LLP, New York (Ryan J. Sestack of counsel), for David A. Kaminsky & Associates, P.C. and David A. Kaminsky, respondents.

Locke Lord LLP, New York (Michael E. Camporeale of counsel), for Linda Salamon and 22 West 30th St. Properties, LLC, respondents.

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Order, Supreme Court, New York County (Cynthia S. Kern, J.), entered on or about February 23, 2015, which, to the extent appealed from as limited by the briefs, upon defendants' motions to dismiss, dismissed plaintiff's third, fourth, fifth, and sixth causes of action in the amended complaint; converted the motions to dismiss the first and second causes of action in the amended complaint to motions for summary judgment, with leave to further

brief the motions; and granted defendant purchaser's counsel leave to disburse $66,152 held in escrow for the purchaser, unanimously affirmed, without costs. Order, same court and Justice, entered on or about June 3, 2015, which, upon the remaining defendants' motions for summary judgment, dismissed the first and second causes of action in the amended complaint, unanimously affirmed, without costs.

The motion court correctly dismissed the third and fourth causes of action. We have some concerns over the manner in which the sale of the building owned by the elderly plaintiff was orchestrated by defendant Kaminsky, her former son-in-law. Kaminsky, an attorney, procured the purchaser and referred plaintiff to the attorneys who represented her in the transaction and assisted her at the closing. It is unclear from the record whether these attorneys ever met with plaintiff before the closing or what role defendant Asher, the self-described "estate attorney," played; that is, what advice, if any, he provided regarding her estate. It is also unclear how the purchase price for the building was arrived at and whether the representations made to plaintiff regarding the sale proceeds were accurate. Also, Kaminsky collected a $200,000 consulting fee for his work on the transaction, paid by the buyer.

Nonetheless, the amended complaint is barebones. It fails to allege any "material misrepresentation," which is a required element of a fraud claim (*see Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]; *Nicosia v Board of Mgrs. of the Weber House Condominium*, 77 AD3d 455, 456 [1st Dept 2010]). Further, plaintiff does not allege how defendant purchaser Linda Salamon and her company, defendant 22 West 30th St. Properties, LLC (together Salamon), exerted any undue influence over plaintiff (*see Franklin v Winard*, 199 AD2d 220, 220 [1st Dept 1993]) or coerced her into a transaction that she alleges made no economic sense. The amended complaint also failed to plead the fraud and undue influence claims with sufficient particularity, as required by CPLR 3016(b) (*see id.*). In addition, there is no private right of action against an attorney or law firm for violations of the Code of Professional Responsibility or disciplinary rules (*Kantor v Bernstein*, 225 AD2d 500, 501 [1st Dept 1996]; *see Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [1st Dept 2003]). Plaintiff failed to address her breach of contract claim in her opening appellate brief, so it can be deemed abandoned (*see Bridgers v West 82nd St. Owners Corp.*, 114 AD3d 606, 607 [2014]). In any event, plaintiff provides no indication of how the contract was breached.

Given the absence of an underlying fraud claim, the motion court correctly dismissed the fifth cause of action, for aiding and abetting fraud, and the sixth cause of action, for conspiracy to commit fraud (*Agostini v Sobol*, 304 AD2d 395, 395 [1st Dept 2003]).

The motion court correctly granted the motions for summary judgment dismissing the first and second causes of action, for legal malpractice. The moving defendants made a prima facie showing of a lack of proximate cause, which is an essential element of a legal malpractice claim (*see Sabalza v Salgado*, 85 AD3d 436, 437 [1st Dept 2011]; *Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]). In opposition, plaintiff failed to raise a triable issue of fact, since she merely speculated that the building she formerly owned, which was in foreclosure at the time of its sale, could have been sold for its appraised value (*see Heritage Partners, LLC v Stroock & Stroock & Lavan LLP*, 133 AD3d 428, 428-429 [1st Dept 2015], *lv denied* __NY3d __, 2016 NY Slip Op 71804 [2016]).

The motion court properly granted Salamon's counsel leave to release to Salamon the amount of $66,152 held in escrow as a commercial tenant's security deposit. The closing statement for the building indicated that the security deposit would be

released to Salamon in the event plaintiff failed to provide an estoppel letter within six months of the closing, which she failed to do. Moreover, pursuant to General Obligations Law § 7-105, "security deposits must be turned over to a purchaser of the premises or assignee of the lease" (*Gerel Corp. v Prime Eastside Holdings, LLC*, 12 AD3d 86, 90 [1st Dept 2004]).

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: SEPTEMBER 1, 2016

DEPUTY CLERK

Friedman, J.P., Acosta, Saxe, Gische, Webber, JJ.

1275-
1276-
1277 Ind. 89/11

The People of the State of New York,
Respondent,

-against-

Jeffrey Brown,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Habiyb Mohammed,
Defendant-Appellant.

- - - - -

The People of the State of New York,
Respondent,

-against-

Jaquan Layne,
Defendant-Appellant.

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Seymour W. James, Jr., The Legal Aid Society, New York (Susan Epstein of counsel), for Jeffrey Brown, appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), for Habiyb Mohammed, appellant.

Marianne Karas, Thornwood, for Jaquan Layne, appellant.

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

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Judgment, Supreme Court, New York County (Edward J.

McLaughlin, J.), rendered November 29, 2011, as amended as to defendant Brown December 12, 2011, convicting each defendant, after a jury trial, of conspiracy in the first and second degrees, and also convicting defendants Layne and Brown of conspiracy in the third and fourth degrees, and sentencing Brown and Mohammed to aggregate terms of 15 years to life, and sentencing Layne to an aggregate term of 20 years to life, unanimously affirmed as to defendants Brown and Layne and unanimously reversed, on the law, as to defendant Mohammed, and the indictment dismissed.

Defendants Layne, Brown, Mohammed, and 11 codefendants – Jonathan Hernandez, Dashawn Davis, Malik Layne, Jahlyl Layne, Afrika Owes, Jazeke Samuels, Pierce Gross, Brandon Santiago, Jarel Robinson, Tyrone Gibbs and Louis Williams – were charged by indictment with conspiracy and related crimes. The verdict as to Brown and Layne 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]).

Extensive recorded telephone conversations, and other evidence, established defendants Brown's and Layne's participation in a central conspiracy. References in these conversations supported reasonable inferences that defendants

Brown and Layne intended to possess or sell cocaine in quantities that met the statutory threshold for a class A felony (*see People v Hill*, 85 NY2d 256, 263 [1995]; *People v Wright*, __ AD3d __, 2016 NY Slip Op 03550, *2 [3d Dept 2016]).

Defendants Brown's and Layne's remaining arguments regarding the sufficiency and weight of the evidence are without merit.

For the reasons stated in our decision on another jointly tried codefendant's appeal (*People v [Jahlyl] Layne*, 124 AD3d 466 [1st Dept 2015]), we conclude that the court properly admitted declarations by conspirators made in the course and in furtherance of the conspiracy. Defendants Brown's and Layne's arguments regarding the scope of our review of the court's ruling are unavailing (*see People v Nicholson*, 26 NY3d 813 [2016]; *People v Garrett*, 23 NY3d 878, 885 n 2 [2014]).

The court properly denied defendant Layne's request to charge separate conspiracies. Layne's remaining arguments on this subject are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. There was no reasonable view of the evidence that there was any conspiracy narrower in scope than the single conspiracy charged in the indictment such that the jury should have been instructed to acquit in the event that something other

than a single integrated conspiracy was proven (*see People v Leisner*, 73 NY2d 140, 150 [1989]).

The court did not violate defendants Brown's and Layne's right to be present, or commit any mode of proceedings error, when it conducted a preliminary screening of prospective jurors in defendants' absence (*see People v Camacho*, 90 NY2d 558 [1997]; *see also People v King*, 27 NY3d 147, 153-157 [2016]), and when it delegated to a court officer the ministerial function of giving the jury the "usual" separation instructions at the end of the fourth day of deliberations (*see People v Galvez*, 85 AD3d 444, 444 [1st Dept 2011], *lv denied* 17 NY3d 816 [2011]; *People v Crespo*, 267 AD2d 36 [1st Dept 1999], *lv denied* 94 NY2d 878 [2000]). We perceive no basis for reducing Layne's sentence.

