SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 12, 2019

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Kapnick, Gesmer, Moulton, JJ.

10440 Abdul Brown, et al., Index 23260/15
Plaintiffs-Respondents,

-against-

43-25 Hunter, L.L.C., et al.,
Defendants-Appellants.

_____

Fabiani Cohen & Hall, LLP, New York (Kevin B. Pollak of counsel), for appellants.

Sacks & Sacks, LLP, New York (Scott N. Singer of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered November 8, 2018, which granted plaintiffs' motion for partial summary judgment on the issue of liability on the Labor Law §§ 240(1) and 241(6) claims, unanimously affirmed, without costs.

Plaintiffs established prima facie entitlement to partial summary judgment on the section 240(1) and 241(6) claims. Plaintiff Abdul Brown testified that he slipped and fell from a wobbly wet ladder, and his foreman provided an affidavit that was consistent with plaintiff's account of the fall (*see e.g. Garcia v Church of St. Joseph of the Holy Family of The City of N.Y.*,

146 AD3d 524, 525-526 [1st Dept 2017]; *Rizzo v Hellman Elec. Corp.*, 281 AD2d 258, 258-259 [1st Dept 2001]).

In opposition, defendants failed to raise a triable issue of fact as to whether the accident occurred in the manner described by plaintiff. Defendants submitted the expert affidavits of two medical experts and a biomechanical engineer,[1] each of which contained only speculative, conclusory statements that plaintiff's injuries were inconsistent with a fall to the concrete ground from a height of approximately 20 feet (*see Robinson v NAB Constr. Corp.*, 210 AD2d 86 [1st Dept 1994]; *cf. Aspromonte v Judlau Contr., Inc.*, 162 AD3d 484 [1st Dept 2018]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

[1] The affidavit of the biomechanical engineer was rejected by the motion court because the expert was disclosed for the first time in opposition to plaintiff's summary judgment motion. However, CPLR 3212(b) expressly permits the submission of expert affidavits in connection with a summary judgment motion, even where an expert exchange pursuant to CPLR § 3101(d) was not furnished prior to the affidavit's submission. Therefore, this Court considered the biomechanical engineer's affidavit in its review of the appeal.

Friedman, J.P., Kapnick, Kern, Singh, JJ.

10262 Cara Eckholm,
Plaintiff-Respondent,

Index 805314/14

-against-

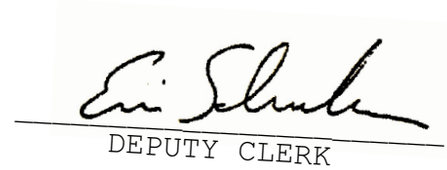
Gil G. Perrone, D.D.S.,
Defendant-Appellant.

Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Eileen A. Rakower, J.), entered on or about September 28, 2018, and from an order of the same court and Justice, entered on or about August 7, 2018,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated November 8, 2019,

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

Richter J.P., Gische, Webber, Gesmer, JJ.

10514 In re 361 Broadway Associates Holdings, LLC, Petitioner-Respondent, Index 156265/18

-against-

Blonder Builders Inc., Respondent-Appellant.

Law Offices of Andrew L. Crabtree, P.C., Melville (Dara M. Hartman of counsel), for appellant.

Rich, Intelisano & Katz, LLP, New York (Daniel E. Katz of counsel), for respondent.

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered November 13, 2018, which granted petitioner's motion to vacate a second mechanic's lien filed by respondent and denied respondent's motion to dismiss the petition, unanimously affirmed, with costs.

Petitioner, the owner of a construction project, entered into a subcontract with respondent pursuant to which respondent was to furnish materials and perform certain construction work. Thereafter, petitioner terminated respondent for cause. Respondent then timely filed a mechanic's lien within eight months after the completion of its work, as required by Lien Law § 10(1). However, that lien listed an incorrect lot number of the subject premises. After the eight month period expired,

respondent filed a second mechanic's lien, listing the correct lot number.

Pursuant to Lien Law § 10(1), a mechanic's lien that is filed more than eight months after the completion of work or furnishing of materials is facially defective, and while section 10(2) allows for the filing of a mechanic's lien to cure the irregularity of an earlier lien, such corrected lien must be filed within the eight-month time period. Accordingly, the second lien that was filed after the applicable period was properly vacated (*see Danica Plumbing & Heating, LLC v 3536 Cambridge Ave., LLC*, 62 AD3d 426, 427 [1st Dept 2009] [Lien Law "allows the filing of successive liens for the same work to cure an irregularity in an earlier lien, as long as the successive lien is filed within the period prescribed in section 10"]; *see also Madison Lexington Venture v Crimmins Contr. Co.*, 159 AD2d 256, 257 [1st Dept 1990], *lv dismissed* 78 NY2d 905 [1991]).

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

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10536 The People of the State of New York, Ind.1835/15
Respondent,

-against-

Dwight Thomas,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered May 19, 2017, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second violent felony offender, to a term of 15 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, the evidence of guilt was overwhelming. In particular, there was ample evidence that defendant swung a small knife at the victim and that this knife was a dangerous instrument because "under the circumstances in which it [was] used, attempted to be used or threatened to be used, [it was] readily capable of causing death or other serious physical injury" (Penal Law § 10.00[13]).

The challenged portions of the People's summation generally constituted fair comment on the evidence, and reasonable inferences to be drawn therefrom, in response to defense arguments, and there was nothing so egregious as to require reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-120 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). To the extent there were any improprieties, any error was harmless in light of the overwhelming evidence of guilt (*see People v Crimmins*, 36 NY2d 230 [1975]).

The court providently exercised its discretion in admitting testimony about the victim's 911 call. This testimony was properly admitted as background to explain police actions leading to the arrest (*see e.g. People v Barnes*, 57 AD3d 289 [1st Dept 2008], *lv denied* 12 NY3d 781 [2009]; *People v Nieves*, 294 AD2d 152, 152-153 [1st Dept 2002], *lv denied* 98 NY2d 700 [2002]). In any event, any error was harmless (*see People v Ludwig*, 24 NY3d 221, 230 [2014]).

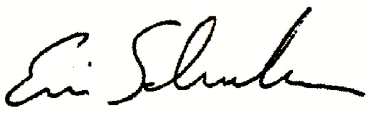
Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10

motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *Strickland v Washington*, 466 US 668 [1984]). Defendant has not shown that counsel's alleged error fell below an objective standard of reasonableness or that it deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

10537 Thomas K. Holmes, Index 150596/18
Plaintiff-Appellant-Respondent,

-against-

The City of New York,
Defendant,

The Gap, Inc.,
Defendant-Respondent-Appellant.

_____

The Layton Law Firm, PLLC, New York (Paul Biedka of counsel), for appellant-respondent.

McAndrew, Conboy & Prisco, LLP, Melville (Mary C. Azzaretto of counsel), for respondent-appellant.

_____

Order, Supreme Court, New York County (Verna L. Saunders, J.), entered December 12, 2018, which, to the extent appealed from as limited by the briefs, granted defendant The Gap, Inc.'s motion to dismiss plaintiff's cause of action against it for negligent infliction of emotional distress, and denied its motion to dismiss plaintiff's causes of action against it for false arrest and malicious prosecution, unanimously modified, on the law, to grant the motion dismissing the causes of action for false arrest and malicious prosecution and otherwise affirmed, without costs.

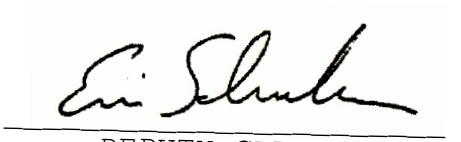
Contrary to plaintiff's argument, extreme and outrageous conduct is an essential element of a cause of action alleging the

negligent infliction of emotional distress (*see Melendez v City of New York*, 171 AD3d 566, 567 [1st Dept], *lv denied* 33 NY3d 914 [2019]). A civilian complaint, seeking police assistance or furnishing information to law enforcement authorities who are then free to exercise their own judgment as to whether an arrest should be made and criminal charge filed, does not provide a basis for false arrest or malicious prosecution (*see Du Chateau v Metro-North Commuter R.R. Co.*, 253 AD2d 128, 131 [1st Dept 1999]).

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

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

10538 In re Shannon E. K.,
Petitioner-Respondent,

-against-

Amir S.,
Respondent-Appellant.

_____

Friedman & Friedman, PLLC, Garden City (Sari Friedman of counsel), for appellant.

Law Office of Wayne F. Crowe, Jr., P.C., Bronx (Wayne F. Crowe, Jr. of counsel), for respondent.

_____

Order, Family Court, New York County (Jonathan H. Shim, J.), entered on or about March 13, 2019, which denied respondent father's objections to an order, same court (Cheryl Weir-Reeves, Support Magistrate), entered on or about April 10, 2018, which, after a hearing, found that respondent was in willful violation of a child support obligation, dismissed his petition for a downward modification of child support and granted petitioner mother's petition for an upward modification of support expenses, unanimously affirmed, without costs.

Since the father failed to raise the issue of termination of his travel credit in his written objections, that contention is unpreserved for appellate review (*see Matter of Best v Hinds*, 113 AD3d 676, 677 [2d Dept 2014]). We decline to review the issue, but as an alternative holding, find that pursuant to both Florida

and New York law, the Support Magistrate properly terminated the travel credit to the father (*Chapoteau v Chapoteau*, 659 So2d 1381, 1384 [Fla 3d DCA 1995]; *see Matter of Yarinsky v Yarinsky*, 36 AD3d 1135, 1138 [3d Dept 2007], *lv denied* 12 NY3d 712 [2009]).

The Family Court also properly accorded deference to the Support Magistrate's credibility determinations, and the record supports the conclusion that the father consented to the child's enrollment in a private school by attending an interview and providing the mother with payments toward the child's tuition (*Matter of Dunung v Singh*, 135 AD3d 606 [1st Dept 2016]).

Although Family Court was required to apply Florida law with respect to the father's downward modification petition, the court's failure to do so was harmless error because application of Florida law or New York law produces the same outcome. Under Florida law, a party moving for modification of child support order has the burden of proving the following: (1) A substantial change in circumstances; (2) the change was not contemplated at the time of the final judgment of dissolution; and (3) the change is sufficient, material, involuntary, and permanent in nature (*Wood v Wood*, 162 So3d 133, 135 [Fla 1st DCA 2014], *rehearing denied* 2015 FLA App LEXIS 3320 [2015]). Moreover, "when the original child support amount is based on an agreement by the parties, there is a heavier burden on the party seeking a

downward modification" (*Maher v Macer*, 96 So2d 1022, 1022 [Fla 4th DCA 2012]). An analysis under New York law yields an identical outcome because a party seeking modification of an order of support has the burden of establishing the existence of a substantial change in circumstances (*O'Brien v McCann*, 249 AD2d 92 [1st Dept 1998]). While a loss of income may be sufficient to modify an order of support in some circumstances, the determination to reduce support "must be based on the petitioner's capacity to generate income, not his current economic status" (*id.* at 93). Here, the court specifically found that the father failed to show that he lost his employment through no fault of his own and further failed to demonstrate diligent efforts to obtain employment commensurate with his qualifications and experience.

With respect to the mother's violation petition, it is clear that New York law applies (Family Ct Act 580-604[c] ["tribunal of this state shall apply the procedures and remedies of this state to enforce current support and collect arrears and interest due on a support order of another state or a foreign country registered in this state"]). The Family Court properly found that the father willfully failed to pay child support and arrears (*see e.g. Nancy R. v Anthony B.*, 121 AD3d 555, 556 [1st Dept 2014]). Contrary to the father's assertions, the fact that he

borrowed money twice from his family to satisfy the child support arrears does not negate the willfulness finding (*see Matter of Sheaf v Sheaf*, 162 AD3d 1152, 1155 [3d Dept 2018]). Based on his failure to substantiate his claims of inability to generate income vis à vis his employment experience and qualifications, and the court's specific finding that he lacked credibility on the subject, the court properly imputed income to him based on his past earnings and granted the upward modification of support expenses.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Gische, Mazzarelli, Moulton, JJ.

10539 Derrick Taylor, Index 305926/13
Plaintiff-Respondent,

-against-

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

The Tactical Team Sgt., etc. et al.,
Defendants.

_____

Zachary W. Carter, Corporation Counsel, New York (Lorenzo Di Silvio of counsel), for appellants.

Sim & DePaola LLP, Bayside (Sang J. Sim of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about January 31, 2019, which denied defendants' motion for summary judgment dismissing plaintiff's state and federal claims of malicious prosecution, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established prima facie entitlement to judgment as a matter of law. The record shows that defendants' observations provided probable cause for plaintiff's arrest, giving them a complete defense to the claims of malicious prosecution notwithstanding the subsequent dismissal of the criminal charges (*see De Lourdes Torres v Jones*, 26 NY3d 742,

759-761 [2016]; *Arzeno v Mack*, 39 AD3d 341 [1st Dept 2007]; *Batista v City of New York*, 15 AD3d 304 [1st Dept 2005]). Plaintiff also failed to establish actual malice with respect to the prosecution (*see Jenkins v City of New York*, 2 AD3d 291 [1st Dept 2003]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Gische J.P., Mazzarelli, Gesmer, Moulton, JJ.

10540-
10540A-
10540B Tokunbo Onilude,
Plaintiff-Respondent,

-against-

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

Index 309622/09

_____

Zachary W. Carter, Corporation Counsel, New York (Diana Lawless of counsel), for appellants.

Sivin & Miller, LLP, New York (Edward Sivin of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about April 6, 2018, upon a jury verdict, in favor of plaintiff, and judgment, same court and Justice, entered on or about January 14, 2019, awarding plaintiff attorneys' fees, unanimously reversed, on the law and the facts, the judgments vacated, and the matter remanded for a new trial before a different judge. Appeal from order, same court and Justice, entered on or about January 9, 2019, unanimously dismissed, without costs, as subsumed in the appeal from the April 6, 2018 judgment.

The trial court improvidently exercised its discretion in precluding testimony from the witness who identified plaintiff to the police as an individual she had seen fleeing the scene of a

crime. Defendants satisfied their discovery obligation by providing the witness's last known address and telephone number during discovery, more than four years before trial. Thus, there could have been no surprise or prejudice warranting the preclusion (*see Castracane v Campbell*, 300 AD2d 704, 706 [3d Dept 2002]; *see also Palomo v 175th St. Realty Corp.*, 101 AD3d 579 [1st Dept 2012]). While the witness subsequently moved, she declined to disclose her new address to any parties to the suit, a factor defendants could not control (*see Todres v W7879, LLC*, 137 AD3d 597 [1st Dept 2016], *lv denied* 28 NY3d 910 [2016]). As defendants did not know her new address, they had no obligation under CPLR 3101(h). Nor should defendants have been sanctioned for the fact that the witness did not wish to discuss the case with plaintiff's counsel when counsel called her. Notably, plaintiff's counsel did not attempt to contact the witness until two months before trial and did not attempt to obtain a nonparty deposition of the witness during discovery. Defendant offered to have the witness further confirm these facts, under oath and outside the presence of the jury. Under these circumstances, the trial court improvidently exercised its discretion in ordering a hearing at which defendants' trial attorney would be subject to questioning by plaintiff's trial attorney, and precluding the witness's testimony when defense counsel declined to participate

in such a hearing. Given that the witness would have offered highly relevant and non-cumulative trial testimony, the error was not harmless (*see Cotter v Mercedes-Benz Manhattan*, 108 AD2d 173, 179 [1st Dept 1985]; *Kajoshaj v Greenspan*, 88 AD2d 538 [1st Dept 1982]).

It was error to include on the special verdict sheet a questions as to a wrongful stop (*Terry v Ohio*, 392 US 1 [1968]), because there was no charge given instructing the jury on the legal standard that must be applied in resolving those claims. The jury was never told that a stop is improper if the detaining officer does not have "reasonable suspicion" that the detainee committed a crime, which is less demanding than the "probable cause" standard applicable to the malicious prosecution claims (see *Grace v McVeigh* 873 F3d 162 [2nd Cir 2017], see *Agront v City of New York*, 294 AD2d 189 [1st Dept 2002]). That the jury sent a note requesting clarification on the question indicated its awareness of the lack of guidance (*see Srikishun v Edye*, 137 AD3d 1 [1st Dept 2016]). As the special verdict sheet provided for a single lump sum award for damages arising from all claims, except punitive damages, the error was not harmless (*see Booth v Penney Co.*, 169 AD2d 663 [1st Dept 1991]). It was error to allow testimony and commentary throughout the trial on plaintiff's innocence, particularly by plaintiff's criminal defense attorney,

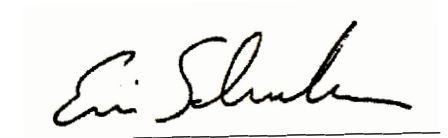
whose extensive testimony was prejudicial.

Defendants correctly point out that the question of guilt or innocence is not relevant to a claim of false arrest or malicious prosecution and that the relevant inquiry is whether there was probable cause (*see Cheeks v City of New York*, 123 AD3d 532, 544-545 [1st Dept 2014]). While the trial court's failure to address this would have been harmless error on its own, the cumulative effect of this error and the other errors requires reversal.

Given our determination that the judgment must be vacated and a new trial held, we do not reach the issue of whether the damages were excessive.

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

10541 The People of the State of New York, Ind. 110/16
Respondent,

-against-

Edward Dawkins,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Brittany N. Francis of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Amanda Katherine Regan of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel FitzGerald, J.), rendered April 24, 2017,

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

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

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

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

10542-
10542A The People of the State of New York, Ind. 2852/16
3039/16
Respondent,

-against-

Dwayne Glover also known as
Dwayane Glover,
Defendant-Appellant.

Janet E. Sabel, The Legal Aid Society, New York (Paul Wiener of counsel), for appellant.

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

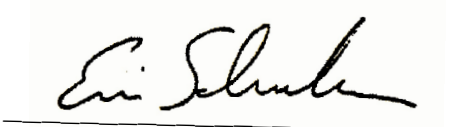
An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Maxwell Wiley, J. at plea; Michael Sonberg, J. at sentencing), rendered April 26, 2017,

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

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

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

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

10544 Thomas Costanzo, et al., Index 150904/17
Plaintiffs-Respondents,

-against-

The Joseph Rosen Foundation, Inc.,
Defendant-Appellant.

_____

Belkin Burden Wenig & Goldman, LLP, New York (Lisa Gallaudet of counsel), for appellant.

David E. Frazer, New York, for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered September 24, 2018, which denied defendant's motion for summary judgment declaring that the subject apartment is not rent stabilized, and granted plaintiffs' cross motion for summary judgment declaring that the subject residential unit is rent stabilized, summary judgment as to liability on their overcharge claim, and summary judgment dismissing defendant's counterclaim for attorneys' fees, and declared in plaintiffs' favor, unanimously affirmed, without costs.

In or about January 1983, defendant's predecessor registered the building it owned as a deregulated interim multiple dwelling (IMD) with the New York City Loft Board under article 7C of the Multiple Dwelling Law (MDL) (the Loft Law). In 1997, defendant purchased the loft rights to the subject unit from plaintiffs'

predecessor in interest under Multiple Dwelling Law § 286(12), and rented the unit as a residential space to plaintiffs at a market rate under a stipulation of settlement resolving the nonpayment proceeding against the prior tenant. Among other things, the stipulation of settlement purported to waive plaintiffs' right to the protections of the Loft Law or the rent stabilization laws. Thereafter, in a series of amendments to the stipulation, plaintiffs extended their right to occupy the unit through 2017, "reconfirming" in each amendment their purported waiver of the protections of the Loft Law or the rent stabilization laws. Following defendant's refusal to renew beyond 2017, plaintiffs commenced this action for a declaration that the unit was subject to rent stabilization and to recover any overcharges resulting from the owner's failure to treat the unit as rent stabilized.

Because the apartment is located in a pre-1974 building containing six or more residential units, and is covered by the Loft Law, it reverted to rent stabilization after defendant purchased the prior occupant's rights under Multiple Dwelling Law § 286(12) (*see Acevedo v Piano Bldg. LLC*, 70 AD3d 124, 129 [1st Dept 2009], *appeal withdrawn* 14 NY3d 884 [2010]). Contrary to defendant's contention, when the building was registered as an IMD, it was deemed under Zoning Resolution 42-133 residential as

of right, and therefore capable of being legalized and subject to rent stabilization (*see id.* at 130-131). In any event, the building would have reverted to rent regulated status because it contains six or more units (*see* MDL § 286[6]). Thus, the exemption from rent stabilization found in Rent Stabilization Code (9 NYCRR) § 2520.11(q) for housing accommodations that would otherwise be subject to rent regulation "solely by reason of the provisions of article 7-C of the MDL," but are exempted pursuant to MDL § 286(6) and (12), is not applicable here. Contrary to defendant's further contention, the court did not de facto vacate the stipulation of settlement; rather, as this Court has held repeatedly, parties may not contract around the rent stabilization laws (*see e.g. Drucker v Mauro*, 30 AD3d 37, 41 [1st Dept 2006], *appeal dismissed* 7 NY3d 844 [2006]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10546 In re Andy Scantlebury, Index 101279/17
Petitioner,

-against-

New York City Police
Department, et al.,
Respondents.

_____

Levine & Gilbert, New York (Harvey A. Levine of counsel), for petitioner.

Zachary W. Carter, Corporation Counsel, New York (Aaron M. Bloom of counsel), for respondents.

_____

Determination of respondents, dated June 9, 2017, which terminated petitioner's employment as a police officer, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Nancy M. Bannon, J.], entered September 21, 2018), dismissed, without costs.

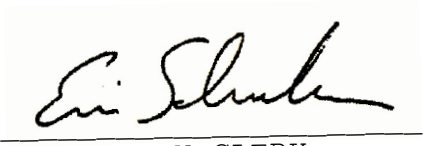
Respondents' determination is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). The victim testified, inter alia, that petitioner held her in a hotel room against her will, beat her, threatened her with his firearm, and damaged her property. Such testimony was corroborated by photographic evidence and injuries that petitioner sustained to his hands.

There exists no basis to disturb the credibility determinations of the Assistant Deputy Commissioner of Trials (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Under the circumstances presented, the penalty of termination does not shock our sense of fairness (*see e.g. Matter of Amador v Kelly*, 109 AD3d 762 [1st Dept 2013]; *Matter of Reyes v Bratton*, 235 AD2d 213 [1st Dept 1997]).

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

10547 Donna Rizzo, Index 304337/13
Plaintiff-Respondent,

-against-

The City of New York,
Defendant,

Trevor Rhoden, et al.,
Defendants-Appellants.

_____

Burke, Conway & Dillon, White Plains (Ronese R. Brooks of counsel), for appellants.

Buttafuoco & Associates, PLLC, Woodbury (Scott Szczesny of counsel), for respondent.

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Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about June 8, 2018, which denied the motion of defendants Trevor Rhoden and Valerie T. Rhoden for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

Defendants established prima facie entitlement to judgment as matter of law in this action where plaintiff was injured when she tripped and fell on the sidewalk in front of defendants' residence. Defendants submitted evidence showing that they were exempt from the statutory liability imposed by Administrative Code of City of New York § 7-210(b) because their property was an owner-occupied, two-family residence and there was no evidence

showing that they made special use of the area (*see Hernandez v Ortiz*, 165 AD3d 559 [1st Dept 2018]). Defendants also made a prima facie showing that they did not cause or create the alleged defect by submitting their deposition testimony denying that they attempted to repair the area before the accident and the deposition testimony of codefendant City of New York's witness that the applicable records for two years prior to and including the accident date for the property were searched and no permits for sidewalk repairs were found.

In opposition, plaintiff raised a triable issue of fact. The photographic evidence showed that there was a patched area on the portion of the sidewalk where she allegedly fell and there was evidence that the City did not undertake any repairs until after plaintiff's accident (*see Gilmartin v City of New York*, 81 AD3d 411 [1st Dept 2011]). Defendants' denials that they repaired the sidewalk before the accident presented a credibility

issue that could not be resolved on a motion for summary judgment.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10548 Seneca Insurance Company, Inc. as subrogee of SI Realty, LLC, Plaintiff-Appellant, Index 159603/15

-against-

JFR Construction Corp., Defendant-Respondent.

Kahn & Goldberg, LLP, New York (Eric Goldberg of counsel), for appellant.

Mauro Lilling Naparty LLP, Woodbury (Anthony F. Destefano of counsel), for respondent.

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered July 5, 2018, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Plaintiff brought this subrogation action arising from property damage that allegedly resulted from the freezing and bursting of sprinkler pipes in the attics of two properties owned by its insured, nonparty SI Realty, LLC. Defendant construction subcontractor installed the sprinkler heads in the properties.

Defendant established prima facie that it did not owe any duty to SI Realty and that any duty it might have owed to SI was not breached. Defendant's sole contracts for the sprinkler work were the subcontracts that it entered into with nonparty Luna

Development, the general contractor, and these subcontracts expressly provided that defendant had no duty to protect the pipes from freezing.

In opposition, plaintiff failed to raise an issue of fact. It contends that defendant failed to comply with a note in the plans that required sprinklers to be protected against freezing and injury as per New York City Building Code (Administrative Code of City of NY) § 27-956. However, as indicated, defendant's contracts expressly disclaimed a duty to protect the sprinklers against freezing.

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

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10549 Wells Fargo Bank, N.A., Index 850065/13
Plaintiff-Respondent,

-against-

Judith Grace Biedermann also known as
Judith Biedermann, et al.,
Defendants-Appellants,

The Board of Managers of L'Ecole, et al.,
Defendants.

_____

Joseph A. Altman, P.C., Bronx (Joseph A. Altman of counsel), for appellants.

Reed Smith LLP, New York (Kerren B. Zinner of counsel), for respondent.

_____

Order, Supreme Court, New York County (Judith N. McMahon, J.), entered March 28, 2018, which denied defendants Judith Biedermann and Denise Biderman's motion to reject the report of the Special Referee, dated May 11, 2017, and granted plaintiff's cross motion to confirm the report, unanimously reversed, on the law, without costs, defendants' motion granted, plaintiff's motion denied, and the complaint dismissed without prejudice.

The court erred in confirming the Referee's report, which found that the notices required by RPAPL 1304 were correctly mailed. RPAPL 1304 requires that notice be sent by the lender, assignee or mortgage loan servicer to the borrower at the address of the mortgaged property and any other address of record at

least 90 days before commencement of a mortgage foreclosure action. Here, although the mortgaged property was a particular unit in a 275-unit condominium building, the notice mailing did not include that unit number. It was addressed only to the building. Under these circumstances, the mailing did not comply with the requirements of RPAPL 1304. The complaint against defendants should be dismissed without prejudice *(Nationstar Mtge., LLC v Cogen*, 159 AD3d 428, 429 [1st Dept 2018]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10550 The People of the State of New York, Respondent, Ind. 1234/16 2612/16

-against-

Mark Williams, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Robert M. Stolz, J. at consolidation motion; Abraham L. Clott, J. at severance motion, jury trial and sentencing), rendered May 16, 2017, convicting defendant of robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of nine years, unanimously affirmed.

Defendant was not deprived of a fair trial by the fact that he was tried jointly with his codefendant. Defendant's arguments in this regard are similar to arguments this Court rejected on the codefendant's appeal (*People v Hilton*, 166 AD3d 567 [1st Dept 2018], *lv denied* 32 NY3d 1173 [2019]), and we find no basis to reach a different result.

Defendant's generalized objections failed to preserve his challenge to police testimony about the identification made by

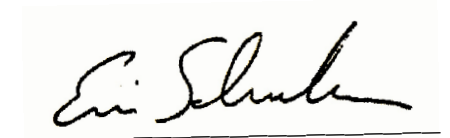
the victim, and we decline to review it in the interest of justice. As an alternative holding, we find that this testimony was properly admitted as background to explain police actions focusing on defendant leading to the arrest (*see People v Nieves*, 294 AD2d 152, 152-153 [1st Dept 2002], *lv denied* 98 NY2d 700 [2002]). In any event, any error was harmless (*see People v Ludwig*, 24 NY3d 221, 230 [2014]).

The trial court providently exercised its discretion in admitting photographs taken of defendant after his arrest on this case. The photographs were relevant to demonstrate that defendant was wearing clothing similar to that described by the victim (*see People v Washington*, 259 AD2d 365 [1st Dept 1999], *lv denied* 93 NY2d 1006 [1999]). In any event, any error in admitting the photographs was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

10551 The People of the State of New York, Respondent, Ind. 2998/16

-against-

Sharon Lashley,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Michael D. Tarbutton of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at plea, Mark Dwyer, J. at sentencing), rendered April 10, 2018, as amended June 12, 2018, convicting defendant of criminal possession of a forged instrument in the second degree, and sentencing her, as a second felony offender, to a term of 3½ to 7 years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and sentence, and remanding for resentencing, including the filing by the People of a proper predicate felony statement, and otherwise affirmed.

Defendant's challenge to the facial sufficiency of the predicate felony offender statement does not require preservation (*see People v Soto*, 138 AD3d 533 [1st Dept 2016], *lv denied* 28 NY3d 937 [2016]).

Nothing in the record demonstrates a sufficient tolling period to support the predicate felony statement submitted by the People. Therefore, the People's failure to include this information in the predicate felony statement cannot be deemed harmless (*see id.* at 534).

Because defendant is entitled to a new sentencing proceeding, we do not reach her remaining contention regarding her sentence.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10552-
10552A JTS Trading Limited,
Plaintiff-Appellant,

-against-

Afin Asesores, et al.,
Defendants-Respondents.

Index 653239/15

Garvey Schubert Barer, P.C., New York (Andrew J. Goodman of counsel), for appellant.

Willkie Farr & Gallagher LLP, New York (Jeffrey B. Korn of counsel), for respondents.

Judgment, Supreme Court, New York County (Saliann Scarpulla, J.), entered October 4, 2018, dismissing the complaint, pursuant to an order, same court and Justice, entered September 25, 2018, which granted defendants' motion to dismiss the complaint on the ground of forum non conveniens, unanimously affirmed, without costs. Appeal from aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

In determining whether an action should be dismissed for forum non conveniens, plaintiff's choice of forum is entitled to strong deference (*Islamic Republic of Iran v Pahlavi*, 62 NY2d 474 [1984], *cert denied* 469 US 1108 [1985]). Among the factors to consider are the residence of the parties, the location of evidence and witnesses, the burden on the New York courts, where

the transaction giving rise to the cause of action took place, the applicability of foreign law, and the connection of the action with New York (*see id.* at 479).

Here, the parties are from Hong Kong and Mexico. The agreement allegedly breached was executed in Mexico, is governed by Mexican law, and was allegedly breached in Mexico. Only a single, peripheral witness is present in New York. Accordingly, despite some initial contacts with one defendant's New York representative, the action was properly dismissed (*see e.g. Kuwaiti Eng'g Group v Consortium of Intl. Consultants, LLC*, 50 AD3d 599 [1st Dept 2008]; *compare American BankNote Corp. v Daniele*, 45 AD3d 338, 339 [1st Dept 2007]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10553- Index 653961/16
10554-
10554A In re Capital Enterprises Co.,
Petitioner-Appellant,

-against-

Alvin Dworman,
Respondent-Respondent.