We find that defendant Mohammed's conviction was not supported by legally sufficient evidence. In determining whether the jury's verdict is supported by legally sufficient evidence, the reviewing court must decide "whether there is any valid line of reasoning and permissible inferences which could lead a rational person to the conclusion reached by the jury on the basis of the evidence at trial, and as a matter of law satisfy the proof and burden requirements for every element of the crime charged" (*People v Bleakley*, 69 NY2d 490, 495 [1987] [citation

omitted]), including the identity of the defendant who committed the crime charged (*see People v Contes*, 60 NY2d 620 [1983]). While there was sufficient evidence to show that a person by the name of Habiyb Mohammed took part in the conspiracy, the record is devoid of any identification of defendant Mohammed to be that same Habiyb Mohammed.

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

ENTERED: SEPTEMBER 1, 2016

Margaret Sowah
DEPUTY CLERK

Tom, J.P., Mazzarelli, Andrias, Manzanet-Daniels, Gesmer, JJ.

1291 Euripedes Karydas, Index 101386/12
Plaintiff-Respondent, 590043/13

-against-

Michelle Ferrara-Ruurds,
Defendant,

Douglas Elliman Property Management,
Defendant-Appellant.

- - - - -

[And a Third-Party Action]

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Peter H. Graber, Huntington Station, for appellant.

Pardalis & Nohavicka, LLP, Astoria (Ashley Serrano of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered October 28, 2015, which, to the extent appealed from, denied defendant Douglas Elliman Property Management's motion for summary judgment dismissing the negligence cause of action as against it, affirmed, without costs.

While defendant established that its managing agreement with the coop board was not so "comprehensive and exclusive" as to displace entirely the board's duty to maintain the premises (*see Caldwell v Two Columbus Ave. Condominium*, 92 AD3d 441, 442 [1st Dept 2012][internal quotation marks omitted]), issues of fact exist whether, in its attempts to repair a minor leak, it

negligently exacerbated the problem, and "launched a force or instrument of harm," i.e., what plaintiff called a "cascad[e]" of water into his unit (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 139 [2002] [internal quotation marks omitted]; *see e.g. Grant v Caprice Mgt. Corp.*, 43 AD3d 708 [1st Dept 2007]).

Regardless of which party had the burden of proof on the *Espinal* exception, the evidence submitted on the motion established that defendant attempted to fix the leak or leaks on several occasions and that the problem persisted and culminated in a flood of water "cascading" into plaintiff's apartment. Plaintiff testified that the leak began on March 8, 2010, and lasted a few days. The leak started again in May 2010, and reoccurred in August 2010 and December 2010, and finally, the "big finale" of water cascading into plaintiff's unit occurred in August 2011. Defendant attempted to fix the leaks on several occasions. Invoices dated March 10, April 13, September 28, and December 30, 2010 indicate that plumbing work was done in response to plaintiff's complaints about water leaks. The notations in these invoices do not definitively establish whether or not defendant's plumbers "launched a force or instrument of harm." Thus, contrary to the dissent's contention, the evidence raises an issue of fact as to whether defendant's attempts to fix

the water leak exacerbated the condition that led to the more serious leak that occurred in August 2011.

All concur except Andrias, J. who dissents in a memorandum as follows:

ANDRIAS, J. (dissenting)

Plaintiff alleges that he suffered property damage caused by a "continual leak" emanating from defendant Ferrara-Ruurds's apartment, located on the floor above plaintiff's in the cooperative apartment building. He seeks to recover from defendant Douglas Elliman Property Management (defendant), the managing agent, on the ground that it breached its duty of care regarding the condition and maintenance of the premises by failing to respond to his repeated maintenance requests and to remedy the condition.

The majority affirms the order denying defendant's motion for summary judgment on the ground that issues of fact exist whether defendant, "in its attempts to repair a minor leak, ... negligently exacerbated the problem, and 'launched a force or instrument of harm.'" However, there is no competent evidence that defendant, an agent for a disclosed principal, was in exclusive control of the building or that the actions of the plumbers it retained created a dangerous condition or increased the risk of water infiltrating into plaintiff's apartment. Therefore, I respectfully dissent.

An agent for a disclosed principal "is not liable to third persons for non-feasance but only for affirmative acts of

negligence or other wrong" (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [1st Dept 2006], *overruled on other grounds Fletcher v Dakota*, 99 AD3d 43 [1st Dept 2012]). "While a duty of care on the part of the managing agent may arise where there is a comprehensive and exclusive management agreement between the agent and the owner which displaces the owner's duty to safely maintain the premises" (*Roveccio v. Ry Mgt. Co., Inc.*, 29 AD3d 562, 562 [2d Dept 2006]), as the majority finds, the agreement at issue is not such a contract (*see Davis v Prestige Mgt. Inc.*, 98 AD3d 909, 910 [1st Dept 2012]).

A duty of care to plaintiff, a noncontracting third party, may also be found if defendant, in failing to exercise reasonable care in the performance of its duties, "launched a force or instrument of harm" that caused plaintiff damage (*Church v Callanan Indus.*, 99 NY2d 104, 111-112 [2002]). This exception to the general rule that a contractual obligation, standing alone, will not give rise to tort liability in favor of a third party requires a finding that the defendant affirmatively made the condition less safe, not that the defendant failed "to become an instrument for good" (*Church*, 99 NY2d at 112 [internal quotation marks omitted] [incomplete installation of guardrail on highway insufficient to support claim because it did not make road less

safe, only failed to make it more safe]). Thus, for defendant to be held liable, the repairs by its plumber must have created or exacerbated the dangerous condition that caused plaintiff's property damage (*see Kerwin v Fusco*, 138 AD3d 1398 [4th Dept 2016] [repairs made to the stair tread did not launch a force or instrument of harm by exacerbating the dangerous condition of the stairway or making it less safe]). A mere act of neglect, or failure to exercise due care, does not suffice (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007] [where plaintiff was injured when his car rear ended another car that was stopped in a lane of traffic due to mechanical failure, the service station that inspected the car cannot be said to have launched an instrument of harm since there was no reason to believe that the inspection made the car less safe than it was beforehand]).

As a threshold matter, we must first determine who bore the burden of proof on the *Espinal* exception. "[T]he prima facie showing which a defendant must make on a motion for summary judgment is governed by the allegations of liability made by the plaintiff in the pleadings" (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). Thus, if the pleadings contained factual allegations that would support an *Espinal* exception, then

the defendant would bear the burden of proof to show that the exception was not applicable. Conversely, if the plaintiff did not allege facts in his pleadings that would establish that an exception might apply, then he would bear the burden of proving that it was applicable (*see Brathwaite v New York City Hous. Auth.*, 92 AD3d 821, 824 [2d Dept 2012], *lv denied* 19 NY3d 804 [2012]).

Plaintiff alleged in his pleadings that on multiple occasions defendant sent a plumber to fix the leaks as they occurred and that, despite these efforts, incidents of water infiltration continued, culminating in the final leak in August 2011. As the basis for his negligence claim, plaintiff asserted that as a result of defendant's failure to adequately respond to his requests and to remedy the problem in the apartment above him, the water leak continued for several months. However, while plaintiff alleged nonfeaseance and inadequate investigation and repair, he did not assert that the actions of plaintiff's plumbers caused the leaks or that they made the condition more dangerous. Accordingly, defendant, "in establishing its prima facie entitlement to judgment as a matter of law, [was] 'not required to negate the possible applicability of [the launch an instrument of harm] exception[]'" (*Brathwaite*, 92 AD3d at 824).

Rather, it was plaintiff's burden to raise a material issue of fact as to the applicability of the exception, which he failed to do.

In any event, defendant's submissions establish that each time water infiltrated plaintiff's unit, the source was traced to the bathroom of defendant Ferrara-Ruurds's unit -- not a common element of the building -- for which Ferrara-Ruurds was ultimately responsible. Defendant's submissions also demonstrated that the cause of all the leaks was not the same and that each time a repair was performed the leak did not recur immediately.

In particular, plaintiff alleged in the complaint and bill of particulars and testified at his deposition that the first leak occurred in March 2010, and lasted a few days. The next leaks occurred in May 2010, August 2010, December 2010, and finally in August 2011, when water began "cascading" into plaintiff's unit. In response to plaintiff's complaints, defendant attempted to fix the leaks as they occurred, as evidenced by invoices dated March 10, April 13, September 28, and December 30, 2010.

The invoice for the March 2010 service call stated that the plumber "[r]eset water closet, and tested." The invoice for the

April 2010 service call stated that the plumber "[p]erformed sewer and drain cleaning to clear stoppage." The invoice for the September 2010 service call stated that the plumber "[s]upplied and installed new diverter spout. Also installed new sections of branch piping using all new ½" brass and copper pipe, fittings, and material as required. Tested all work." The invoice for the December 2010 service call indicated that the plumber "found toilet leaking at wall and tub overflow plate leaking at plate." The plumber removed the toilet, installing "a new wax and felt gasket" and the overflow plate, caulking the area. Both repairs were tested, and no leaks were detected.

Defendant's submissions also demonstrate that in July 2010, Ferrara-Ruurds hired third-party defendant, Curaj Painting & Interiors, Inc., to install a new toilet and sink in her bathroom. The December 2010 invoice of defendant's plumber indicated that the toilet was the source of the December 2010 leak. Plaintiff also submitted the deposition testimony of Nazim Curovic, who testified that the cause of the next and final leak, in August 2011, which caused the most extensive damage, was rotting sheetrock on the wall of the shower.

In opposition, plaintiff failed to offer any expert opinion or other evidence demonstrating that the work of defendant's

plumbers caused or worsened any condition in the Ferrara-Ruurds unit that led to water infiltrating his apartment, including the leaking toilet or rotting sheetrock. At best, plaintiff contends that defendant was negligent in failing to timely investigate and remedy the cause of the leaks from Ferrara-Ruurds's bathroom, which does not rise to the level of launching an instrument of harm (see *Medinas v MILT Holdings LLC*, 131 AD3d 121, 126 [1st Dept 2015] ["even accepting for purposes of this analysis that The Elevator Man negligently inspected the elevator on January 14, 2010 and negligently failed to correctly assess the condition of the elevator and necessary repair on May 26, 2010, it cannot be said to have launched a force or instrument of harm. That is, in failing to correctly inspect or repair the elevator, it did not create or exacerbate an unsafe condition"]). Accordingly, I would grant defendant's motion for summary judgment dismissing the negligence claim as against it.

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

ENTERED: SEPTEMBER 1, 2016

DEPUTY CLERK

Tom, J.P., Friedman, Richter, Kapnick, Gesmer, JJ.

1552-
1553 Karen Gravano, Index 151633/14
156443/14
Plaintiff-Respondent,

-against-

Take-Two Interactive Software, Inc., et al.,
Defendants-Appellants.

- - - - -

Lindsay Lohan,
Plaintiff-Respondent,

-against-

Take-Two Interactive Software, Inc., et al.,
Defendants-Appellants.

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Debevoise & Plimpton LLP, New York (Jeremy Feigelson of counsel), for appellants.

Law Office of Thomas A. Farinella, P.C., New York (Thomas A. Farinella of counsel), for Karen Gravano, respondent.

The Pritchard Law Firm, New York (Robert O. Pritchard of counsel), for Lindsay Lohan, respondent.

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Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 14, 2016, which, to the extent appealed from, denied defendants' motion to dismiss the first cause of action in the Gravano complaint and for sanctions, unanimously modified, on the law, to grant the part of the motion seeking to dismiss, and otherwise affirmed, without costs. Order, same court and Justice, entered March 14, 2016, which denied defendants' motion

to dismiss the Lohan complaint and for sanctions, unanimously modified, on the law, to grant the part of the motion seeking to dismiss, and otherwise affirmed, without costs. The Clerk is directed to enter judgment in each action dismissing the complaint.

In these appeals, each plaintiff alleges that defendants violated her right to privacy under New York Civil Rights Law § 51 by misappropriating her likeness for use in the video game "Grand Theft Auto V." This video game takes place in the fictional city "Los Santos," which itself is in a fictional American state of "San Andreas." Players control one of several main characters at various points in the game, engaging in approximately 80 main story missions as well as many optional random events. Plaintiffs allege that during certain optional random events, the player encounters characters that are depictions of plaintiffs.

Gravano alleges that in one of the optional random events in the video game, the character Andrea Bottino is introduced, and that her image, portrait, voice, and likeness are incorporated in this character. Specifically, Gravano argues that the character uses the same phrases she uses; that the character's father mirrors Gravano's own father; that the character's story about

moving out west to safe houses mirrors Gravano's fear of being ripped out of her former life and being sent to Nebraska; that the character's story about dealing with the character's father cooperating with the state government is the same as Gravano dealing with the repercussions of her father's cooperation; and that the character's father not letting the character do a reality show is the same as Gravano's father publicly decrying her doing a reality show.

Lohan alleges that defendants used a look-alike model to evoke Lohan's persona and image. Further, Lohan argues that defendants purposefully used Lohan's bikini, shoulder-length blonde hair, jewelry, cell phone, and "signature 'peace sign' pose" in one image, and used Lohan's likeness in another image by appropriating facial features, body type, physical appearance, hair, hat, sunglasses, jean shorts, and loose white top. Finally, Lohan argues that defendants used her portraits and voice impersonation in a character that is introduced to the player in a "side mission."

Both Gravano's and Lohan's respective causes of action under Civil Rights Law § 51 "must fail because defendants did not use [plaintiffs'] 'name, portrait, or picture'" (*see Costanza v Seinfeld*, 279 AD2d 255, 255 [1st Dept 2001], citing *Wojtowicz v*

Delacorte Press, 43 NY2d 858, 860 [1978]). Despite Gravano's contention that the video game depicts her, defendants never referred to Gravano by name or used her actual name in the video game, never used Gravano herself as an actor for the video game, and never used a photograph of her (*see Costanza* at 255; *see generally Wojtowicz* at 860). As to Lohan's claim that an avatar in the video game is she and that her image is used in various images, defendants also never referred to Lohan by name or used her actual name in the video game, never used Lohan herself as an actor for the video game, and never used a photograph of Lohan (*see Costanza* at 255).

Even if we accept plaintiffs' contentions that the video game depictions are close enough to be considered representations of the respective plaintiffs, plaintiffs' claims should be dismissed because this video game does not fall under the statutory definitions of "advertising" or "trade" (*see Costanza* at 255, citing *Hampton v Guare*, 195 AD2d 366, 366 [1st Dept 1993], *lv denied* 82 NY2d 659 [1993] [stating that "works of fiction and satire do not fall within the narrow scope of the statutory phrases 'advertising' and 'trade'"]; *see generally Brown v Entertainment Merchants Assn.*, 564 US 786, 790 [2011] ["(l)ike the protected books, plays, and movies that preceded

them, video games communicate ideas . . .” and deserve First Amendment protection]). This video game’s unique story, characters, dialogue, and environment, combined with the player’s ability to choose how to proceed in the game, render it a work of fiction and satire.

Further, Lohan’s claim that her image was used in advertising materials for the video game should also be dismissed. The images are not of Lohan herself, but merely the avatar in the game that Lohan claims is a depiction of her (*see Costanza* at 255 [the “use of the character in advertising was incidental or ancillary to the permitted use[,]” and therefore was not commercial]).

In view of the foregoing, it is unnecessary to address defendants’ remaining grounds for dismissal.

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

ENTERED: SEPTEMBER 1, 2016

Margaret Sowal

DEPUTY CLERK

Mazzarelli, J.P., Friedman, Moskowitz, Gische, JJ.

16626 Keyspan Gas East Corporation, Index 604715/97
Plaintiff-Respondent,

-against-

Munich Reinsurance America, Inc.,
et al.,
Defendants,

Century Indemnity Company,
Defendant-Appellant.

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O'Melveny & Myers LLP, Washington, D.C. (Jonathan D. Hacker of the bar of the District of Columbia and the bar of the State of Maryland, admitted pro hac vice, of counsel), for appellant.

Covington & Burling LLP, New York (Jay T. Smith of counsel), for respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 22, 2014, reversed, on the law, without costs, the motion granted, and it is declared that defendant Century Indemnity Company is not responsible for any part of the costs of cleanup for periods of time where insurance was unavailable before 1953 and after 1986.

Opinion by Gische, J. All concur.

Order filed.

Tom, J.P., Saxe, Richter, Gische, Webber, JJ.

1205 MP Cool Investments Ltd., Index 650730/15
Plaintiff-Appellant,

-against-

Dan Forkosh, et al.,
Defendants-Respondents.

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Kasowitz, Benson, Torres & Friedman LLP, New York (David S. Rosner of counsel), for appellant.

Troutman Sanders LLP, New York (Aurora Cassirer of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, affirmed, with costs.

The Decision and Order of this Court entered herein on May 31, 2016 is hereby recalled and vacated (*see* M-3244 decided simultaneously herewith).

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
David Friedman
Karla Moskowitz
Judith J. Gische, JJ.