_____

Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Mintz, Levin, Cohn, Ferris, Glovsky & Popeo P.C., New York (Christopher J. Sullivan of counsel), for respondent.

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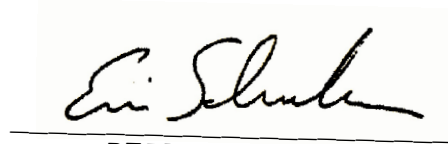
Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered May 14, 2019, May 17, 2019, and July 19, 2019, which denied petitioner's motions to vacate certain orders issued by an arbitrator, unanimously reversed, on the law, with costs, and the orders vacated.

The arbitrator's orders were issued in connection with the sale process that followed the issuance of a partial final arbitral award (*see Matter of Capital Enters. Co. v Dworman*, 173 AD3d 466 [1st Dept 2019]). However, the orders are interlocutory and therefore not subject to judicial review (*see Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276, 281 [1977] ["before the court may ... even entertain a suit seeking court intervention, there must be an 'award' within the meaning of the

statute"]; CPLR article 75). After the sale process has been concluded, when the properties have been sold and a final accounting rendered, petitioner may seek to vacate the final award (*see Avon Prods. v Solow*, 150 AD2d 236, 238-239 [1st Dept 1989]).

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

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

10555N Mercedes Rodriguez, Index 303136/15
Plaintiff-Respondent,

-against-

Amy Sharma, et al.,
Defendants-Appellants,

Oneida Reyes,
Defendant.

- - - - -

[And a Third-Party Action]

_____

James G. Bilello & Associates, Hicksville (Susan J. Mitola of counsel), for appellants.

Helen Dalton & Associates, P.C., Kew Gardens (Thomas W. Reimel of counsel), for respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about December 13, 2018, which, to the extent it granted plaintiff Mercedes Rodriguez's motion to renew and reargue on default, and upon reargument, vacated its September 28, 2017, order, and denied the Sharma defendants' motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the Sharma defendants' motion granted. The Clerk is directed to enter judgment dismissing the complaint as against the Sharma defendants.

Plaintiff properly moved for leave to reargue pursuant to

CPLR 2221(a), as the motion court engaged in a merits determination by considering the parties' deposition testimony (*see Massey v City of New York*, 249 AD2d 245 [1st Dept 1998]). However, upon granting reargument, the motion court should have adhered to its original determination granting Sharma defendants' motion for summary judgment.

It is well established that a rear-end collision with a stopped vehicle creates a prima facie case of negligence on the part of the operator of the moving vehicle unless the operator presents evidence sufficient to rebut the inference of negligence (*see De La Cruz v Ock Wee Leong*, 16 AD3d 199 [2005]). A sudden stop of the front vehicle is a non-negligent explanation for a rear-end collision (*see Barry v City of New York*, 283 AD2d 300 [2001]). Here, defendant Amy Sharma's unrefuted testimony submitted in support of defendants' motion for summary judgment indicated that, prior to being rear-ended, her vehicle was stopped at the time, in stop and go traffic conditions, due to a car stopped in front of her. Accordingly, there are no triable

issues, and summary judgment should have been granted dismissing the matter as against the Sharma defendants.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

10556N- Index 100452/18
10556NA Moustapha Magassouba,
Plaintiff-Appellant,

-against-

Cascione, Purcigliotti, et al.,
Defendants-Respondents.

_____

Moustapha Magassouba, appellant pro se.

Cascione, Purcigliotti & Galluzzi, P.C., New York (Kelly L. Murtha of counsel), for respondents.

_____

Order, Supreme Court, New York County (Shlomo Hagler, J.), entered December 14, 2018, which granted defendants' motion to dismiss the complaint, unanimously affirmed. Order, same court and Justice, entered April 4, 2019, to the extent it denied plaintiff's motion for leave to renew and, sub silentio, denied his leave to replead, unanimously affirmed, and the appeal therefrom otherwise dismissed, without costs, as taken from a nonappealable order.

This action alleging legal malpractice was correctly dismissed because plaintiff could not show that, but for defendants' negligence, he would have prevailed in the underlying action alleging false arrest, wrongful imprisonment, and the deprivation of rights under 42 USC § 1983 (*see Brooks v Lewin*, 21 AD3d 731, 734 [1st Dept 2005], *lv denied* 6 NY3d 713 [2006]).

Plaintiff could not have prevailed in that action because the dismissing court found that there was probable cause for his arrest, and probable cause is a complete defense to the claims plaintiff asserted (*Marrero v City of New York*, 33 AD3d 556, 557 [1st Dept 2006]; *Brooks v Whiteford*, 384 F Supp 3d 365, 371 [WD NY 2019]). Plaintiff's proposed amended malpractice complaint, which, in essence, restates the original allegations, does not rectify the deficiency.

Plaintiff's argument that defendants failed to timely file the underlying action is unavailing because, even timely, the action would have been dismissed on the substantive ground of probable cause. His argument that defendants filed the underlying action in the wrong courthouse is unavailing because the action was dismissed against the Allegheny County District Attorney on grounds of personal jurisdiction, not subject matter jurisdiction.

To the extent plaintiff challenges the threshold determination of probable cause, including the contention that the court was biased against him, that determination was made in a June 2015 order that is not on appeal and is therefore not properly before us.

The denial of reargument is not appealable (*McCoy v Metropolitan Transp. Auth.*, 75 AD3d 428, 430 [1st Dept 2010]).

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

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10557 The People of the State of New York, Ind. 86/17
Respondent,

-against-

Ricardo Castang,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Ben A. Schatz of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Kevin McGrath, J.), rendered October 5, 2017,

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

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

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

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

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10558 In re Alexander Tenenbein, Index 101588/15
Petitioner-Appellant,

-against-

New York City Department
of Education, et al.,
Respondents-Respondents,

City of New York,
Respondent.

_____

The Law Offices of Richard J. Washington, New York (Richard J. Washington of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Lucy Billings, J.), entered February 15, 2018, to the extent appealed from as limited by the briefs, denying the petition to annul the determination of respondent Department of Education, dated April 27, 2015, which terminated petitioner's probationary employment, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Petitioner failed to show that his dismissal was in bad faith, as the record demonstrates a history of poor work performance, including tardiness to meetings, insubordination, and ineffective teaching methods (*see Matter of Almonte v Department of Educ. of City of N.Y.*, 132 AD3d 505 [1st Dept

2015]; *Matter of Soto v Koehler*, 171 AD2d 567, 568 [1st Dept 1991], *lv denied* 78 NY2d 855 [1991]). There is no support for petitioner's argument that the unfavorable classroom observations of him were "subjective and meritless," and his claims regarding Civil Service Law § 75-b fail because respondent demonstrated an independent basis supporting the discontinuance of petitioner's probationary employment (*see Roens v New York City Tr. Auth.*, 202 AD2d 274, 275 [1st Dept 1994]).

Petitioner further fails to show that any conduct or comments by respondent's staff members were based on his alleged learning disability. The comments made by staff members did not reference his disability (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 308 [2004]). Since petitioner failed to state a claim under the New York City Human Rights Law, his discrimination claims also fail under the federal and state anti-discrimination laws (*see Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 46 [1st Dept 2011], *lv denied* 18 NY3d 811 [2012]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10559 In re Catherine L.,
Petitioner-Appellant,

-against-

Jeffrey S.,
Respondent-Respondent.

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

The Law Offices of Salihah R. Denman, PLLC, Harrison (Salihah R. Denman of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc, New York (Shirim Nothenberg of counsel), attorney for the child.

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Order, Family Court, New York County (Clark V. Richardson, J.), entered on or about July 26, 2018, which, to the extent appealed from as limited by the briefs, after a hearing, granted petitioner father's petition to relocate with the parties' child to Georgia, unanimously modified, on the law, to the extent of remanding the matter for further proceedings to determine an appropriate visitation schedule, and otherwise affirmed, without costs.

The court considered all of the relevant factors and properly concluded that the proposed relocation would serve the child's best interests (*see Matter of Tropea v Tropea*, 87 NY2d 727, 739-741 [1996]). The father has been the child's primary

caregiver for the past four years, and the father showed that a move to Georgia would improve the child's quality of life (*see Matter of Kevin McK. v Elizabeth A.E.*, 111 AD3d 124, 131 [1st Dept 2013]; *Matter of Melissa Marie G. v John Christopher W.*, 73 AD3d 658 [1st Dept 2010]]. The father has also demonstrated a commitment to fostering a relationship between the child and the mother (*see Sonbuchner v Sonbuchner*, 96 AD3d 566, 567 [1st Dept 2012]).

However, Family Court erred in failing to determine an appropriate visitation plan. Given the parties' historic difficulty communicating with each other and the mother's history of mental illness that led to the child's removal from her care and which was untreated at the time of trial, it was unrealistic to expect the parties to cooperate in effectuating appropriate visitation (*see Spencer v Killoran*, 147 AD3d 862, 863 [2d Dept 2017]). Moreover, Family Court's order essentially delegated the

court's authority to determine visitation to the father, which it may not do (*In re Izrael J.*, 149 AD3d 630 [1st Dept 2017]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

CORRECTED ORDER - DECEMBER 16, 2019

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10560 Global Liberty Insurance Co. of New York,
Plaintiff-Appellant,

-against-

Acupuncture Now, P.C., et al.,
Defendants-Respondents.

Index **650910/18**

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The Law Office of Jason Tenenbaum, P.C., Garden City (Talia Beard of counsel), for appellant.

The Rybak Firm, PLLC, Brooklyn (Karina Barska of counsel), for respondents.

_____

Order, Supreme Court, New York County (Tanya R. Kennedy, J.), entered on or about December 5, 2018, which, to the extent appealed from, denied plaintiffs' motion for summary judgment on their claims seeking a declaration that licensed acupuncturists are entitled to payment of no-fault insurance benefits only as set forth in the workers' compensation fee schedule for chiropractors, and an order enjoining defendants from claiming payment in litigation or arbitration under the fee schedule for physicians, unanimously affirmed, without costs.

In this action, plaintiff no-fault insurers seek to resolve, as a matter of law, the question of the fee schedule applicable to reimbursement of licensed acupuncturists who provide services to eligible individuals injured in motor vehicle accidents. Under the Insurance Law, no-fault coverage for necessary medical

expenses "shall not exceed the charges permissible under the schedules prepared and established by the chairman of the workers' compensation board for industrial accidents" except under "unique circumstances" (Insurance Law § 5108[a]). Under applicable regulations, where a service is reimbursable but the superintendent has not adopted or established a fee schedule applicable to the provider, then the permissible charge for such service shall be the prevailing fee in the geographic location of the provider subject to review by the insurer for consistency with the charges permissible for similar procedures under schedules already adopted or established (11 NYCRR 68.5[b]; *see Forrest Chen Acupuncture Servs., P.C. v GEICO Ins. Co.*, 54 AD3d 996, 997 [2d Dept 2008], *affg* 15 Misc 3d 137[A], 2007 NY Slip Op 50874[U] [App Term 2d Dept 2007]). The superintendent has not adopted a fee schedule applicable to licensed acupuncturists, requiring consideration of "charges permissible for similar procedures under schedules already adopted or established" (11 NYCRR 68.5[b]).[1]

Plaintiffs did not proffer admissible evidence sufficient to make a prima facie showing of entitlement to judgment on the issue as a matter of law (*see Winegrad v New York Univ. Med.*

[1]We join the recommendation of the Appellate Term, Second Department, that the Superintendent of Insurance consider adopting a fee schedule including licensed acupuncturists to resolve the issue

Ctr., 64 NY2d 851, 853 [1985]). Plaintiffs rely on a 2004 informal opinion letter of the former Insurance Department, but that letter did not resolve the issue. It allows insurers to pay "the rates established for doctors and chiropractors," instead of a higher "prevailing fee in the geographic location of the provider," so long as there is a review "for consistency with the charges permissible for similar procedures" under either fee schedule (Ops Gen Counsel NY Ins Dept No. 04-10-03; *see* 11 NYCRR 68.5[b]). The opinion letter "did not give any guidance as to which particular fee schedule should be applied to a licensed acupuncturist in any particular instance, although the Department was aware" that "the fee schedules for acupuncture services performed by chiropractors are lower than the fee schedules for such services performed by physicians" (*Great Wall Acupuncture v GEICO Gen. Ins. Co.*, 16 Misc 3d 23, 28 [App Term 2d Dept 2007]; *see Andryeyeva v New York Health Care, Inc.*, 33 NY3d 152, 174 [2019] [requiring judicial deference to an "agency's rational interpretation of its own regulations"]). While courts have held that "an insurer *may* use the workers' compensation fee schedule for acupuncture services performed by chiropractors to determine the amount which a licensed acupuncturist is entitled to receive" (*Great Wall Acupuncture, P.C. v Geico Ins. Co.*, 26 Misc 3d 23, 24 [App Term 2d Dept 2009] [emphasis added]; *see also Akita Med. Acupuncture, P.C. v Clarendon Ins. Co.*, 41 Misc 3d 134[A], 2013

NY Slip Op 51860[U] [App Term 1st Dept 2013]), such holdings do not foreclose the use of the physician fee schedule in all cases (*see e.g. Okslen Acupuncture P.C. v Travco Ins. Co.*, 44 Misc 3d 135[A], 2014 NY Slip Op 51209[U], at *1 [App Term 1st Dept 2014]; *Raz Acupuncture, P.C. v AIG Indem. Ins. Co.*, 28 Misc3d 127[A], 2010 NY Slip Op 51177[U], at *2 [App Term 2d Dept 2010]).

Further, plaintiffs did not "proffer sufficient evidence to establish as a matter of law that the claims were improperly billed or were in excess of the amount permitted by the fee schedule" (*Easy Care Acupuncture, P.C. v A. Cent. Ins. Co.*, 48 Misc 3d 129[A], 2015 NY Slip Op 50973[U], at *1 [App Term 1st Dept 2015]).

In any event, defendants raised an issue of fact as to whether the physician fee schedule should apply. They rely on the former Insurance Department's regulatory impact statement accompanying its proposed 2010 rule amendment, by which it sought to clarify "inconsistent" court rulings, that "acupuncture treatments are the primary service performed and billed by licensed acupuncturists" and "such treatments merit reimbursement at the same rate that medical doctors receive for comparable services" (NY State Register, Vol. XXXII, Issue 29, at 12-13 [July 21, 2010]). They also proffered, among other things, an affidavit from a licensed acupuncturist who averred that he was consistently reimbursed by workers' compensation insurers at the

physician rates, for over 15 years, which plaintiffs did not rebut.

Further, Supreme Court did not err by finding the motion for summary judgment on the issue of overbilling to be premature prior to discovery (*see American Tr. Ins. Co. v Jaga Med. Servs., P.C.*, 128 AD3d 441, 441 [1st Dept 2015]; *see also* CPLR 3212[f]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10561-
10561A Duanyu Lin, et al.,
Plaintiffs-Appellants,

-against-

Yi Xie, et al.,
Defendants-Respondents.

Index 805473/16

_____

Pollack, Pollack, Isaac & DeCicco, LLP, New York (Brian J. Isaac of counsel), for appellants.

Marulli, Lindenbaum & Tomaszewski, LLP, New York (John J. Tomaszewski of counsel), for Yi Xie and Xie Yi Medical Office, P.C., respondents.

Harris Beach PLLC, New York (Svetlana K. Ivy of counsel), for Michael Liou, Jennifer A. Chen and Chinatown Cardiology P.C., respondents.

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Orders, Supreme Court, New York County (Eileen A. Rakower, J.), entered May 8, 2019, which granted the motions of defendants Yi Xie and Xie Yi Medical Office, P.C. (neurology defendants), and defendants Michael Liou, Jennifer A. Chen, and Chinatown Cardiology P.C. (cardiology defendants), for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions denied.

Plaintiff Duanyu Lin (the patient) suffered a stroke of unknown origin while abroad. Upon returning to New York, she was referred by her primary care physician to defendant Dr. Xie, a neurologist, who performed imaging studies to confirm that she

had suffered a stroke, and then referred her to the cardiology defendants on an urgent basis to rule out a cardiac origin. Two weeks after her first appointment with the cardiology defendants, the patient suffered a severe recurrent stroke, underwent a trans-esophageal echocardiogram (TEE) at the hospital that revealed a likely thrombus on the left atrial wall of her heart as the cause, and was placed on anticoagulation therapy. The TEE also revealed a likely patent foramen ovale.

Plaintiffs allege that defendants were negligent for scheduling a TEE, the definitive diagnostic tool to detect the presence of atrial clots, more than two weeks after the patient's initial stroke was confirmed and she was referred to the cardiology defendants. Plaintiffs allege that defendants should have scheduled the TEE to take place within 48 hours, or, alternatively, placed the patient on anticoagulants as a prophylactic measure.

The expert affidavit submitted by plaintiff raises an issue of fact whether the neurology defendants retained a duty to ensure that the patient received a timely TEE insofar as Dr. Xie referred her to the cardiology defendants as part of his overall neurological assessment, and he continued to manage her condition throughout. Under these circumstances, questions exist whether defendants were engaged in "joint action in diagnosis or

treatment" so as to make it appropriate to impose liability on one for the negligence of the other (*Graddy v New York Med. Coll.*, 19 AD2d 426, 429 [1st Dept 1963]; *see Brown v Speaker*, 33 AD3d 446 [1st Dept 2006]).

Defendants established prima facie that they did not depart from good and accepted medical practice. Defendants submitted, inter alia, the patient's medical records, deposition testimony, and the affirmations of medical experts, demonstrating that they did not deviate from good and accepted medical practice in their diagnosis and treatment of the patient by ordering or performing all of the appropriate tests in a timely manner based on her clinical picture (*see Anyie B. v Bronx Lebanon Hosp.*, 128 AD3d 1, 3 [1st Dept 2015]).

In opposition, plaintiffs raised a triable issue of fact through their expert affirmations. The opinions of plaintiffs' experts conflict with the opinions of defendants' experts as to the appropriate time frame in which defendants should have performed the TEE given the high risk of recurrent stroke and Dr. Xie's testimony that he suspected a cardiac embolism was the cause of the patient's initial stroke. Defendants do not dispute that had the TEE been performed earlier, her doctors would have become aware of her likely thrombus and patent foramen ovale, both linked with cardioembolic strokes, and the patient would

have been started on anticoagulation therapy, which would have likely prevented her recurrent stroke (*see Cruz v St. Barnabas Hosp.*, 50 AD3d 382 [1st Dept 2008]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10562 The People of the State of New York, Ind. 976/16
Respondent,

-against-

Gabriel Camacho,
Defendant-Appellant.

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Christina Swarns, Office of the Appellate Defender, New York (Margaret E. Knight of counsel), and Debevoise & Plimpton LLP, New York (Matthew Specht of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Julia P. Cohen of counsel), for respondent.

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Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered June 29, 2017, as amended October 20, 2017, convicting defendant, after a jury trial, of robbery in the third degree, grand larceny in the fourth degree and petit larceny, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years, unanimously modified, on the law, to the extent of vacating the robbery conviction and remanding for a new trial on that charge, and vacating the grand larceny conviction and dismissing that charge, and otherwise affirmed.

Defendant was deprived of effective assistance of counsel when his attorney failed to make a timely request for submission of petit larceny as a lesser included offense of robbery (*People v Jones*, 167 AD3d 443, 443 [1st Dept 2018], *lv denied* 31 NY3d

1205 [2019]). Defendant was charged with thefts of cell phones from four wireless phone stores. As to one incident, it was alleged defendant forcibly stole a cell phone in that his showing of a knife to the store employee constituted a threat of force and was perceived by the employee as a threat. While the defense conceded that defendant stole a cell phone, it denied any force was used. Nevertheless, at the charge conference prior to jury deliberations, defense counsel failed to ask for submission of the charge of petit larceny. Since the existing record clearly establishes that this was a mistake, rather than a strategic decision, no CPL 440.10 motion is necessary. When counsel asked for submission of the lesser included offense in the midst of jury deliberations, he expressly admitted that he had been "remiss" in not making a timely request. In any event, counsel could not have been employing an all-or-nothing strategy as to the robbery as argued by the People. This strategy would have made no sense, because the defense was conceding that defendant was guilty of petit larceny as to the other incidents and was already inviting convictions of several misdemeanors.

Although the verdict convicting defendant of robbery was not against the weight of the evidence, there was a reasonable view of the evidence to support petit larceny, and the evidence of forcible stealing was not so overwhelming so as to render a

request for petit larceny futile.

Defendant is also entitled to dismissal of the grand larceny charge, which was based upon the improper aggregation of the value of phones taken from two separate AT&T stores on two different days. The People failed to prove that the stores, and the phones located therein, had the same "owner" for the purpose of aggregating multiple thefts (*see People v Miller*, 145 AD3d 593, 594 [1st Dept 2016], *lv denied* 29 NY3d 950 [2017]). There was no evidence that these stores were *owned* by the same corporation, as opposed to, for example, dealerships separately owned and authorized to sell AT&T wireless products and services (*see Kapoor v AWI Wireless, LLC*, 159 AD3d 1027, 1028 [2d Dept 2018] [discussing a type of dealership contract used by AT&T]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10563 The People of the State of New York, Ind. 704/18
Respondent,

-against-

Edwin Espinal,
Defendant-Appellant.

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Marianne Karas, Thornwood, for appellant.

Darcel D. Clark, District Attorney, Bronx (Ryan J. Foley of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (George R. Villegas, J. at plea; Raymond L. Bruce, J. at sentencing), rendered September 27, 2018, convicting defendant of attempted burglary in the second degree, and sentencing him to a term of 3 years, unanimously affirmed.

Regardless of whether defendant's arguments survive his waiver of his right to appeal, we find them unavailing.

Defendant did not preserve his claim that the court should have conducted an inquiry under *People v Outley* (80 NY2d 702, 712 [1993]) into whether he violated the conditions of his plea agreement (*see e.g. People v Saxon*, 28 AD3d 330, 331 [1st Dept 2006], *lv denied* 7 NY3d 763 [2006]), and we decline to review it in the interest of justice.

Defendant's claim that his counsel rendered ineffective

assistance by abandoning a request for an *Outley* inquiry is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record (*see People v Rivera*, 71 NY2d 705, 709 [1988]). Since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claim may not be addressed on appeal.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10564 Abdullah Ileiwat, Index 150343/10
Plaintiff-Appellant,

-against-

PS Marcato Elevator Co., Inc., et al.,
Defendants-Respondents.

– – – – –

PS Marcato Elevator Co., Inc.,
Third-Party Plaintiff-Respondent,

-against-

G.R. Housing Corporation,
Third-Party Defendant-Respondent.

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[And a Second Third-Party Action]

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Pollack, Pollack, Isaac & DeCicco, LLP, New York (Michael H. Zhu of counsel), for appellant.

Lawrence, Worden, Rainis & Bard, P.C., Melville (Michael E. Shay of counsel), for PS Marcato Elevator Co., Inc., respondent.

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for Cooper Square Realty, respondent.

Linda A. Stark, New York, for G.R. Housing Corporation, respondent.

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Order, Supreme Court, New York County (Arlene P. Bluth, J.), entered December 8, 2017, which, to the extent appealed from, granted defendant First Service Residential New York, Inc. f/k/a Cooper Square Realty, Inc.'s (Cooper Square) and defendant PS Marcato Elevator Co., Inc.'s (PS Marcato) motions for summary

judgment dismissing the complaint as against them and third-party defendant G.R. Housing Corporation's (G.R.) motion for summary judgment dismissing the complaint, unanimously modified, on the law, to deny Cooper Square's motion, and to deny G.R.'s motion to the extent it seeks dismissal of the complaint as against Cooper Square, and otherwise affirmed, without costs.

Plaintiff alleges that he was injured by an elevator falling on him while he was in the elevator pit in a building owned by G.R., which contracted with Cooper Square to maintain the building and with PS Marcato to maintain the elevators.

Contrary to Cooper Square's contention, the complaint and bill of particulars, construed in the light most favorable to plaintiff, allege that PS Marcato owed plaintiff a duty of care because, in failing to exercise reasonable care, it launched a force or instrument of harm (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]), and that Cooper Square owed plaintiff a duty of care because it displaced G.R.'s duty to maintain the premises safely (*see id.*). Accordingly, to establish their prima facie entitlement to judgment as a matter of law, defendants were also required to address these exceptions to the rule that a contractual obligation will not give rise to tort liability in favor of a third party (*see id.* at 138) as applicable to them (*Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2011]).

Cooper Square failed to establish prima facie that it did not displace G.R.'s duty to maintain the premises in a reasonably safe condition. Its management agreement with G.R. authorized Cooper Square to make repairs or alterations to the premises and to purchase supplies and materials for the building. Cooper Square also agreed to "directly supervise the work of, hire and discharge all maintenance and security personnel," and was "clothed with such general authority and powers as may be necessary or advisable to carry out the spirit and intent of th[e] Agreement." An amendment to the management agreement recognized that Cooper Square "ha[d] been delegated significant authority and discretion in the operation of the Building under th[e] Agreement."

The deposition testimony it submitted also undermined Cooper Square's prima facie showing. The building's assistant superintendent, who allegedly instructed plaintiff to climb into the elevator pit, testified that he received his paycheck from Cooper Square and that he was suspended by Cooper Square's property manager after plaintiff's accident. The building superintendent confirmed that the assistant superintendent was suspended. In addition, the president of G.R.'s board of directors testified that the property manager's duties included ensuring "that the building runs properly" and included

"[a]nything that has to do with the proper running of the building." Thus, Cooper Square's motion and so much of G.R.'s motion as seeks dismissal of the action as against Cooper Square should be denied without regard to the sufficiency of plaintiff's opposition papers (*see Pullman v Silverman*, 28 NY3d 1060, 1063 [2016]).

PS Marcato, which inspected and made repairs to the elevator before plaintiff was injured by it, established prima facie that it did not create or exacerbate the dilapidated condition of the elevator, and therefore did not launch a force or instrument of harm (*see Espinal*, 98 NY2d at 142-143; *Fernandez v Otis El. Co.*, 4 AD3d 69, 73 [1st Dept 2004]). While the record suggests that PS Marcato knew that the elevator was in disrepair and being tampered with, it "did nothing more than neglect to make the [elevator] *safer* – as opposed to less safe – than it was before" the inspection and repairs were made (*Church v Callanan Indus.*, 99 NY2d 104, 112 [2002]).

Contrary to plaintiff's argument, *Rogers v Dorchester Assoc.* (32 NY2d 553 [1973]) does not compel a different result. The elevator company in that case, and in the other authorities on which plaintiff relies, was contractually obligated to perform all inspection and maintenance of the subject elevators. PS Marcato's contract with regard to the elevator that injured

plaintiff was not a full service contract; it limited PS Marcato's obligations to inspecting and maintaining certain components and aspects of the elevator.

With regard to the contested issue of causation, we note that plaintiff was injured after allegedly following the assistant superintendent's instruction. The record suggests that Cooper Square allowed the elevator that injured plaintiff to remain in service before his accident despite being aware that it was in disrepair and being tampered with (*see Lopez v 1372 Shakespeare Ave. Hous. Dev. Fund Corp.*, 299 AD2d 230, 232 [1st Dept 2002] ["It is well settled that there can be more than one proximate cause of an accident]"). Accordingly, issues of fact exist as to whether and to what extent plaintiff's comparative negligence, if any, may relieve Cooper Square of liability (*see generally Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 314-315 [1980]; *Rotz v City of New York*, 143 AD2d 301, 304 [1st Dept 1988]).

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: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10566 The People of the State of New York, Respondent, Ind. 3606/09

-against-

Durville Small, Defendant-Appellant.

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

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

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Judgment, Supreme Court, Bronx County (Ralph Fabrizio, J.), rendered February 27, 2018, convicting defendant, upon his plea of guilty, of manslaughter in the first degree, and sentencing him to a term of 23 years, unanimously affirmed.

Defendant failed to preserve, and affirmatively waived, his claim that the New York County District Attorney's Office, acting as special prosecutor, unlawfully represented the People at sentencing after its authority to do so had been rescinded, and we decline to review it in the interest of justice. The alleged procedural error did not go to the substantive legality of the sentence (*see People v Samms*, 95 NY2d 52, 58 [2000]), and it did not fall within the narrow category of mode of proceedings errors (*see People v Mack*, 27 NY3d 534, 540-541 [2016]).

In any event, the order removing the special prosecutor and

reinstating the Bronx District Attorney had not yet been entered at the time of sentencing. Therefore, it was not enforceable against the affected party (*see generally Lori v Malstrom*, 13 AD3d 243 [1st Dept 2004]). We also note that the order had been granted inadvertently, on the day before sentencing, by an administrative judge who was unaware that defendant had withdrawn his request for that relief, and this order, itself, was ultimately rescinded.

Defendant made a valid waiver of his right to appeal (*see People v Bryant*, 28 NY3d 1094 [2016]), which forecloses review of his excessive sentence claim. Regardless of whether defendant validly waived his right to appeal, we perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10567 Eileen Baez, etc., Index 309276/11
Plaintiff-Respondent-Appellant,

-against-

1749 Grand Concourse LLC, et al.,
Defendants-Appellants-Respondents,

Lemle Realty Corporation, et al.,
Defendants,

Municipal Inspection Corporation,
Defendant-Respondent,

Dunwell Elevator Electrical Industries, Inc.,
Defendant-Respondent-Appellant.

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Carol R. Finocchio, New York, for appellants-respondents.

Antin Ehrlich & Epstein LLP, New York (Anthony V. Gentile of counsel), for Eileen Baez, respondent-appellant.

Gottlieb Siegel & Schwartz, LLP, New York (Lauren M. Solari of counsel), for Dunwell Elevator Electrical Industries, Inc., respondent-appellant.

Clausen Miller P.C., New York (Joseph J. Ferrini of counsel), for respondent.

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Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered on or about September 27, 2018, which, to the extent appealed from, denied defendants 1749 Grand Concourse LLC and Lemle & Wolff, Inc.'s (collectively, the Building Defendants) and Dunwell Elevator Electrical Industries, Inc.'s (Dunwell) motions for summary judgment dismissing all claims as against

them, denied plaintiff's cross motion for summary judgment on liability against the Building Defendants, and granted defendant Municipal Inspection Corporation's (Municipal) motion for summary judgment dismissing the Building Defendants' cross claims against it, unanimously modified, on the law, to grant Dunwell's motion, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against Dunwell.

While moving into his apartment at 1749 Grand Concourse, plaintiff's decedent fell down an elevator shaft and died. Defendants 1749 Grand Concourse LLC and Lemle & Wolff, Inc. were the owner and manager, respectively, of the building. Defendant Dunwell was an elevator maintenance company retained to perform maintenance on the building's elevators. Defendant Municipal was an elevator inspection company hired to inspect the elevators on one occasion preceding the accident.

Plaintiff's motion was properly considered although it was untimely, because it addressed the same basic issues as the Building Defendants' timely filed motion, i.e., the liability of the Building Defendants to plaintiff for negligence (*see* CPLR 3212[a]; *Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 [1st Dept 2018]).