16626
Index 604715/97

_____x

Keyspan Gas East Corporation,
Plaintiff-Respondent,

-against-

Munich Reinsurance America, Inc., et al
Defendants,

Century Indemnity Company,
Defendant-Appellant.

_____x

Defendant Century Indemnity Company appeals from the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered October 22, 2014, which, to the extent appealed from, denied its motion for partial summary judgment declaring that it is not responsible for any part of the costs of cleanup for periods of time when insurance was unavailable before 1953 and after 1986.

O'Melveny & Myers LLP, Washington, D.C. (Jonathan D. Hacker of the bar of the District of Columbia and the bar of the State of Maryland, admitted pro hac vice, and Anton Metlitsky of counsel), and Boutin & Boutin, P.L.L.C., Carmel (John L. Altieri of counsel), for appellant.

Covington & Burling LLP, New York (Jay Smith and Mark Gimbel of counsel), for respondent.

GISCHE J.

This is an insurance coverage dispute involving long-term, gradual environmental property damage caused by pollution from manufactured gas plants (MGPs) owned by plaintiff and/or its predecessors (collectively Keyspan). Hazardous waste from the MGPs leached into groundwater over a protracted period of time. The New York Department of Environmental Conservation (NYDEC) made claims against Keyspan, requiring it to assume the costs of investigation and clean-up of the environmental contamination. Keyspan, in turn, filed claims with its insurer, defendant Century Indemnity Company (Century), under certain general liability policies in effect during a 16 year period in which the pollution was occurring. There is no dispute that the harm caused by the pollution was indivisible and continuous over a long period of time that greatly exceeded the 16-year period during which Century had issued insurance policies.

We are called upon to decide an issue of first impression in New York State appellate courts, concerning the proper allocation, under the Century insurance policies, of risk of loss attributable to a continuous harm occurring, in part, during periods when liability insurance was unavailable in the marketplace. Keyspan contends, and the motion court agreed, that the pro rata allocation analysis set forth by the Court of

Appeals in *Consolidated Edison Co. of N.Y. v Allstate Ins. Co. (Con Edison)* (98 NY2d 208 [2002]) should be refined to require that the insurer assume the allocated risk for losses occurring during periods when liability insurance was unavailable in the marketplace. Century argues that under a pro rata allocation of risk, Keyspan, the insured, should be held accountable for losses attributable to periods of time when it could not, and consequently did not, purchase insurance. Although we believe that, in accordance with the Court of Appeals' decision in *Con Edison*, the insurance policies in this case warrant a pro rata allocation of risk, *Con Edison* left unanswered the specific question posed on this appeal.[1] For the reasons set forth below, we answer the question by holding that under the insurance policies at issue, Century does not have to indemnify Keyspan for losses that are attributable to time periods when liability insurance was otherwise unavailable in the marketplace.

Keyspan has operated two MGPs,[2] located respectively in

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[1]In *Con Edison* (98 NY2d at 225), the Court of Appeals stated "Courts also differ on how to treat self-insured retentions, periods of no insurance, *periods where no insurance is available* and settled policies under various allocation methods" (emphasis added). Although the Court recognized different treatments of this issue, it did not resolve those differences.

[2]There are four other sites that are the subject of this action, as well as other defendants. Only two of the MGPs and only the Century policies are at issue in this appeal. Century

Rockaway Park, Queens, and Hempstead, Long Island, since the early 20th century. These (and other) MGP sites are contaminated with numerous hazardous wastes (predominantly tar) that have leached into the surrounding groundwater and soil. Although exactly when contamination of these sites began is disputed, and the amount of environmental damage that occurred in any given year cannot be precisely ascertained, it is clear that the contamination was continuous and gradual, occurring over a period of many decades. Century claims that contamination of the Hempstead site took place between 1903 and 2001, whereas contamination of the Rockaway site began in 1905 and possibly continued until 2012[3]. The contamination was caused by Keyspan's operation and maintenance of the MGPs.

In 1995, NYDEC sought to hold Keyspan strictly liable for the resulting pollution, requiring it to pay for the investigation and clean-up of these sites (See Environmental Conservation Law § 1-0101 *et seq.*). Keyspan's remediation costs

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represents the first "layer" of excess insurance coverage.

[3]The precise period of contamination is disputed. Following the motion court's summary judgment decision, there was a coverage trial as to the Rockaway MGP and one other site. The jury found that property damage at the Rockaway site commenced in 1905. The accuracy of this date or anything else that occurred at trial is not before the Court on this appeal, but the parties have provided this information in their briefs.

ran in the millions of dollars. Keyspan now seeks to have Century indemnify it for these costs based upon 16 successive years of general liability insurance policies issued by Century from 1953 to 1969.[4] The various claims in this action implicate multiple successive insurance policies, as well as periods of no insurance. Insofar as is relevant to this appeal, Keyspan's claim for indemnification by Century includes not only the 16-year period that the policies were in effect, but also periods of time, both before 1953 and after 1969, when insurance covering this risk could not be purchased in the marketplace.[5] Conversely, Century denies that it must indemnify Keyspan for any damages that did not occur "during the policy period," contending that any property damage that occurred outside that 16-year period and during periods of no insurance is the sole responsibility of Keyspan, whether or not other insurance coverage was available in the marketplace. In concrete terms, the parties' dispute implicates responsibility for as many as 70 years' worth of allocated risk.

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[4]Century is the only remaining defendant in this case as to both these MGPs, and KeySpan had insurance through other providers thereafter until 1986.

[5]Century claims that before 1922 the Legislature prohibited the sale of stand-alone property liability coverage covering the losses at issue here. The parties stipulated at trial that insurance first became available in the marketplace in 1933.

Keyspan brought this action for a declaratory judgment seeking indemnification for the costs of the environmental clean-up compelled by NYDEC. On Century's motion for summary judgment, the motion court held generally that a pro rata time on the risk allocation formula is appropriate to determine the parties' respective obligations for the loss. This holding is not challenged on appeal. The court also held that for periods when Keyspan did not purchase insurance that was otherwise available in the marketplace, Keyspan is responsible for a share of liability attributable to that period of time. It further held that Keyspan is allocated liability for the time period between 1971 and 1982 when the Insurance Law expressly prohibited insurers from covering liability arising out of pollution or contamination. The motion court reasoned that this result was consistent with the purpose of the Insurance Law to have companies, such as Keyspan, bear the full burden of their own actions affecting the environment. These holdings are also not challenged on appeal. Lastly, the court held that except for the period of time when the Legislature expressly prohibited the sale of pollution liability insurance, liability for periods of time when insurance was unavailable in the marketplace should be allocated to Century.

We begin our analysis with a review of the existing New York

insurance law applicable to injuries that are continuous and occur over a period of years. These injuries frequently implicate multiple, sequential insurance policies, as well as periods of no insurance. The legal challenges raised in these cases occur because it is impossible to precisely determine what injury or damage took place during a particular policy period or during periods of no insurance. While the occurrence of some injury during the policy period will usually trigger coverage under the terms of a particular policy, the parties still face thorny issues about who bears the risk of injuries attributable to different time periods outside of those policy periods.

Con Edison (98 NY2d at 208), *supra*, and the very recent Court of Appeals decision in *Matter of Viking Pump. Inc*. (27 NY3d 244 [2016]) make it abundantly clear that the predominant consideration in the Court's analysis of these issues is the language of the particular insurance policy. These cases are in accord with well established precedent holding that when determining a dispute over insurance coverage, courts are required to look first at the language of the policies involved (*Roman Catholic Diocese of Brooklyn v National Union Fire Ins. Comp. of Pittsburgh, Pa.*, 21 NY3d 139, 148 [2013]). *Con Edison* and *Viking Pump* both concerned insurance claims made for injuries that occurred over a period of time and across policy periods.