Plaintiff's motion and the Building Defendants' motion were correctly denied. None of the statutory provisions relied upon

by plaintiff constitutes proper bases for a finding of negligence per se. 1968 Building Code of City of New York (Administrative Code of City of NY) § 27-987 and Multiple Dwelling Law § 78 are not sufficiently specific as cited here, i.e., for the broad proposition that elevators must be maintained in safe operating condition (*see Amaya v Denihan Ownership Co., LLC*, 30 AD3d 327 [1st Dept 2006]; *Sheila C. v Povich*, 11 AD3d 120, 131-132 [1st Dept 2004]). Violation of New York City Building Code (Administrative Code, tit 28, ch 7) § BC 3010.1 does not constitute negligence per se, but only evidence of negligence (*see Jainsinghani v One Vanderbilt Owner, LLC*, 162 AD3d 603, 604 [1st Dept 2018]; *see also Elliott v City of New York*, 95 NY2d 730, 734 [2001]).

In addition, issues of fact exist as to whether the Building Defendants were negligent in permitting the elevator to operate without door rollers, link arms, or a location indicator; in allowing the decedent to use the elevator unsupervised, without an elevator operator; and in moving the elevator while the decedent was still using it, without notifying him that it had been moved. Plaintiff's expert affirmation was not unduly speculative or lacking evidentiary support. However, it was not conclusive, as it remains unclear whether a location indicator was required, and it is at least arguable that the absence of

door rollers and link arms did not create a safety hazard in and of itself, because it rendered it impossible for the general public to use the elevator.

Issues of fact also exist as to whether the slim jim that the decedent used to enter the elevator and instructions in its use were given to the decedent by a building representative; whether the building representative expressly advised the decedent that the elevator cab would be where he left it because he was the only one using it; and whether the building superintendent was aware of the decedent's profession as an elevator mechanic before the accident. The resolution of these issues is necessary for a determination of foreseeability and thus of proximate causation (*see e.g. Richards v Robert Corp.*, 297 NY 605, 606 [1947]; *Saldarriaga v De Santis Bros.*, 151 AD2d 270, 270-71 [1st Dept 1989], *lv denied* 74 NY2d 613 [1989]; *Schuchatowitz v Leff*, 225 App Div 574, 576-577 [1st Dept 1929]; *Jolliffe v Miller*, 126 App Div 763, 770 [1st Dept 1908], *affd* 196 NY 504 [1909]; *see also generally Lynch v Bay Ridge Obstetrical & Gynecological Assoc., P.C.*, 72 NY2d 632, 636 [1988]).

This is not a case such as those cited by the Building Defendants where the plaintiff jumped from a stalled elevator (*see e.g. Egan v A.J. Constr. Corp.*, 94 NY2d 839, 841 [1999]). The other cases cited by the Building Defendants are also

factually distinguishable.

The affidavits relied upon by plaintiff were properly considered, because they did not contradict testimony or evidence previously submitted by plaintiff or official records or raise new theories of liability. The identities of the affiants were timely disclosed (*cf. Ravagnan v One Ninety Realty Co.*, 64 AD3d 481, 482 [1st Dept 2009]).

Municipal's motion for summary judgment dismissing, as relevant on appeal, the Building Defendants' cross claims against it was correctly granted. Municipal fulfilled its contractual obligations to the Building Defendants by performing an inspection and preparing an ELV3 form, which detailed the lack of door rollers and other deficiencies. There is no evidence in the record that any of the defects required Municipal to shut the elevator down.

Dunwell's motion for summary judgment dismissing all claims against it should be granted. Dunwell cannot be held liable to plaintiff, because it did not owe the decedent any duty. There is no evidence in the record that Dunwell created or exacerbated any of the alleged elevator defects, including the missing door rollers and link arms, even if it were found to have wrongfully failed to diagnose or correct them (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 142-143 [2002]; *Medinas v MILT*

Holdings LLC, 131 AD3d 121, 127-128 [1st Dept 2015]). Moreover, Dunwell in fact did recommend that these parts be replaced, but its proposal was not accepted by the Building Defendants, and the governing maintenance agreement did not allow Dunwell to replace them without authorization (*see Fernandez v Otis El. Co.*, 4 AD3d 69, 73 [1st Dept 2004]). The maintenance agreement was not comprehensive and exclusive and therefore did not displace the Building Defendants' obligations to maintain the elevators in a safe condition (*see id.*). Plaintiff does not argue that the decedent detrimentally relied on Dunwell's continued performance of its duties (*see Espinal*, 98 NY2d at 140). To the extent plaintiff relies on a line of cases holding that an elevator maintenance company owes a duty of care to members of the public, that reliance is misplaced; this Court has since held that those cases are not good law (*see Medinas*, 131 AD3d at 127-128).

Dunwell fulfilled its contractual obligations to the Building Defendants by performing monthly maintenance and submitting a proposal to replace missing door rollers. There is no evidence in the record that any of the alleged defects required Dunwell to shut the elevator down, and, as indicated,

this is not a case in which the elevator maintenance company completely assumed the building's responsibility to maintain the elevator.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10569 The People of the State of New York, Ind. 130/16
Respondent,

-against-

Russell Smith,
Defendant-Appellant.

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

Darcel D. Clark, District Attorney, Bronx (Robert C. McIver of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Barbara F. Newman, J. at jury trial; Robert E. Torres, J. at CPL 330.30 motion and sentencing), rendered May 19, 2017, as amended May 23, 2017, convicting defendant of rape in the first degree, and sentencing him, as a second violent felony offender, to a term of 18 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348–349 [2007]). There is no basis for disturbing the jury's credibility determinations, including its rejection of the defense of consent.

The court properly denied defendant's CPL 330.30(2) motion to set aside the verdict on the ground of juror misconduct. "[N]ot every misstep by a juror rises to the inherently prejudicial level at which reversal is required automatically"

(*People v Brown*, 48 NY2d 388, 394 [1979]; *see also People v Maragh*, 94 NY2d 569, 574 [2000])). Under all the circumstances of the case, the extraneous information introduced by a juror was inconsequential and did not require that the verdict be set aside. No evidentiary hearing was necessary, because defendant was not entitled to a new trial even assuming the truth of his allegations about the juror's conduct.

To the extent that defendant is raising a constitutional claim, that claim is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10570 Crown Wisteria, Inc., Index 651307/18
Plaintiff-Appellant-Respondent,

-against-

Fiona Madeline Cibani,
Defendant-Respondent-Appellant,

Shawmut Woodworking & Supply doing
business as Shawmut Design and Construction,
Defendant.

_____

Stamell & Schager, LLP, New York (Andrew R. Goldenberg of counsel), for appellant-respondent.

Ingram Yuzek Gainen Carroll & Bertolotti, LLP, New York (Maurizio Anglani of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Melissa A. Crane, J.), entered January 22, 2019, which denied plaintiff's motion for partial summary judgment on its breach of contract cause of action and for attorney's fees based on the parties' license agreement, and denied defendant's motion for summary judgment dismissing the complaint, unanimously modified, on the law, to grant plaintiff's motion for partial summary judgment on liability, and remand for a determination of the amount of damages and plaintiff's attorneys' fees, and otherwise affirmed, without costs.

Where a contract is clear and unambiguous on its face, the intent of the parties must be determined from the four corners of

the agreement, not from extrinsic evidence (*see Millennium Holdings LLC v Glidden Co.*, 146 AD3d 539, 551 [1st Dept 2017]), and the agreement "must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]).

Here, the language of the license agreement is clear. Defendant Cibani was required to install brick in a new party wall that "matches" the brick on the facade, but failed to do so. In fact, Cibani had found such matching brick prior to entering into the license agreement, but chose to use a cheaper brick that does not match.

Moreover, Cibani agreed to hold plaintiff harmless from the attorneys' fees it incurred because of the construction work she performed. The indemnification clauses in the license agreement were neither limited to a specific list of items, nor did they explicitly limit indemnification to third-party claims (*see Crossroads ABL LLC v Canaras Capital Mgt., LLC*, 105 AD3d 645

[1st Dept 2013]; *see also Abax Lotus Ltd. v China Mobile Media Tech. Inc.*, 149 AD3d 535 [1st Dept 2017], *lv dismissed* 30 NY3d 1090 [2018]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10571 In re Global Liberty Insurance Company of New York,
Petitioner-Appellant-Respondent,

-against-

North Shore Family Chiropractic, PC, as assignee of Ramon Martinez, et al.,
Respondents-Respondents-Appellants.

Index 28391/18E

The Law Office of Jason Tenenbaum, P.C., Garden City (Talia Beard of counsel), for appellant-respondent.

Gary Tsirelman, P.C., Brooklyn (Gary Tsirelman of counsel), for respondents-appellants.

Order, Supreme Court, Bronx County (Donna Mills, J.), entered February 1, 2019, which granted respondents' motion to vacate, pursuant to stipulation, an order entered on default vacating an arbitration award, deny the petition to vacate the award, and grant statutory attorneys' fees, to the extent of dismissing the petition, unanimously modified, on the law, to remand for a determination of respondents' attorneys' fees pursuant to 11 NYCRR 65-4.10(j)(4), and otherwise affirmed, without costs.

Petitioner failed to establish that respondents' assignor was injured in the course of his employment, and therefore that it properly denied his claim because workers' compensation benefits were available to him (*see Westchester Med. Ctr. v*

American Tr. Ins. Co., 60 AD3d 848, 849 [2d Dept 2009]). Although the assignor was allegedly injured while driving a livery car, his license from the New York Taxi and Limousine Commission was issued that day. Further, petitioner submitted no evidence that the assignor was on duty or carrying a paying passenger at the time of the incident (*cf. Matter of Aminov v New York Black Car Operators Injury Compensation Fund*, 2 AD3d 1007, 1007-1008 [3d Dept 2003], *lv denied* 4 NY3d 709 [2005]).

Supreme Court had the authority to award attorneys' fees in connection with a "court appeal from a master arbitration award and any further appeals" (11 NYCRR 65-4.10[j][4]). Because the court failed to address respondents' request for attorneys' fees, the matter is remanded for a determination of the amount of fees to which respondents are entitled (*see Matter of GEICO Ins. Co. v AAAMG Leasing Corp.*, 148 AD3d 703 [2d Dept 2017]), including fees for the instant appeal (*see Matter of Country-Wide Ins. Co. v Bay Needle Acupuncture, P.C.*, 167 AD3d 404, 405 [1st Dept 2018]).

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10572 Jose R. Abrew, Jr., Index 21109/16E
Plaintiff-Respondent,

-against-

Triple C Properties, LLC, et al.,
Defendants-Appellants.

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Koster, Brady & Nagler LLP, New York (Erica L. Mobley of counsel), for appellants.

Burns & Harris, New York (Jason S. Steinberg of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura Douglas, J.), entered March 5, 2018, which, insofar as appealed from, denied defendants' motion to compel plaintiff to provide unrestricted medical authorizations and for records relating to his prior hernia injury, unanimously modified, on the law and the facts, the motion granted to the extent that plaintiff is directed to provide authorizations for medical records relating to his hernia injury from the date of that injury to present, and otherwise affirmed, without costs.

Plaintiff was injured when the ceiling in his apartment collapsed on him in August 2015. As a result of the accident, plaintiff underwent two back surgeries in October 2016. According to two hospital operative reports, plaintiff's back surgeries were complicated and protracted by a prior hernia

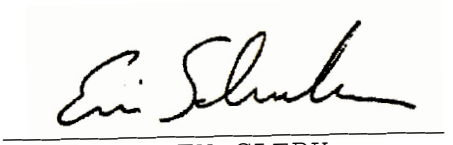
surgery. Accordingly, the medical records from the 2012 hernia injury are material and necessary to his claim for pain and suffering relating to the back surgeries, and discovery of preexisting conditions is permitted where it is relevant to the injuries to the parts of the body that were placed in controversy (*see Walters v Sallah*, 109 AD3d 401 [1st Dept 2013]). Plaintiff's argument that defendants failed to provide an affidavit of a medical expert linking the hernia injury to his back surgeries, is unavailing. The operative reports, which were written by doctors, noted the effect of the prior hernia surgery on the back surgeries.

Furthermore, defendants argue that they are entitled to discovery of plaintiff's general medical condition both before and after the 2015 accident, based on plaintiff's claim that his injuries are permanent, caused mental anguish, prevented him from enjoying life, and interfered with his ability to perform his daily activities. However, this Court has repeatedly rejected such broad requests for discovery of prior injuries (*see e.g.*

James v 1620 Westchester Ave., LLC, 147 AD3d 575 [1st Dept 2017]; *Kenneh v Jey Livery Serv.*, 131 AD3d 902 [1st Dept 2015]).

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10573 Paul Marzario, et al., Index 152742/17
Plaintiffs-Appellants,

-against-

Snitow Kanfer Holzer & Millus, LLP, et al.,
Defendants-Respondents.

_____

Charles A. Termini, Oceanside, for appellant.

Rivkin Radler LLP, Uniondale (Merril S. Biscone of counsel), for Snitow Kanfer Holtzer & Millus, LLP, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Richard W. Boone, Jr. of counsel), for Meyer, Suozzi, English & Klein, P.C. and Paul F. Millus, respondents.

_____

Order, Supreme Court, New York County (Barbara Jaffe, J.), entered May 29, 2018, which granted defendants' motions to dismiss the complaint on statute of limitations grounds, unanimously affirmed, without costs.

An action to recover damages arising from an attorney's malpractice must be commenced within three years of accrual (*McCoy v Feinman*, 99 NY2d 295, 301 [2002], citing CPLR 214[6]), and the claim accrues when the malpractice is committed (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]).

Here, the acts of alleged malpractice are errors in drafting the underlying complaint, failure to include Collision Capital as a plaintiff, and poor representation and advice during a

settlement meeting. The complaint in the underlying lawsuit was filed on August 11, 2011. Plaintiffs allege they unsuccessfully asked defendants to add Collision Capital as a plaintiff sometime prior to April 2012. The settlement meeting at issue took place on August 6, 2013. Accordingly, it is submitted that any alleged malpractice here would have occurred, at the latest, on or before August 6, 2013. As the complaint was not filed until March 23, 2017, defendants made a prima facie showing the case was time-barred.

The trial court appropriately determined that plaintiffs failed to show the continuous representation doctrine, which would have tolled the statute of limitations, applied, or that there was an issue of fact with respect thereto (*860 Fifth Avenue Corp v Superstructures-Engrs. & Architects*, 15 AD3d 213 [1st Dept 2005]).

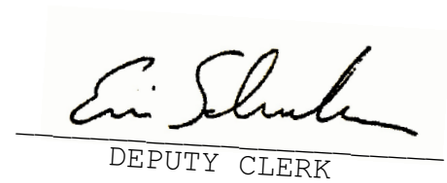
The court reasonably determined the period of continuous representation ended, and the limitations period began to run, at the latest, on March 6, 2014, when plaintiff Marzario told defendant Millus to turn over PPL's files. The court reasonably construed this communication as Marzario's acknowledgment that he no longer had trust or confidence in the attorney-client relationship, and accordingly deemed the relationship, and any toll on the limitations period, terminated as of then (*see Farage*

v Ehrenberg, 124 AD3d 159 [2d Dept 2014], *lv denied* 25 NY3d 906 [2015]; *Aseel v Jonathan E. Kroll & Assoc., PLLC*, 106 AD3d 1037 [2d Dept 2013]).

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

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10574 Gershon Sontag, etc., Index 156056/15
Plaintiff-Appellant,

-against-

American International
Group, Inc., et al.,
Defendants-Respondents,

Moshe Lebovits,
Defendant.

_____

Law Office of Elizabeth Eilender P.C., New York (David Jaroslawicz of counsel), for appellant.

Fishkin Lucks LLP, New York (Steven M. Lucks of counsel), for respondents.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about May 5, 2017, which granted defendants American International Group, Inc. and American General Life Insurance Company's motion to dismiss the complaint as against them, and denied plaintiff's motion for a default judgment against defendant Moshe Lebovits, unanimously affirmed, without costs.

Much of this action, which concerns the sale of two stranger-oriented life insurance policies to plaintiff, and the instant appeal, has been mooted by the death of the insured and the fact that plaintiff has received the payout from the policies. To the extent plaintiff still seeks a mandatory

injunction compelling the insurer to articulate how it calculated premiums because plaintiff believes he was overcharged, this claim was correctly dismissed because the damages are pecuniary in nature (*see Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596 [1st Dept 2011]).

Plaintiff is not entitled to a default judgment against defendant Lebovits because he has no viable claim against Lebovits (*see Guzetti v City of New York*, 32 AD3d 234, 235 [1st Dept 2006, McGuire, J., concurring] ["Some proof of liability is ... required to satisfy the court as to the prima facie validity of the uncontested cause of action"] [internal quotation marks omitted]). The fraud claim, which is premised on the allegation that defendants secretly sold plaintiff New Jersey life insurance policies, is belied by the text of the policies themselves, which refutes any allegation of justifiable reliance (*see Sandcham Realty Corp. v Taub*, 299 AD2d 220, 221 [1st Dept 2002]; *see also Goldberg v Manufacturers Life Ins. Co.*, 242 AD2d 175, 180 [1st Dept 1998], *lv dismissed in part, denied in part* 92 NY2d 1000 [1998]).

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

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10575 Michael A. Schiavone, et al., Index 161990/15
Plaintiffs-Respondents,

-against-

Seaman Arms, LLC,
Defendant-Appellant.

_____

Lester Schwab Katz & Dwyer, LLP, New York (Daniel S. Kotler of counsel), for appellant.

Hasapidis Law Office, Scarsdale (Annette Hasapidis of counsel), for respondent.

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Order, Supreme Court, New York County (Carmen Victoria St. George, J.), entered September 13, 2018, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff firefighter Michael Schiavone was injured while responding to a fire at a residential building owned by defendant. Schiavone testified that he was on the building's roof and as he was attempting to remove a piece of the roof that a fellow firefighter had cut open to allow for ventilation, his momentum carried him backwards and he stepped on something that caused him to fall. Although Schiavone did not initially see what caused his fall, he stated that when he stood up, he noticed that there was debris, including roofing materials and pieces of wood, which appeared to be from prior repair work on the roof.

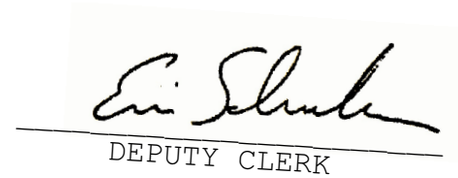
The court properly denied the motion for summary judgment, since defendant failed to satisfy its prima facie burden of showing that it did not have constructive notice of the debris on the roof. Defendant did not offer evidence as to when the roof was last inspected or cleaned prior to plaintiff's fall, even though its resident manager testified that he would routinely inspect the roof about once a month (*see DiMarzo v Jones Lang LaSalle Ams. Inc.*, 129 AD3d 490 [1st Dept 2015]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 421 [1st Dept 2011]). Although Schiavone testified that initially, he did not know what caused him to fall, he later consistently testified that his fall was caused by debris from a prior roof repair, which presents a triable issue of fact (*see Figueroa v City of New York*, 126 AD3d 438, 440 [1st Dept 2015]; *Cuevas v City of New York*, 32 AD3d 372, 373 [1st Dept 2006]).

Furthermore, since defendant was unable to satisfy its prima facie burden as to plaintiffs' common-law negligence claim, it was not entitled to dismissal of plaintiffs' claims pursuant to General Obligations Law § 11-106 and General Municipal Law § 205-a

(*see Jensen v Oak Point Assets*, 295 AD2d 114, 114-115 [1st Dept 2002]; *Lusenskas v Axelrod*, 183 AD2d 244, 248 [1st Dept 1992], *appeal dismissed* 81 NY2d 300 [1993]).

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

ENTERED: DECEMBER 12, 2019



DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10576N Anthony Higgs, Index 20880/13E
Plaintiff-Appellant,

-against-

Desmond Williams, et al.,
Defendants,

44th Enterprises Corp., etc., et al.,
Defendants-Respondents.

_____

Zimmerman Law, P.C., Huntington Station (Gary R. Novins of counsel), for appellant.

Callahan & Fusco, LLC, New York (Ryan D. Lang of counsel), for respondents.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered February 8, 2018, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion to vacate an order entered on default granting defendant 44th Enterprises Corp.'s motion for discovery sanctions to the extent of precluding plaintiff from testifying at trial or submitting an affidavit in opposition to any motion for summary judgment, unanimously affirmed, without costs.

Plaintiff failed to demonstrate a reasonable excuse for his default (CPLR 5015[a][1]; *see Bobet v Rockefeller Ctr., N., Inc.*, 78 AD3d 475 [1st Dept 2010]). His explanation that he changed his cell phone number several times and that his attorney's paralegal

did not locate another contact – in other words, plaintiff's "failure to maintain contact with his attorney and to keep himself apprised of the progress of his lawsuit" – is not reasonable (*Sheikh v New York City Tr. Auth.*, 258 AD2d 347, 348 [1st Dept 1999]). Plaintiff's assertion that he was available to appear for deposition "throughout the entire course of the litigation" is inconsistent with his statement that his attorney evidently had no way of contacting him. Moreover, toffice failure.

Because plaintiff failed to proffer a reasonable excuse for his default, we need not determine whether he demonstrated a meritorious cause of action (*see Matter of Christina McK. v Kyle S.*, 154 AD3d 548 [1st Dept 2017]).

Plaintiff's alternative argument that vacatur is warranted pursuant to CPLR 5015(a)(3) because defendant made misrepresentations in support of the motion to preclude is unsupported by the record.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

Richter, J.P., Manzanet-Daniels, Webber, Gesmer, JJ.

10577N In re Manuel Castedo, et al., Index 652177/19
Petitioners-Appellants,

-against-

The Permanent Mission of Thailand
to the United Nations,
Respondent-Respondent,

Richter Contracting Corp.,
Respondent.

_____

Milber Makris Plousadis & Seiden, LLP, White Plains (Jeffrey J. Fox of counsel), for appellants.

Mazzola Lindstrom LLP, New York (Richard E. Lerner of counsel), for respondents.

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Judgment (denominated an decision and order), Supreme Court, New York County (Debra A. James, J.), entered on or about June 17, 2019, which denied petitioner's CPLR 7503 motion to permanently stay arbitration, and dismissed the proceeding, unanimously reversed, on the law, without costs, and the petition granted.

Contrary to the respondents' argument, under the circumstances here, the petitioner architect did not receive direct tangible benefits from a separate construction agreement containing an arbitration clause (*see Matter of Belzberg v Verus Invs. Holdings Inc.*, 21 NY3d 626, 631 [2013]). Any benefit that petitioner derived was from its own contract, which expressly opted-out of arbitration. The contract between petitioner and

respondents specified that petitioner was to bill respondents monthly, and the fee payments were not contingent on any specific phase of the project having been first completed. Petitioner was entitled to be paid for the architectural work it performed, regardless whether the project reached the construction phase. Moreover, the contract between petitioner and respondents specifically excluded arbitration as a remedy.

We further conclude that petitioner is not bound by the arbitration agreement contained in the construction contract's General Conditions under the theory of incorporation by reference, because the language in the architect's contract does not clearly reflect an intention to incorporate the General Conditions (*see Matter of Wonder Works Constr. Corp. v R.C. Dolner, Inc.*, 73 AD3d 511, 513 [1st Dept 2010]).

We have considered the remaining arguments, and find them unavailing.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK

CORRECTED OPINION - DECEMBER 19, 2019

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
John W. Sweeny, Jr.
Troy K. Webber
Ellen Gesmer
Anil C. Singh, JJ.

8963
Index 451213/17

_____x

The Port Authority of New York
and New Jersey,
Plaintiff-Appellant,

-against-

The Brickman Group Ltd., LLC, et al.,
Defendants-Respondents.
_____x

Plaintiff appeals from the order of the Supreme Court, New York County (David B. Cohen, J.), entered on or about June 27, 2018, which, to the extent appealed from as limited by the briefs, granted defendant ACE American Insurance Company's motion and defendant Everest National Insurance Company's cross motion to dismiss the complaint as against each of them, denied plaintiff's request (deemed by the court to constitute a cross motion) for leave to amend its complaint to assert a cause of action against defendant Brickman Group, Ltd., LLC for breach of an agreement to procure insurance, and denied plaintiff's cross motion for summary judgment declaring that ACE and Everest are obligated to indemnify it for its liability to the plaintiffs in the underlying actions and to

reimburse it for the costs it incurred in defending itself in the underlying actions.

Hurwitz & Fine, P.C., Buffalo (Dan D. Kohane and Jennifer A. Ehman of counsel), for appellant.

Ahmuty, Demers & McManus, New York(Glenn A. Kaminska and Nicholas M. Cardascia of counsel), for The Brickman Group Ltd., LLC, respondent.

Robinson & Cole LLP, New York (J. Gregory Lahr, Cara C. Vecchione and Elise A. Smith of counsel), for ACE American Insurance Company, respondent.

Kennedys CMK LLP, New York (Daniel Pickett of counsel), for Everest National Insurance Company, respondent.

FRIEDMAN, J.P.

In this insurance coverage action brought by a putative additional insured, the liability insurance policies at issue do not impose on the insurers a duty to defend the insured in a covered action. The policies do, however, require the insurers to reimburse the insured for defense costs incurred in an action "in which damages . . . to which this insurance applies are alleged." The ultimate factual determination in the underlying personal injury actions was that the loss was actually outside the scope of the additional insured coverage. This determination, while it means that the insurers have no duty to indemnify the putative additional insured for its liability to pay damages, is not conclusive of a different question posed to us, which is whether the putative additional insured is entitled **to** reimbursement of its defense costs.

The party seeking a declaration that it is entitled to coverage as an additional insured is plaintiff the Port Authority of New York and New Jersey (the Port Authority). The Port Authority was a defendant in two long-running personal injury actions, in which it was alleged that the plaintiffs' injuries resulted from, among other causes, the negligence of defendant The Brickman Group Ltd., LLC (Brickman Group), a contractor of the Port Authority and the named insured under the subject

policies, or the negligence of a subcontractor of Brickman Group. The Port Authority now seeks, among other relief, a declaration that it is entitled to reimbursement of its defense costs in those actions as an additional insured under Brickman Group's policies. The Port Authority seeks to have its defense costs reimbursed notwithstanding that it was ultimately determined in the underlying actions that the Port Authority itself was the sole party at fault for the accident — a determination that, as more fully discussed below, places the Port Authority's liability to the underlying plaintiffs outside the scope of its additional insured coverage. We hold, however, that the ultimate liability determination in the underlying actions does not prevent the Port Authority from obtaining reimbursement of its defense costs from Brickman Group's insurers under the relevant policy language, given that "damages . . . to which [the additional insured coverage] applie[d]" were "alleged" in those actions from inception until the verdict adverse to the Port Authority was returned.

Factual Background

The Contract Between the Port Authority and Brickman Group

The Port Authority and Control Environmental Services, Inc. (CES) entered into a contract, dated May 31, 2007 (hereinafter, the maintenance contract), under which CES assumed responsibility

for maintaining the landscaping and irrigation systems in the area of the Van Wyck Expressway at John F. Kennedy International Airport (JFK) for a term of 34 months. In June 2007, CES, with the Port Authority's consent, assigned the maintenance contract to Brickman Group. The maintenance contract contains a provision requiring Brickman Group to maintain a commercial general liability insurance policy (or policies) covering the Port Authority as an additional insured for a specified amount of liability for bodily injury. The maintenance contract also contains a provision requiring Brickman Group to indemnify, hold harmless, and, "[i]f so directed," defend the Port Authority from and against all claims "in any way connected with" Brickman Group's services under the contract.

Additional Insured Endorsements to Brickman Group's ACE Policy

At the time relevant to this appeal, Brickman Group was the named insured under a commercial general liability policy issued by defendant ACE American Insurance Company (ACE) for the period from July 1, 2008, to July 1, 2009. As here pertinent, the ACE policy covers liability for "bodily injury" occurring during the policy period. The policy includes, among others, the following endorsements addressing additional insured coverage:

- Endorsement No. 17 provides, in pertinent part, that coverage is extended to "[a]ny

person or organization whom you [i.e., Brickman Group] have agreed to include as an additional insured by contract or agreement," but such coverage is extended "*only with respect to liability arising out of your operations* . . ." (emphasis added).

- Endorsement No. 21 provides, in pertinent part, that coverage is extended to "[a]ll persons or organizations where required by contract," but such coverage is extended "only with respect to liability for 'bodily injury' . . . *caused, in whole or in part, by . . . [y]our* [i.e., Brickman Group's] *acts or omissions; or . . . [t]he acts or omissions of those acting on your behalf*; in the performance of your ongoing operations for the additional insured(s) . . ." (emphasis added).[1]

Additional provisions of the ACE policy that are relevant to this appeal are set forth in the course of our discussion of the legal issues.

Brickman Group's Everest Policy

Also in effect at the time relevant to this appeal was a commercial excess liability policy issued by defendant Everest National Insurance Company (Everest) to Brickman Group as the named insured. The Everest policy provides that it is excess to Brickman Group's ACE policy (denominated the "first underlying

[1]Another additional insured endorsement to the ACE Policy (Endorsement No. 75), although it refers to the Port Authority by name, is not relevant to this matter because it did go into effect until April 1, 2009, which was several months after the occurrence of the incident giving rise to this litigation.

insurance"). The Everest policy further provides that "[t]he coverage provided by this policy will:

> "a. Follow the terms, definitions, conditions and exclusions that are contained in the 'first underlying insurance', unless otherwise directed by this policy, including any attached endorsement; and
>
> "b. Not be broader than that provided by the 'first underlying insurance.'"

The Everest policy also provides that it covers as an insured "[a]ny person or organization qualifying as such under the 'first underlying insurance.'"

The November 2008 Incident and the Underlying Actions

The incident giving rise to this dispute occurred on November 22, 2008, during a period of below-freezing temperatures. On or about that date, sprinkler heads on the property of JFK discharged water onto the Van Wyck Expressway, which resulted in the formation of a layer of ice on the roadway. A multi-vehicle collision occurred when drivers on the Van Wyck encountered the ice.[2] The sprinklers that had discharged the water were part of the irrigation system for which Brickman Group was responsible under the maintenance contract. Brickman Group's winterization subcontractor, nonparty Metro Irrigation &

[2]The manner in which the accident occurred is described in *Kandel v FN; Taxi; Inc.* (137 AD3d 980, 980-981 [2d Dept 2016]).

Maintenance Corp. (Metro), was working at JFK at or about the time of the accident.

The November 2008 car pileup gave rise to two personal injury actions in Supreme Court, Kings County (hereinafter, the underlying actions), each of which was commenced in 2009.[3] The named defendants in each of the underlying actions included, among others, the Port Authority, Brickman Group, and Metro. The complaints in the underlying actions contained allegations that the discharge of water onto the Van Wyck had resulted from the negligence of the Port Authority, Brickman Group and/or Metro. The Port Authority, which was represented by its in-house counsel in that litigation, asserted cross claims against Brickman Group for contractual indemnification, common-law indemnification, contribution and breach of contract.[4]

The underlying actions were consolidated for a joint trial on the issue of liability, which was held in April 2017. During the trial, the court dismissed Brickman Group from the case and

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[3]The underlying actions were *Pavel Kandel, et al. v FN; Taxi; Inc. d/b/a FN Taxi, Inc., et al.*, Sup Ct, Kings County, index No. 3625/09, and *Robert Favors v Port Auth. of New York and New Jersey, et al.*, Sup Ct, Kings County, index No. 27151/09.