Con Edison, as here, involved a claim for indemnity in connection with environmental contamination clean-up. *Viking Pump* concerned personal injuries resulting from exposure to asbestos. In *Con Edison*, the Court of Appeals held that where the insurance policies provide coverage for "all sums" of liability that resulted from an accident occurring "during the policy period," a pro rata allocation based upon an insurer's time on the risk is consistent with the policy language (98 NY2d at 224). The specific issue before the Court was whether indemnification for liability for long-term, continuous environmental damage should be allocated among all the insurance polices that are triggered, or whether for every policy triggered by some part of the continuous injury occurring during that policy period, the insurer should be held jointly and severally liable for all of the damages.[6] The court held that pro rata allocation was more in keeping with the terms of the particular policies than joint

[6]The mechanics of joint and several liability would permit the insured to select one triggered policy that would be responsible for the full amount of liability. The selected insurer would then be able to seek contribution from other insurers (*Roman Catholic Diocese*, 21 NY3d at 153-154 ("A joint and several allocation permits the insured to 'collect its total liability ... under any policy in effect during' the periods that the damage occurred ..., whereas a pro rata allocation 'limits an insurer's liability to all sums incurred by the insured during a policy period'"] [quoting *Con Edison*, 98 NY2d at 222-223]).

and several liability for each insurer. In distinction, the Court of Appeals, in reviewing different policy language, recently held in *Viking Pump*, that when a policy contains anti stacking or non-cumulation provisions, pro rata allocation of risk is not consistent with the policy language.

Where a pro rata allocation is warranted, courts applying New York law have approved the use of a time on the risk allocation formula (*see e.g. Roman Catholic Diocese*, 21 NY3d 139 [2013] [plaintiff sought indemnification for claim of long-term ongoing sexual molestation by a priest; Court of Appeals approved time on the risk proration of liability among the insurers]; *Con Edison*, 98 NY2d 208; *Serio v Public Serv. Mut. Ins. Co.*, 304 AD2d 167 [2d Dept 2003] [time on the risk applied to allocate damages in personal injury lead-paint case, as opposed to equal apportionment]; *Olin Corp. v Ins. Co. of N. Am.*, 221 F3d 307 [2d Cir 2000] [applying New York law using a pro rata time on risk formula to determine insurer's liability to indemnify for ongoing and progressive damage from pollution]; *Stonewall Ins. Co. v Asbestos Claims Management Corp.* 73 F3d 1178 [2nd Cir 1995] [applying New York Law]. Time on the risk is a simple calculation method, best expressed by a formula that multiplies the total risk by a fraction that has as its denominator the entire number of years of the claimant's injury and as its

numerator the number of years within which the policy was in effect (*Olin*, 221 F3d at 321-328). In cases involving environmental contamination, the formula assumes that the amount of pollution occurring in any particular year is always the same as in every other year.[7] This assumption accounts for the uncertainty in determining the amount of pollution occurring in any particular year.

Pro rata allocation typically includes apportioning some part of the risk to the policyholder in connection with periods of no insurance. Policyholders will usually be required to bear the financial burden of periods when it could have, but chose not to, obtain insurance (*Stonewall,* 73 F3d at 1203). The rationale underlying this allocation is that these period of no-insurance (or going bare) reflect a decision by the insured to assume or retain a risk, since it could have, but chose not to, purchase insurance to ameiliorate its risk. The same rationale applies to periods of self-insurance and/or insufficient insurance, which reflect deliberate decisions by the insured (*id.*) [proration to

[7]This method of allocation, however, is not the only method by which to prorate liability. In *Con Edison* (98 NY2d at 222), the Court of Appeals recognized that there might be other methods of allocation (*see also State of N.Y. Ins. Dept., Liquidation Bur. [Generali Ins.],* 44 AD3d 469 [1st Dept 2007], *appeal withdrawn* 9 NY3d 1030 [2008]).).

the insured is "appropriate as to years in which (the insured) elected not to purchase insurance or purchased insufficient insurance, as demonstrated by the exhaustion of its policy limits"]). Any rule to the contrary would disincentivize parties to acquire insurance when available, to cover and spread risk, and otherwise achieve cost efficiencies in the marketplace (*see Owens-Illinois, Inc. v Untied Ins. Co.*, 138 NJ 437, 472-473 [NJ 1994] ["Because insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentive to parties to acquire insurance when available to cover their risks"]). While the proration to the insured rule may be subject to exceptions,[8] the motion court's general ruling allocating certain periods of no coverage to plaintiff is not challenged in this appeal.

New York appellate courts, however, have not expressly ruled on the question presented here, which is: When the reason for the

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[8]In *Generali Ins. Co* (44 AD3d 469, 470-471), this Court affirmed as "manifestly fair" an equal risk allocation between insurance companies to cover a settlement, even though the damage extended over periods of no insurance. Our decision effectively prorated no risk to the insured for periods of no insurance, because the insured was defunct and could not have financially contributed to the settlement. The facts of *Generali* are unique in that one insurer (represented by the Liquidation Bureau) seeks to have the other insurer contribute to a settlement of an underlying action, as opposed to the insured seeking indemnity. The decision was made over a strong dissent.

period of no insurance is that the insured could not have obtained insurance even if it had wanted to, is the risk attendant to the unavailability of insurance in the marketplace allocable to the existing, triggered insurance policies or to the insured? This coverage dispute is not unique to New York. Courts that have considered this issue, both in trying to predict New York law and in other states dealing with the same or similar insurance policy language as here, have come to different conclusions, employing different rationales.

Stonewall (73 F3d 1178) and *Olin* (221 F3d 307) both Second Circuit Court of Appeals cases seeking to apply New York law, have determined that an exception to proration to the insured should be made in situations where insurance is not available in the marketplace (*see also RT Vanderbilt Co., Inc v Hartford Acc. & Indem. Co.*, 2014 WL 1647135 [Conn Superior Ct 2014]). Clearly, the general justification for proration to the insured, i.e., encouraging the purchase of insurance to spread risk, does not hold when there is no insurance to be had. This unavailability exception to the rule of proration to the insured largely has its genesis in the New Jersey case of *Owens-Illinois* (138 NJ 437). The New Jersey Supreme Court, unable to find the answers to allocation in the language of the policies there at issue, looked to public interest factors for guidance, including, insofar as is

relevant here, providing incentives for parties to engage in responsible conduct, avoiding disincentives to the acquisition of insurance and creating incentives that will tend to minimize the recurrence of the problems presented in the case before it (138 NJ at 471). In accordance with these principles, the court held: "A fair method of allocation appears to be one that is related to both the time on the risk and the degree of the risk assumed. When periods of no insurance reflect a decision by the actor to assume or retain a risk, *as opposed to periods when coverage for a risk is not available*, to expect the risk-bearer to share in the allocation is reasonable" (138 NJ at 479) (emphasis supplied).

Other courts have taken a contrary view of the issue (*see Sybron Transitition Corp. v Security Ins. Of Hartford*, 258 F3d 595 [7th Cir 2001] [applying New York Law]; *Boston Gas Co. v Century Indem. Co.*, 454 Mass 337, 910 NE2d 290, 315 [Mass 2009] [expressly declining to adopt unavailability exception "because to do so would contravene the limitation of coverage in the ... policies to liability attributable to property damage during policy periods"]; *Crossmann Communities of N. Carolina, Inc. v Harleysville Mut. Ins. Co.*, 395 SC 40, 66 n 19, 717 SE2d 589, 602 n16 [SC 2011] [rejecting unavailability exception as "exceeding the trial court's authority, as the effect is to shift losses

from one policy period to another in order to create coverage where none was purchased"]; *Midamerican Energy Co. v Certain Underwriters at Lloyds London,* 2011 WL 2011374 [Iowa Dist 2011]; ["'unavailability' exception disproportionately allocate(s) damages(s) to insurers for periods of time when no coverage was agreed to or bargained for"]; *Bradford Oil Co. v Stonington Ins. Co.*, 54 A3d 983,981 [Vt 2011] [in rejecting the availability exception the court concluded "that the reason for the absence of effective insurance in not determinative" and it is "not consistent with a pure time-on-the-risk methodology"]; *AAA Disposal Sys. Inc. v Aetna Cas. & Sur. Co.,* 355 Ill App 3d 275, 288, 821 NE2d 1278, 1290 [Ill App Ct 2055] *lv denied* 213 Ill2d 553 [2005] ["it would be unfair to allocate the damage occurring during the uninsured period to an insurer that did not agree to provide coverage during that time"]). A general concept underlying these decisions is that the policies themselves did not provide coverage for the disputed periods, and the overall effect of passing that risk on to the insurance companies would be to provide free insurance coverage to the policyholders for those periods of no insurance. Some of these cases pointed out the problem with the concept of unavailability and to what extent it is a function of economic feasibility; i.e., does the cost of covering the risk at the time insurance is sought exceed the

anticipated cost of the perceived risk (*Sybron*, 258 F3d at 300).

Turning now to the language of the insurance contracts at issue in this case, the parties stipulated that the terms and conditions of the policies at issue[9] are as follows:

Three Century policies (No. XCP 3860 effective 1953-1957; No. XCP 1086 effective 1955-1957; and No. XCP 3001 effective 1957-1959) state that the policy "applies only to occurrences or accidents which happen during the policy period." Three policies (No. XCP 1200 effective 1957-1961; No. XBC-1097 effective 1961-1966; and No. XBC-40530 effective 1966-1967), state that "the policy applies only to occurrences . . . during the policy period."

Two of the policies (No. XBC-41176 effective 1967-1968; No. SRL-2220 effective 1968-1969) state that the policy applies to "property damage . . . which occurs anywhere during the policy period."

The policies also have slight differences as to how "occurrences" are defined:

Policy XCP-1200 defines an occurrence as "either an accident or a continuous or repeated exposure to conditions which result

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[9]Two of the policies cannot be located, but the parties stipulated some facts as to them. Hence, the total number of policies addressed in this decision may not always add up to eight.

during the policy period in injury to or destruction of property . . . ." Policies XBC-1097 and XBC-40530 define occurrence as "either an accident happening during the policy period or a continuous or repeated exposure to conditions which . . . causes injury to or destruction of property during the policy period." XBC-411176 and SRL-2220 state that "[o]ccurence, as respects property damage, means an accident, including injurious exposure to conditions, which results, during the policy period, in property damage . . . ."

While these policies are not identical to those in *Con Edison*, and not every policy that Century issued to Keyspan contains the exact same language, they are substantially similar to those in *Con Edison*, and the variations among Century's own policies from year to year are not significant enough to affect a holistic analysis of them. None of the policies contain the anti-stacking provisions that were at issue in *Viking Pump* (27 NY3d 244).

We find that the policy language supports a conclusion that the unavailability exception to proration to the insured does not apply. As with the policies in *Con Edison*, the "all sums" policy language in the policies at bar is qualified by other language. Each policy, despite some minor variations, provides the insured with coverage for occurrences, accidents and continuous and

repeated exposure to conditions that result in damage "during the policy period." While none of the policies expressly address how to allocate liability in a situation where the underlying damage is long-term, continuous and indivisible, the fact that the policies require Century to indemnify Keyspan for occurrences, accidents, etc., "during the policy period" is consistent with allocation for time on the risk. Unavailability is an exception to time on the risk, since it allocates responsibility for periods of time when no insurance was purchased and it is, therefore, inconsistent with policy language restricting coverage to the policy period. There is no other or additional contractual language in the policy justifying this exception. There are no express contract provisions requiring the insurer to cover damages outside of the policy period when insurance is otherwise unavailable in the marketplace (*Con Edison*, 98 NY2d 208; *see also Long Isl. Light. Co. v Allianz Underwriters Ins. Co.*, 301 AD2d 23, 31 [1st Dept 2002]). A related argument by Keyspan, that in issuing the original policies Century undertook to indemnify Keyspan for periods before the inception date, also simply adds language that is not in any of the policies. Keyspan's interpretations would expose Century to risks beyond those contemplated by the parties when the policies were purchased, as evidenced by the plain language

of the policy (*see e.g. Henry Modell & Co., v General Ins. Co. of Trieste & Venice,* 193 AD2d 412 [1st Dept 1993]). Nor do we find that the policy provisions are in anyway ambiguous on these issues. The Court of Appeals in *Con Edison*, in considering essentially similar policy language, was able to interpret such policies as consistent with allocating risk to the insurer occurring within the policy period. These policies should be interpreted in an identical manner.

Keyspan alternatively raises certain policy arguments in support of its position, claiming that the unavailability exception is consistent with the protective purpose of liability insurance by spreading risk and transferring it from a policyholder to an insurer. In addition, Keyspan argues that there will be increased costs to consumers if it is required to share in the costs of remediation. New York courts, however, will not rewrite the terms of a policy for equitable reasons (*see Breed v Insurance Co. of N. Am.*, 46 NY2d 351, 355 [1978]). Nor will they disregard clear provisions that an insurer inserted into a policy and the insured accepted (*see Raymond Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 NY3d 157, 162 [2005]). Moreover, the spreading of industry risk through insurance is accomplished through the setting and payment of premiums for insurance, consistent with the parties' forward

looking assessment of what that risk might entail. In the absence of a contract requiring such action, spreading risk should not by itself serve as a legal basis for providing free insurance to an insured.

Accordingly, the order of the Supreme Court, New York County (Saliann Scarpulla, J.), entered October 22, 2014, which, to the extent appealed from, denied defendant Century Indemnity Company's motion for partial summary judgment declaring that Century is not responsible for any part of the costs of cleanup for periods of time when insurance was unavailable before 1953 and after 1986, should be unanimously reversed, on the law, without costs, and the motion granted, and it should be so declared.

All concur.

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

ENTERED: SEPTEMBER 1, 2016

Margaret Saval

DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rosalyn H. Richter
Judith J. Gische
Troy K. Webber, JJ.

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MP Cool Investments Ltd.,
Plaintiff-Appellant,

-against-

Dan Forkosh, et al.,
Defendants-Respondents.

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Plaintiff appeals from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, which granted defendants' motion to dismiss the complaint.

Kasowitz, Benson, Torres & Friedman LLP, New York (David S. Rosner, Michael C. Harwood and Hershy Stern of counsel), for appellant.

Troutman Sanders LLP, New York (Aurora Cassirer and Bennet Moskowitz of counsel), for respondents.

GISCHE, J.

In this appeal over allegations of common law fraud in connection with the production and sale of a commercial heating and ventilation system by an Israeli-based company, we are asked to scrutinize every required element of a claim of fraud with specific emphasis on the effect of the claimant's status as a so-called sophisticated investor. Plaintiff alleges, among other things, that defendants, formerly controlling shareholders in DuCool, Ltd., intentionally provided plaintiff with false information over an extended period of time, inducing it to repeatedly invest in DuCool, by claiming the company possessed new technology for innovative heating, ventilation and air conditioning systems (HVAC), the units were more efficient than conventional units in the United States, and DuCool products could be installed without any expensive on-site retrofitting. Plaintiff also alleges that defendants intentionally concealed and withheld critical information regarding mounting maintenance and quality problems with these HVAC systems and that all the data defendants provided, including economic and technical models, and studies of current product installations, were false.

We affirm the motion court's dismissal of plaintiff's fraud claims because they were not pleaded with the requisite particularity (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173,

178 [2011]; CPLR 3016[b]). Moreover, plaintiff's allegations do not establish justifiable reliance as required to prove fraud because plaintiff is a sophisticated investor that had the means available to it to learn the true nature and real quality of the investment it made *(ACA Fin. Guar. Corp. v Goldman, Sachs & Co.*, 25 NY3d 1043, 1044 [2015]). Nor do the allegations support the element of scienter necessary for fraud. We also hold that the facts alleged do not support a claim for breach of fiduciary duty or breach of an implied covenant of good faith and fair dealing.

Plaintiff is presently the majority owner of DuCool, an Israeli company that manufactures commercial and industrial heating and ventilation systems. In December 2009, plaintiff entered into an exclusive option agreement with DuCool to obtain a majority interest in the company. Pursuant thereto, plaintiff made an initial investment, by which it acquired an initial 49% interest in the company for $30 million and installed three officers on the board. Plaintiff had the option to make additional investments in DuCool, which ultimately would permit plaintiff to acquire a majority interest in the company. In May 2012, plaintiff exercised its option, thereby acquiring an additional 23.2% equity interest in DuCool, by investing the sum of $30 million, and also purchased defendants' shares in the company for $10 million. Altogether, by 2012, plaintiff had

invested $70 million in DuCool and acquired a 72% majority interest in the Company. Subsequent investments, although not at issue here, brought plaintiff's equity interest in the Company to 90%.

The parties' agreement makes it clear that before making any investment in DuCool, plaintiff had a 90-day due diligence period during which it was afforded full access to the company's business operations, properties, technology data and plans. Plaintiff also had the right to direct access to all of DuCool's customers, but exercised that right only as to one customer. Plaintiff alleges that it availed itself of the right to conduct "extensive" due diligence by, among other things, hiring two consultants. It hired one company (QuinetiQ) to perform technical evaluations of DuCool's technology, manufacturing facility, and installation sites, and another company (McKinsey) to evaluate the company's business model, financial information, and market potential. McKinsey drafted a proposed business plan for the company that was included in the parties' initial purchase agreements. After the initial investment, but before the second investment, plaintiff appointed three of the seven members of the board of directors and two of McKinsey's representatives were installed as officers of DuCool.