[4]The Port Authority, in its complaint in this action, alleges that, in 2009, it tendered its defense in each of the underlying actions "to BRICKMAN and/or its insurers, including but not limited to ACE and EVEREST," but the tenders were not accepted.

held the Port Authority liable as a matter of law.[5] At the close of the evidence, the jury was asked to determine whether any negligence by Metro or by one of the plaintiffs (Kandel) was a substantial factor in causing the accident and, if so, to apportion fault for the accident among either or both of those parties and the Port Authority (which, as noted, the court had previously ruled liable as matter of law). On April 25, 2017, the jury returned a verdict finding that neither Metro nor Kandel had been negligent and assigning 100 percent of the fault for the accident to the Port Authority. The Port Authority subsequently settled with the plaintiffs in the underlying actions.[6]

On May 3, 2017, Brickman Group moved to dismiss the Port Authority's cross claims against it in the underlying actions. Brickman Group argued, among other things, that, given the jury's finding that the Port Authority was the sole party at fault for causing the accident, Brickman Group could not be held liable to

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[5]The record for this appeal does not include any decision or transcript setting forth the basis for these trial rulings in the underlying actions. An affirmation by the Port Authority's counsel that is in the record states that Kings County Supreme Court "ruled that Brickman [Group] owed no duty to the plaintiffs as they are not parties to the . . . [maintenance] [c]ontract."

[6]An affirmation of the Port Authority's counsel in the record states: "After the liability trial, the *Kandel* Action settled for an amount that the parties agreed to keep confidential, and subsequent to the damages trial, the *Favors* Action settled for a sum below the jury award."

the Port Authority under the maintenance contract's indemnification provision. In opposition, the Port Authority argued, as relevant to this appeal, that Brickman Group was obligated under the maintenance contract to procure liability insurance for the Port Authority, and that the determination of whether such insurance had been procured should be deferred to a proceeding to which Brickman Group's insurers were parties.[7] By order dated June 28, 2017, and entered July 6, 2017, Kings County Supreme Court granted Brickman Group's motion. Thereafter, on September 12, 2017, a judgment was entered that dismissed with prejudice all of the Port Authority's cross claims against Brickman Group in the underlying actions. The Port Authority has taken an appeal to the Second Department from that judgment, which appeal has not yet been decided.

Prior Proceedings in this Action

On April 28, 2017 — three days after the return of the verdict in the underlying actions, and five days before Brickman Group moved to dismiss the Port Authority's cross claims therein — the Port Authority commenced this action against Brickman

[7]Although the Port Authority had asserted cross claims for breach of contract against Brickman Group in its answers in the underlying actions, the pleadings did not allege that Brickman Group had breached the maintenance contract by failing to procure insurance coverage.

Group, ACE and Everest in Supreme Court, New York County. The Port Authority's complaint asserts two causes of action, the first for a declaration that the Port Authority is entitled to defense and indemnification in the underlying actions under the ACE and Everest policies. The second cause of action is for damages for breach of contract against the insurers, based on their respective policies, and against Brickman Group, based on the latter's alleged breach of the maintenance contract by failing to provide the Port Authority with indemnity and defense in the underlying actions.[8]

On or about August 8, 2017 — after Brickman Group's motion to dismiss the Port Authority's cross claims against it in the underlying actions had been granted — Brickman Group moved in this action to dismiss the complaint as against it. Insofar as relevant to this appeal, Brickman Group argued that any claim the Port Authority might have against it was barred both by the statute of limitations and by the doctrines of res judicata and collateral estoppel. In its opposition to the motion, the Port Authority requested that it be permitted to amend its complaint to assert a claim against Brickman Group for failing to procure

[8]The complaint, while it refers to Brickman Group's obligation under the maintenance contract to procure insurance coverage for the Port Authority, does not specifically allege that Brickman Group failed to fulfill that obligation.

insurance as required by the maintenance contract. The Port Authority did not, however, make a formal cross motion for such relief.

While Brickman Group's motion to dismiss was still pending, ACE moved to dismiss the complaint as against it pursuant to CPLR 3211(a)(1) and (7), and Everest made a cross motion for the same relief as to itself. The Port Authority opposed the insurers' motions and cross-moved for summary judgment declaring that it was entitled to coverage under the ACE and Everest policies for both indemnity and defense costs in the underling actions.

The Decision Appealed From

Supreme Court consolidated the motions described above for disposition and determined them in a decision and order entered June 27, 2018. The court granted the motions to dismiss by Brickman Group, ACE and Everest and denied the Port Authority's cross motion for summary judgment against ACE and Everest. As to the Port Authority's request for leave to amend the complaint to assert a claim against Brickman Group for failing to procure insurance coverage, the court treated that request as a formal cross motion and denied it. This appeal by the Port Authority ensued.

Discussion

For the reasons discussed below, we modify the order

appealed from to grant the Port Authority's cross motion for summary judgment to the extent of declaring that ACE and Everest are obligated, within the limits of their respective policies, to reimburse the Port Authority for the costs it reasonably incurred, in excess of the "retained limit" under the ACE policy (as explained below), in defending the underlying actions through the date on which the jury rendered its verdict. We affirm Supreme Court's denial of the Port Authority's request for leave to amend the complaint to assert a new claim against Brickman Group and the court's determination that the insurers have no duty to indemnify the Port Authority for its liability to the plaintiffs in the underlying actions.[9]

We turn first to the portion of the court's decision dealing with the Port Authority's attempt to assert claims against Brickman Group. On its appeal from this aspect of the order, the Port Authority challenges only the denial of its request (which the court treated as a cross motion) for leave to amend its complaint to assert a claim against Brickman Group for failing to

[9]While Supreme Court, in granting ACE's and Everest's respective motions to dismiss, correctly determined that the insurers have no duty to indemnify the Port Authority for its liability to the plaintiffs in the underlying actions, we modify this aspect of its order to render a declaration to that effect on a search of the record prompted by the Port Authority's cross motion for summary judgment (*see* CPLR 3212[b]; *see also Lanza v Wagner*, 11 NY2d 317, 334 [1962], *cert denied* 371 US 901 [1962]).

fulfill its obligation under the maintenance contract to procure insurance coverage for the Port Authority. The court correctly denied this request, on two separate grounds.[10]

First, contrary to the Port Authority's argument that a failure to procure contractually required insurance is a continuing breach, a claim for such a breach accrues upon the failure to procure the coverage when the obligation to do so first attaches (*see Wright v Emigrant Sav. Bank*, 112 AD3d 401, 402 [1st Dept 2013]; *Polat v Fifty CPW Tenants Corp.*, 249 AD2d 163, 163-164 [1st Dept 1998]; *Sloniger v Niagara Mohawk Power Corp.*, 306 AD2d 842, 842 [4th Dept 2003]; *see generally Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]). Accordingly, any claim based on a failure to procure the insurance required by the maintenance contract, which was assigned to Brickman Group in 2007, was already barred by the applicable six-year statute of limitations (CPLR 213[2]) when the Port Authority commenced this action in 2017.

Second, the judgment in the underlying actions dismissing with prejudice the Port Authority's cross claims against Brickman

[10]Since we conclude that the Port Authority's request for leave to amend its complaint was correctly denied on the merits, we need not address Brickman Group's contention that the Port Authority's arguments challenging the denial of the request should not be considered on procedural grounds.

Group constitutes res judicata barring the Port Authority's assertion in this action of a contractual claim against Brickman Group for failing to procure insurance. This is because the proposed claim for failing to procure insurance arises out of the same series of transactions that gave rise to the Port Authority's cross claims against Brickman Group in the underlying actions (*see Matter of Hunter*, 4 NY3d 260, 269 [2005]; *Elias v Rothschild*, 29 AD3d 448 [1st Dept 2006]). Indeed, it appears that the Port Authority's contractual indemnity and breach of contract cross claims against Brickman Group in the underlying actions sought precisely the same damages that would be sought by the claim for failure to procure insurance that the Port Authority proposes to assert in this action, the only difference being the legal theory of recovery (*see Hunter*, 4 NY3d at 269 ["claims arising out of the same transaction or series of transactions (as a finally determined claim) are barred, even if based upon different theories"] [internal quotation marks omitted]). That the proposed insurance procurement claim in this action arises from the same subject matter as the cross claims in the underling actions is further highlighted by the fact that the Port Authority, in opposing the dismissal of the cross claims, invoked — to no avail — Brickman Group's contractual obligation to procure insurance coverage.

We next consider the question of whether the Port Authority is covered, as an additional insured under the ACE and Everest policies, either for the liability imposed on it, or for the defense costs it incurred, in the underlying actions. As noted, in the order appealed from, the court held, in ruling on the insurers' motions to dismiss and the Port Authority's motion for summary judgment, that the Port Authority was not entitled to any coverage under these policies. In reviewing this determination, we shall first consider the question of whether the insurers have a duty to indemnify the Port Authority and then turn to the question of whether they have a duty to reimburse the Port Authority's defense costs.[11]

As previously discussed, it was determined in the underlying actions that neither Brickman Group nor its subcontractor, Metro, bore any fault for the accident that resulted in the plaintiffs' injuries. In view of the exoneration of Brickman Group and Metro, the court in this action correctly determined that the insurers have no obligation to indemnify the Port Authority for

[11]As previously noted, the Everest policy, which is excess to the ACE policy, provides that it "[f]ollow[s] the terms, definitions, conditions, and exclusions" of the ACE policy, and further provides that it covers as an insured "[a]ny person or organization qualifying as such under [the ACE policy]." Accordingly, in the discussion that follows, we refer to the provisions of the ACE policy only.

its liability to the plaintiffs in the underlying actions. This conclusion is the same under either of the two aforementioned potentially applicable additional insured endorsements to the ACE policy, Endorsement No. 17 and Endorsement No. 21.[12]

Endorsement No. 21 to the ACE policy, the more narrowly drawn provision, extends additional insured coverage to the Port Authority "only with respect to liability . . . caused, in whole or in part, by your [Brickman Group's] acts or omissions; or . . . [t]he acts or omissions of those acting on your behalf." The Court of Appeals has held that this language ("liability caused, in whole or in part, by your acts or omissions") does not afford additional insured coverage where — as here — it has been

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[12]Because there is no indemnity coverage under either endorsement, we need not address the insurers' argument that, in the event there were coverage under one endorsement but not the other, the narrower endorsement (No. 21) should be applied on the ground that it is somehow more "specific" than the other (No. 17). In any event, neither of these two endorsements appears to be more specific than the other. We observe that the insurers cite no authority supporting their position that an endorsement to an insurance policy that would otherwise afford additional insured coverage should not be applied where such coverage would not be afforded under a different, more specific endorsement to the same policy. The insurers' position on this issue appears, at a minimum, to be in tension with the well-established principle that "any ambiguity [in an insurance policy] must be construed in favor of the insured and against the insurer" (*White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]). As previously noted, Endorsement No. 75, which specifically names the Port Authority as an additional insured, does not apply because it did not go into effect until after the subject accident.

determined that "the named insured bears no legal fault for the underlying harm" (*Burlington Ins. Co. v NYC Tr. Auth.*, 29 NY3d 313, 317 [2017]). The Port Authority therefore is not entitled to indemnity coverage for this loss under Endorsement No. 21.

Endorsement No. 17 to the ACE policy, the broader provision, affords additional insured coverage, in pertinent part, "only with respect to liability arising out of your [Brickman Group's] operations." While Brickman Group was responsible for maintaining the irrigation system that malfunctioned, it was determined in the underlying actions, to reiterate, that the malfunction arose solely from the Port Authority's own negligence, not from any negligence by either Brickman Group or Metro. The Port Authority correctly points out that the operative language of Endorsement No. 17 ("liability arising out of your operations") covers claims against an additional insured for injuries to the named insured's employees, even if the named insured is not (or is not alleged to have been) at fault (*see Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34 [2010]). This point is unavailing, however, since the plaintiffs in the underlying actions were not employees of the named insured, Brickman Group, or of any subcontractor of Brickman Group. The irrigation system maintained by Brickman Group therefore "was merely the situs of the accident" and "there

was [no] connection between [the] accident and the risk for which coverage [under Endorsement No. 17] was intended" (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 416 [2008]).

The Court of Appeals' decision in *Worth* is instructive. The loss at issue in *Worth* was an injury to a construction worker who had slipped on a staircase installed by one subcontractor (Pacific), to which fireproofing had been applied by a different subcontractor. The injured worker was not an employee of Pacific. In the declaratory judgment action giving rise to the appeal to the Court of Appeals, the general contractor (Worth) sought additional insured coverage under Pacific's policy, which included an additional insured endorsement with the same "arising out of your operations" language as Endorsement No. 17 here. However, in the underlying personal injury litigation, Worth had admitted that its third-party claim against Pacific had no merit because Pacific had not been negligent in installing the staircase (10 NY3d at 414-415). Based on this admission, the Court of Appeals held that the loss had not arisen out of Pacific's operations for purposes of the additional insured endorsement. The Court of Appeals explained:

> "Once Worth admitted that its claims of negligence against Pacific were without factual merit, it conceded that the staircase was merely the situs of the accident. Therefore, it could no longer be argued that there was any connection between [the worker's]

> accident and the risk for which coverage was intended" (*id.* at 416).

In this case, given the determinations in the underlying actions that Brickman Group and Metro, its subcontractor, were not negligent, the irrigation system is analogous to the staircase in *Worth* as "merely the situs of the accident" (*id.*).

The Port Authority does not dispute that it is bound by the determination in the underlying actions that it is the sole party at fault for the causation of the accident. However, in support of its cross motion for summary judgment, the Port Authority argues that this determination does not resolve the question of whether its liability arose "out of [Brickman Group's] operations" for purposes of Endorsement No. 17. This argument is unavailing. That Brickman Group was obligated to maintain the instrumentality by which the accident was caused (i.e., the irrigation system) does not mean that the accident arose from Brickman Group's "operations" where (1) the persons injured were not employees of Brickman Group or Metro, its subcontractor, (2) it has been determined that neither Brickman Group nor Metro bears any fault for the accident, and (3) the Port Authority has not produced sufficient evidence even to raise an issue as to whether any act of Brickman Group or Metro, even if nonnegligent, was a link in the chain of causation that led to the accident,

much less to establish such causation as a matter of law (*cf. Burlington*, 29 NY3d at 332 n 5 [Fahey, J., dissenting] [noting that a "non-negligent" act may be a cause of an accident]).[13] Accordingly, Endorsement No. 17, like Endorsement No. 21, does not afford the Port Authority indemnity coverage for its liability to the plaintiffs in the underlying actions, and, on a search of the record pursuant to CPLR 3212(b), we grant the insurers summary judgment to that effect.

This brings us to the question of whether the Port Authority, although not entitled to indemnity in the underlying actions, is entitled to reimbursement of any of the defense costs it incurred in that litigation as an additional insured under

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[13]Apart from the liability verdict adverse to the Port Authority in the underlying actions, the only evidence contained in the present record concerning the causation of the accident is a handwritten, one-page statement by Christian Preuss, an employee of Metro, which document the Port Authority submitted in support of its cross motion for summary judgment. In his statement, Preuss attributed the water discharge to a "zone valve being left (malfunction) in the open position," but did not address how that state of affairs had come about, or which organization had control of the valve. Accordingly, the Preuss statement not only fails to prove that the loss arose from the operations of Brickman Group or its subcontractor, it fails even to raise an issue of fact in that regard. It bears mention that, although the underlying actions were litigated for about eight years before the liability verdict was rendered, the Preuss statement is the only piece of evidence concerning the causation of the accident that the Port Authority submitted in this action in support of its position that its liability in the underlying actions arose from Brickman Group's operations.