Plaintiff claims that in the period before it purchased any

interest in DuCool (pre-investment) and during the two year period after its first investment (i.e. 2010 through 2012), when it acquired a majority interest in the company, defendants made numerous knowingly false representations and provided inaccurate data about DuCool's air conditioning technology, financial condition and overall successes in the United States and other markets. Plaintiff alleges that it relied on this information, inducing it to repeatedly invest in DuCool, believing it was a better performing company than it was. In support of its claim that defendants made certain pre-investment false representations, plaintiff largely relies on the fact that defendants provided it with an October 2009 study, titled "Overview, Advantages and Case Studies," falsely claiming, among other things, that DuCool's systems were 25% more efficient at removing humidity than conventional HVAC units and could be incorporated into existing, conventional systems, with no need to add additional applications. Plaintiff contends these representations were critical in inducing it to invest the initial sum and the second tranche, because they reflected highly appealing key benefits over existing commercial air conditioning technology. Other deceptions defendants allegedly made include providing false information about successful DuCool product installations in China and India, when

in fact there were rampant failures. Another false representation involved an installation project at an ice skating rink in Florida. Defendants allegedly reported to plaintiff that the project was stopped due to "regulatory" problems when, in actuality, the units had malfunctioned, resulting in a $200,000 loss to the company.

With respect to plaintiff's allegations of defendants' post-investment fraud, plaintiff claims that defendants deceived it by intentionally concealing known problems with DuCool's installations in at least three major sites in the United States and Costa Rica. Other alleged falsehoods pertain to inflated energy cost savings in an April 2011 "study" touting DuCool products' performance and cutting edge technology.

It is unrefuted that plaintiff is a sophisticated investor; in fact a share purchase agreement (SPA) was executed by the parties before the initial acquisition occurred, in which plaintiff made the following express representations:

> "Section 4.06 Investment Experience. The Investor [plaintiff] has substantial experience in evaluating and investing in securities of companies similar to [DuCool] and acknowledges that the Investor can protect its own interests. The Investor has such knowledge and experience in financial and business matters so that the Investor is capable of evaluating the merits and risks of its investment in the Company."

The SPA also warns of the "highly speculative nature" of the investment:

> "Section 4.07 Speculative Nature of Investment. The Investor understands and acknowledges that [DuCool] has a limited financial and operating history and that an investment in the Company is highly speculative and involves substantial risks. The Investor can bear the economic risk of the Investor's investment and is able, without impairing the Investor's financial condition, to hold the Purchased Shares for an indefinite period of time and to suffer a complete loss of the Investor's investment."

Section 4.08 of the SPA pertains to plaintiff's access to information about the company and ability to seek additional information directly from DuCool's officers:

> "Section 4.08 Access to Data. The Investor has had an opportunity to ask questions of, and receive answers from, the officers of the Company concerning the Transaction Documents, the exhibits and schedules attached thereto and the transactions contemplated by the Transaction Documents, as well as the Company's business, operations, properties, technology, prospects and plans, management and financial affairs, which questions were answered to its satisfaction. The Investor believes that it has received all the information the Investor considers necessary or appropriate for deciding whether to purchase the Purchased Shares. The Investor acknowledges that any business plans prepared by the Company have been, and continue to be, subject to change and that any projections included in such business plans or otherwise are necessarily speculative in nature, and it can be expected that some or all of the assumptions underlying the projections will

> not materialize or will vary significantly from actual results."

Where a cause of action is based in fraud, "the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury" (*see Dembeck v 220 Cent. Park S.*, LLC, 33 AD3d 491, 492 [1st Dept 2006]). Furthermore, where the plaintiff is a sophisticated party, "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*ACA Fin. Guar. Corp.*, 25 NY3d at 1044). Circumstances constituting fraud must be set forth in a complaint in detail (CPLR 3016[b]).

The complaint fails to allege fraud with sufficient specificity as to each individual defendant and the various time frames involved. There are no misrepresentations or omissions attributed directly to defendants Vromen or Rosenblum, each of whom at all times only held a minority interest in DuCool. The only allegations are generally that neither Vromen nor Rosenblum

corrected misinformation that the other named defendants provided, despite their "superior knowledge" of the company. The superiority of their knowledge is based solely upon the fact that Vromen and Rosenblum were "insiders" and long time friends of the Forkosh defendants. With respect to the Forkosh defendants, they are alleged to have known of and intentionally misrepresented or concealed information about DuCool's poor performance, motivated by a desire to stay employed by the company and derive hefty bonuses. Actual specific false factual statements are not identified. Nor is specific false concealment identified. Such bundled, bare-boned and conclusory allegations do not establish the basic elements of fraud, namely a "representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006] lv denied 8 NY3d 803 [207], citing *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]).

Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044). Plaintiff had total, unfettered access to every aspect of DuCool's company

information both before and after its initial investment, even before it held a controlling interest in DuCool. Although learning through the due diligence conducted by its own technology and business consultants that there were frequent technological problems with DuCool products, some of them "severe," plaintiff proceeded to invest in the company. Thereafter, as the 49% shareholder, plaintiff had the largest percentage ownership of any individual shareholder and it had access to information concerning the operations of the business. There is no factual basis on which to conclude that the alleged fraud involved matters peculiarly within defendants' knowledge, because plaintiff had the means to discover the truth behind any false claims about the condition of the company and whether this was a feasible investment (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044).

With respect to the scienter element of its claim, although "most likely to be within the sole knowledge of the defendant and least amenable to direct proof," plaintiff is still required to allege facts "from which it is possible to infer defendant[s'] knowledge of the falsity of [their] statements" when they were made (*Houbigant, Inc. v Deloitte & Touche,* 303 AD2d 92, 98, 99 [1st Dept 2003]). It has not done so. Plaintiff, based upon its

own due diligence, concluded that DuCool presented a profitable, albeit speculative, investment opportunity given its development of new technology and registered patents. Although the company may not have performed as plaintiff expected, this does not support a reasonable inference that defendants knew that DuCool would fall short of its business projections. The parties' agreement not only contained plaintiff's express acknowledgment that success was speculative, but also a further acknowledgment that "any business plans prepared by the Company, have been, and continue to be, subject to change and that any projections included in such business plans or otherwise are necessarily speculative in nature. . ."

Plaintiff argues that the court erred in dismissing its claim based upon defendants' breach of their fiduciary duty to, among other things, impart critical information. This claim was properly dismissed because the relationship alleged does not support a finding of a fiduciary relationship. A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.* 5 NY3d 11, 19 [2005]). The transactions at their inception were arm's length transactions

between sophisticated commercial parties. The SPA identifies plaintiff as an experienced investor. Defendants did not provide plaintiff with financial advice; nor was a relationship of higher trust created at that time (*see id.* at 19-22). Plaintiff hired its own investment adviser and engineer, seeking their advice about the viability of DuCool's products and whether this was a good investment opportunity. In the absence of a fiduciary relationship between these sophisticated entities, plaintiff cannot maintain a claim for breach of a fiduciary duty, and that claim was properly dismissed. Nor does a breach of fiduciary duty claim exist based upon the parties' status as co-shareholders after the initial investment, because once plaintiff acquired a 49% interest in DuCool, it became the largest single shareholder.

Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, based upon alleged violations of the parties' shareholder agreement and a financing option agreement, was also correctly dismissed. Implicit in every contract is a covenant that in the course of performing the contract, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384,

389 [1995] [internal quotation marks omitted]). The facts alleged describe little more than a breach of these agreements. Given our decision dismissing the complaint, we need not reach the other issues raised by the parties.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, which granted defendants' motion to dismiss the complaint, should be affirmed, with costs.

The Decision and Order of this Court entered herein on May 31, 2016 is hereby recalled and vacated (*see* M-3244 decided simultaneously herewith).

All concur.

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

ENTERED: SEPTEMBER 1, 2016

Margaret Saval

DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
David B. Saxe
Rosalyn H. Richter
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Troy K. Webber, JJ.

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Plaintiff-Appellant,

-against-

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GISCHE, J.

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Plaintiff claims that in the period before it purchased any

interest in DuCool (pre-investment) and during the two year period after its first investment (i.e. 2010 through 2012), when it acquired a majority interest in the company, defendants made numerous knowingly false representations and provided inaccurate data about DuCool's air conditioning technology, financial condition and overall successes in the United States and other markets. Plaintiff alleges that it relied on this information, inducing it to repeatedly invest in DuCool, believing it was a better performing company than it was. In support of its claim that defendants made certain pre-investment false representations, plaintiff largely relies on the fact that defendants provided it with an October 2009 study, titled "Overview, Advantages and Case Studies," falsely claiming, among other things, that DuCool's systems were 25% more efficient at removing humidity than conventional HVAC units and could be incorporated into existing, conventional systems, with no need to add additional applications. Plaintiff contends these representations were critical in inducing it to invest the initial sum and the second tranche, because they reflected highly appealing key benefits over existing commercial air conditioning technology. Other deceptions defendants allegedly made include providing false information about successful DuCool product installations in China and India, when

in fact there were rampant failures. Another false representation involved an installation project at an ice skating rink in Florida. Defendants allegedly reported to plaintiff that the project was stopped due to "regulatory" problems when, in actuality, the units had malfunctioned, resulting in a $200,000 loss to the company.

With respect to plaintiff's allegations of defendants' post-investment fraud, plaintiff claims that defendants deceived it by intentionally concealing known problems with DuCool's installations in at least three major sites in the United States and Costa Rica. Other alleged falsehoods pertain to inflated energy cost savings in an April 2011 "study" touting DuCool products' performance and cutting edge technology.

It is unrefuted that plaintiff is a sophisticated investor; in fact a share purchase agreement (SPA) was executed by the parties before the initial acquisition occurred, in which plaintiff made the following express representations:

> "Section 4.06 Investment Experience. The Investor [plaintiff] has substantial experience in evaluating and investing in securities of companies similar to [DuCool] and acknowledges that the Investor can protect its own interests. The Investor has such knowledge and experience in financial and business matters so that the Investor is capable of evaluating the merits and risks of its investment in the Company."

The SPA also warns of the "highly speculative nature" of the investment:

> "Section 4.07 Speculative Nature of Investment. The Investor understands and acknowledges that [DuCool] has a limited financial and operating history and that an investment in the Company is highly speculative and involves substantial risks. The Investor can bear the economic risk of the Investor's investment and is able, without impairing the Investor's financial condition, to hold the Purchased Shares for an indefinite period of time and to suffer a complete loss of the Investor's investment."

Section 4.08 of the SPA pertains to plaintiff's access to information about the company and ability to seek additional information directly from DuCool's officers:

> "Section 4.08 Access to Data. The Investor has had an opportunity to ask questions of, and receive answers from, the officers of the Company concerning the Transaction Documents, the exhibits and schedules attached thereto and the transactions contemplated by the Transaction Documents, as well as the Company's business, operations, properties, technology, prospects and plans, management and financial affairs, which questions were answered to its satisfaction. The Investor believes that it has received all the information the Investor considers necessary or appropriate for deciding whether to purchase the Purchased Shares. The Investor acknowledges that any business plans prepared by the Company have been, and continue to be, subject to change and that any projections included in such business plans or otherwise are necessarily speculative in nature, and it can be expected that some or all of the assumptions underlying the projections will

> not materialize or will vary significantly from actual results."

Where a cause of action is based in fraud, "the complaint must allege misrepresentation or concealment of a material fact, falsity, scienter on the part of the wrongdoer, justifiable reliance and resulting injury" (*see Dembeck v 220 Cent. Park S.*, LLC, 33 AD3d 491, 492 [1st Dept 2006]). Furthermore, where the plaintiff is a sophisticated party, "if the facts represented are not matters peculiarly within the [defendant's] knowledge, and the [plaintiff] has the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation, [the plaintiff] must make use of those means, or [it] will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*ACA Fin. Guar. Corp.*, 25 NY3d at 1044). Circumstances constituting fraud must be set forth in a complaint in detail (CPLR 3016[b]).

The complaint fails to allege fraud with sufficient specificity as to each individual defendant and the various time frames involved. There are no misrepresentations or omissions attributed directly to defendants Vromen or Rosenblum, each of whom at all times only held a minority interest in DuCool. The only allegations are generally that neither Vromen nor Rosenblum

corrected misinformation that the other named defendants provided, despite their "superior knowledge" of the company. The superiority of their knowledge is based solely upon the fact that Vromen and Rosenblum were "insiders" and long time friends of the Forkosh defendants. With respect to the Forkosh defendants, they are alleged to have known of and intentionally misrepresented or concealed information about DuCool's poor performance, motivated by a desire to stay employed by the company and derive hefty bonuses. Actual specific false factual statements are not identified. Nor is specific false concealment identified. Such bundled, bare-boned and conclusory allegations do not establish the basic elements of fraud, namely a "representation of material fact, the falsity of that representation, knowledge by the party who made the representation that it was false when made, justifiable reliance by the plaintiff, and resulting injury" (*Pope v Saget*, 29 AD3d 437, 441 [1st Dept 2006] lv denied 8 NY3d 803 [207], citing *Channel Master Corp. v Aluminum Ltd. Sales*, 4 NY2d 403, 406-407 [1958]).

Plaintiff is an experienced and sophisticated investor. It did not plead facts to support the justifiable reliance element of fraud (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044). Plaintiff had total, unfettered access to every aspect of DuCool's company

information both before and after its initial investment, even before it held a controlling interest in DuCool. Although learning through the due diligence conducted by its own technology and business consultants that there were frequent technological problems with DuCool products, some of them "severe," plaintiff proceeded to invest in the company. Thereafter, as the 49% shareholder, plaintiff had the largest percentage ownership of any individual shareholder and it had access to information concerning the operations of the business. There is no factual basis on which to conclude that the alleged fraud involved matters peculiarly within defendants' knowledge, because plaintiff had the means to discover the truth behind any false claims about the condition of the company and whether this was a feasible investment (*see ACA Fin. Guar. Corp.*, 25 NY3d at 1044).

With respect to the scienter element of its claim, although "most likely to be within the sole knowledge of the defendant and least amenable to direct proof," plaintiff is still required to allege facts "from which it is possible to infer defendant[s'] knowledge of the falsity of [their] statements" when they were made (*Houbigant, Inc. v Deloitte & Touche,* 303 AD2d 92, 98, 99 [1st Dept 2003]). It has not done so. Plaintiff, based upon its

own due diligence, concluded that DuCool presented a profitable, albeit speculative, investment opportunity given its development of new technology and registered patents. Although the company may not have performed as plaintiff expected, this does not support a reasonable inference that defendants knew that DuCool would fall short of its business projections. The parties' agreement not only contained plaintiff's express acknowledgment that success was speculative, but also a further acknowledgment that "any business plans prepared by the Company, have been, and continue to be, subject to change and that any projections included in such business plans or otherwise are necessarily speculative in nature. . ."

Plaintiff argues that the court erred in dismissing its claim based upon defendants' breach of their fiduciary duty to, among other things, impart critical information. This claim was properly dismissed because the relationship alleged does not support a finding of a fiduciary relationship. A fiduciary relationship "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation" (*EBC I, Inc. v Goldman, Sachs & Co.* 5 NY3d 11, 19 [2005]). The transactions at their inception were arm's length transactions

between sophisticated commercial parties. The SPA identifies plaintiff as an experienced investor. Defendants did not provide plaintiff with financial advice; nor was a relationship of higher trust created at that time (*see id.* at 19-22). Plaintiff hired its own investment adviser and engineer, seeking their advice about the viability of DuCool's products and whether this was a good investment opportunity. In the absence of a fiduciary relationship between these sophisticated entities, plaintiff cannot maintain a claim for breach of a fiduciary duty, and that claim was properly dismissed. Nor does a breach of fiduciary duty claim exist based upon the parties' status as co-shareholders after the initial investment, because once plaintiff acquired a 49% interest in DuCool, it became the largest single shareholder.

Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, based upon alleged violations of the parties' shareholder agreement and a financing option agreement, was also correctly dismissed. Implicit in every contract is a covenant that in the course of performing the contract, "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract" (*Dalton v Educational Testing Serv.*, 87 NY2d 384,

389 [1995] [internal quotation marks omitted]). The facts alleged describe little more than a breach of these agreements. Given our decision dismissing the complaint, we need not reach the other issues raised by the parties.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered October 29, 2015, which granted defendants' motion to dismiss the complaint, should be affirmed, with costs.

The Decision and Order of this Court entered herein on May 31, 2016 is hereby recalled and vacated (*see* M-3244 decided simultaneously herewith).

All concur.

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

ENTERED: SEPTEMBER 1, 2016

Margaret Saval

DEPUTY CLERK