Brickman Group's policies. The Port Authority, in its appellate brief, makes clear that it "is not asking ACE to assume . . . [its] defense" in the underlying actions, since "[t]he case is over," but simply to reimburse the costs of its unsuccessful defense. While the terms of the ACE policy plainly exclude any duty to defend an insured in litigation (as more fully discussed below), it does not follow from the absence of a duty to defend that there is no obligation to reimburse defense costs.[14]

The ACE policy's insuring agreement provides, in pertinent part:

> "We will pay the insured for the 'ultimate net loss' in excess of the 'retained limit' shown in the Declarations that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. *No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for* under DEFENSE, INVESTIGATION, SETTLEMENT, LEGAL EXPENSES, AND INTEREST ON JUDGMENTS" (emphasis added).

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[14]This Court has observed that the difference between a duty to defend and a duty to pay defense costs is "who chooses and pays the defense attorney" (*Federal Ins. Co. v Kozlowski* [hereinafter, *Kozlowski*], 18 AD3d 33, 41 n 10 [1st Dept 2005]; *see also Liberty Mut. Ins. Co. v Pella Corp.* [hereinafter, *Pella*], 650 F3d 1161, 1172 [8th Cir 2011] [a duty to defend, unlike a duty to pay defense costs, "necessarily requires the insurer to . . . conduct and take control of the whole defense"]; *In re WorldCom, Inc. Sec. Litig.*, 354 F Supp 2d 455, 464 n 11 [SD NY 2005] ["In contrast to a duty to pay defense costs, the duty to defend customarily includes an insurer's right to choose the attorney and to control the litigation strategy"]).

The Declarations indicate that the "retained limit" under the ACE policy is $500,000 for each occurrence.

As amended by Endorsement No. 29 to the ACE policy, the policy's provision under the heading "Defense, Investigation, Settlement, Legal Expenses, and Interest on Judgments" (which is referenced in the above-quoted insuring agreement) provides in pertinent part:

> "This policy does not apply to defense, investigation, settlement, or legal expenses, *other than 'loss adjustment expense,'* or prejudgment interest arising out of any 'occurrence' or offense, but *we shall have the right and opportunity to assume from the insured the defense and control of any claim or 'suit'*, including any appeal from a judgment, seeking payment of damages covered under this policy that we believe likely to exceed the 'retained limit'. In such event we and the insured shall cooperate fully. Our obligation to pay 'Loss Adjustment Expense' ends when we have used up the applicable Limits of Insurance in payment of 'Ultimate Net Loss'" (emphasis added).[15]

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[15]Although the Port Authority (as previously noted) no longer seeks to require ACE to assume its defense, we observe that the policy's above-quoted express conferral upon ACE of "*the right and opportunity* to assume from the insured the defense and control of any claim or suit" (emphasis added; internal quotation marks omitted), without mention of any *duty* on ACE's part to undertake the insured's defense, necessarily implies that ACE has no duty to defend (*see Topliffe v US Art Co., Inc.*, 40 AD3d 967, 970 [2d Dept 2007] ["Pursuant to the language of the policy, (the insurer) had the option to defend, not the duty to defend"]; *see also Quadrant Structured Prods. Co., Ltd. v Vertin*, 23 NY3d 549, 560 [2014] [noting that "(t)he maxim *expressio unius est exclusion alterius*" applies to "the interpretation of contracts"]; *Salerno v Coach, Inc.*, 144 AD3d 449, 450 [1st Dept 2016] [same]; *Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302 [1st Dept 2007] [same]). In addition, the insuring

Endorsement No. 29 further defines the term "loss adjustment expense" in the above-quoted paragraph, in pertinent part, as follows:

> "'Loss adjustment expense' means such claim expenses and costs incurred by the insured or by us in connection with the investigation, administration, adjustment, settlement or defense of any claim or 'suit' to which this policy applies. Such expenses include, but are not limited to, attorneys' fees for claims in suit, court costs and related costs such as filing fees . . . ."

In addition, Endorsement No. 29 provides that "[l]oss adjustment expense" (as defined above) "shall be included within the 'retained limit'" specified in the Declarations.

Notwithstanding that the ACE policy does not impose on the insurer any duty to defend, the policy, as amended by Endorsement No. 29, does require the insurer to pay "loss adjustment expense" in excess of the retained limit, up to the policy limits.[16] The

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agreement of the ACE policy expressly excludes any "obligation . . . to . . perform acts or services" that is not "explicitly provided for" under the referenced heading.

[16]The reason the duty to defend is often replaced by a duty to reimburse defense costs in insurance policies that provide for a substantial self-insured retention (such as the $500,000 "retained limit" under Brickman Group's ACE policy) has been explained as follows: "By using the obligation to pay claim expenses instead of the duty to defend, the insurers avoid having to pay defense costs on smaller cases where the defense costs do not exceed the self-insured retention. . . . The applicability of the self-insured retention saves money for the insurer on small cases, and in exchange the policyholder maintains greater control over the litigation (and hopefully receives a lower premium)"

term "loss adjustment expense" is defined by Endorsement No. 29 to include "expenses and costs incurred by the insured . . . in connection with the investigation, administration, settlement or defense of any claim or 'suit' to which this policy applies," including "attorneys' fees for claims in suit." Furthermore, the endorsement provides that "'[l]oss adjustment expense' shall be included within the [insured's] 'retained limit'."[17]

The question to be answered on this appeal is whether, in the absence of any duty to defend, the duty to reimburse "loss adjustment expense" under Endorsement No. 29 to the ACE policy depends on the complaint's containing allegations that (if true) would put the loss within the scope of coverage or, in the alternative, on the facts as ultimately determined at the end of the action. In this case, if the duty to reimburse depends on

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(Jeffrey E. Thomas, *The Scope of the Obligation to Pay Claim Expenses*, New Appleman on Insurance: Current Critical Issues in Insurance Law [Nov. 2006]). While the Port Authority is not the policyholder in this case, to the extent it has the status of an additional insured, it holds the same rights as does the policyholder (*see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 715 [2007] [an additional insured "enjoy(s) the same protection as the named insured"] [internal quotation marks omitted]).

[17]In determining that the Port Authority is not entitled to reimbursement of defense costs, Supreme Court relied on the underlying policy form without considering the attached Endorsement No. 29, which amends the policy to cover "loss adjustment expense."

the facts as finally adjudicated in the underlying actions, the conclusion would be that the Port Authority's defense costs are not covered. This is because, as previously discussed, the exoneration of Brickman Group and Metro in the underlying actions means that, in fact, the loss was not "caused, in whole or in part," by Brickman Group's "acts or omissions" for purposes of Endorsement No. 21, nor did the loss "aris[e] out of [Brickman Group's] operations" for purposes of Endorsement No. 17. However, if the allegations of the complaint constitute the determinative factor for purposes of the duty to reimburse, the conclusion would be that the Port Authority's defense costs are covered. As explained in the following paragraph, that is the conclusion we reach.

Again, Endorsement No. 29 defines the "loss adjustment expense" covered by the ACE policy, in pertinent part, as "such claim expenses and costs incurred by the insured . . . in connection with the . . . defense of any claim or *'suit' to which this policy applies*" (emphasis added). The policy defines the term "suit," in pertinent part, to mean "a civil proceeding in which damages because of *'bodily injury' . . . to which this insurance applies are alleged*" (emphasis added). Under the policy's additional insured endorsements, the insurance applies to liability for bodily injury "arising out of [Brickman Group's]

operations" (Endorsement No. 17) or "caused, in whole or in part, by . . . [Brickman Group's] acts or omissions" (Endorsement No. 21). The complaint in each of the underlying actions alleged that negligence by Brickman Group and/or Metro, its subcontractor, was a cause of the plaintiff's injuries. Thus, "'bodily injury' . . . to which [the] insurance applie[d]" was "alleged" in each of the underlying actions, from inception through the return of the jury's liability verdict, at which point both Brickman Group and Metro had been exonerated. Until that time, by reason of the allegations placing the loss within the scope of the additional insured coverage, each of the underlying actions had been a "suit" within the meaning of the policy's definition of a covered "loss adjustment expense."[18] This fact was not retroactively changed by the ultimate determination rendered in the underlying actions concerning the causation of the plaintiffs' injuries.

Moreover, the ACE policy defines "loss adjustment expense" simply as the "costs incurred . . . in connection with the . . .

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[18]*Cf. Pella*, 650 F3d at 1171 [under a policy providing for reimbursement of attorneys' fees incurred by the insured "for *claims in suit*," and defining the term "suit" to mean an action in which covered property damage is "*alleged*," the insured was entitled to have the insurer "reimburse (its) attorneys' fees for claims in a suit in which covered 'property damage' is *alleged*"] [internal quotation marks omitted]).

defense of any . . . 'suit' to which this policy applies," without excluding the cost of defending against noncovered claims within the same action. Accordingly, there is no need to allocate the Port Authority's defense costs in the underlying actions between covered and noncovered claims. To the extent the policy language might be deemed to be ambiguous on this point, we again note that "any ambiguity must be construed in favor of the insured and against the insurer" (*White*, 9 NY3d at 267).

Based on the foregoing analysis, we conclude that the ACE policy, on its face, covers the costs the Port Authority incurred in defending the underlying actions through the return of the verdict on April 25, 2017, notwithstanding that the policy does not cover the Port Authority for its liability to the plaintiffs in those actions.[19] Although the determinative factor in deciding this appeal is the particular policy language at issue, we note that this result is consistent with this Court's statement that "[t]he same allegations [in a complaint] that trigger a duty to defend trigger an obligation to pay defense costs" (*Kozlowski*, 18 AD3d at 40 [internal quotation marks

[19]Although the Port Authority's complaint seeks, in addition to declaratory relief, an award of its defense costs in the underlying actions, the amount of the defense costs that the Port Authority is entitled to recover from the insurers cannot be determined on the existing record. We therefore remand this matter for further proceedings to make such a determination.

omitted]; *see also Westpoint Intl., Inc. v American Intl. S. Ins. Co.*, 71 AD3d 561, 563 [1st Dept 2010] ["Having failed to demonstrate that there is no possibility of coverage, (the insurer) cannot avoid its obligation to advance defense costs," notwithstanding that there was no duty to defend under the policy]; *Lowy v Travelers Prop. & Cas. Co.*, 2000 WL 526702, *2 n 1, 2000 US Dist LEXIS 5672, *6 n 1 [SD NY 2000] ["(T)here is no relevant difference between the allegations that trigger an insurer's duty to defend and the allegations that trigger an insurer's obligation to pay defense expenses"]).[20] Beyond question, if the standard for triggering the duty to defend is applied to the duty to pay defense costs at issue in this case, the Port Authority is entitled to reimbursement of its defense

[20]We note that, unlike the ACE commercial general liability policy at issue here, the directors and officers liability policies at issue in *Kozlowski* and *Westpoint* entitled the insurer to recoup the amounts advanced to defend claims ultimately determined not to be covered (*see Westpoint*, 71 AD3d at 563; *Kozlowski*, 18 AD3d 41-42; *see also National Union Fire Ins. Co. of Pittsburgh, PA v Ambassador Group, Inc.*, 157 AD2d 293, 299 [1st Dept 1990] [where a directors and officers liability policy required the insurer to reimburse the insured's defense costs but not to provide a defense, any advances of the insured's defense costs would be "subject to recoupment in the event it is ultimately determined no coverage was afforded" and also "subject to apportionment between covered and noncovered claims and parties"). To reiterate, nothing in the ACE policy suggests that the insurer may avoid bearing the cost of defending noncovered claims asserted alongside covered claims in a "suit" as defined by the policy.

costs in the underlying actions through the end of the liability trial.

The standard used to determine whether a duty to defend has been triggered is whether "the allegations in a complaint state a cause of action that gives rise to the reasonable possibility of recovery under the policy" (*Fieldston Prop. Owners Assn., Inc. v Hermitage Ins. Co.*, 16 NY3d 257, 264 [2011] [internal quotation marks omitted]). It is irrelevant that any judgment ultimately entered against the insured might be based on claims not covered and, as such, might not be subject to the duty to indemnify (*see BP A.C. Corp.*, 8 NY3d at 714). Moreover, the duty to defend extends to the entire action "if any of the claims against an insured arguably arise from covered events" (*Fieldston*, 16 NY3d at 264 [internal quotation marks omitted]). Plainly, the allegations in the underlying actions that negligence by the named insured, Brickman Group, and/or its subcontractor, Metro, was a cause of the accident — allegations that, if proven, would have placed the loss squarely within the scope of the ACE policy's additional insured coverage — "g[ave] rise to the reasonable possibility of recovery under the policy" (*Fieldston*, 16 NY3d at 264 [internal quotation marks omitted]).[21]

[21]Notably, in *BP A.C. Corp.*, the Court of Appeals specifically rejected the contention that, where there is a duty

We also note that the trend of recent case law, in situations where there is a duty to reimburse defense costs but no duty to defend, is to "apply traditional duty to defend analysis when determining whether insurers must advance or reimburse insureds' defense expenses" (Douglas R. Richmond, *Liability Insurance and the Duty to Pay Defense Expenses Versus the Duty to Defend*, 52 Tort Trial & Ins Prac L J 1, 9 [2016]; *see also id.* at 9-10 n 45 [citing cases]). As a federal appeals court has observed, "[S]tate courts generally have viewed an insurer's duty to advance defense costs as an obligation congruent to the insurer's duty to defend, concluding that the duty arises if the allegations in the complaint could, if proven, give rise to a duty to indemnify" (*Pella*, 650 F3d at 1170 [internal quotation marks omitted]; *see also id.* ["Therefore, even though this case does not involve a duty to defend, the parameters of that duty, under Iowa law, nevertheless guide our

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to defend, an additional insured should not be entitled to a defense until it has been determined whether the loss was within the scope of the additional insured coverage (*see* 8 NY3d at 714-715). In this regard, the Court stated: "[T]he standard for determining whether an additional . . . insured is entitled to a defense is the same standard that is used to determine if a named insured is entitled to a defense" (*id.* at 715). This principle — that an additional insured "enjoy[s] the same protection as the named insured" (*id.* at 715 [internal quotation marks omitted]) — is equally applicable to an insurer's duty to reimburse defense costs.

analysis of Liberty Mutual's duty to reimburse Pella's defense costs"]; *Worthington Fed. Bank v Everest Natl. Ins. Co.*, 110 F Supp 3d 1211, 1222 [ND Ala 2015] ["Courts considering whether an insurer's obligation to advance defense costs is triggered generally do so using standards that are the same or similar to those employed to ascertain whether an insurer has a duty to provide the defense itself . . . The court will likewise do so here"]; *American Chem. Socy. v Leadscope, Inc.*, 2005 WL 1220746, *8, 2005 Ohio App LEXIS 2428, *22 [Ohio Ct App 2005] ["We see no reason to make a distinction between duty to defend cases and duty to advance defense costs cases with respect to the application of the one claim-all claims principle and pleadings test"]; Restatement of Liability Insurance § 22[2][a] [2019] [taking the position that, where a policy requires the insurer to pay defense costs on an ongoing basis but not to provide a defense, "(t)he scope of the insurer's defense-cost obligation is determined using the rules governing the duty to defend"]).

Finally, we acknowledge that, in each of the cases cited in the foregoing discussion, the court appears to have determined that the insured was entitled to have the insurer pay its defense costs while the question of the insured's liability was still being litigated in the underlying proceedings. In this case, by contrast, the Port Authority chose not to press its claim against

ACE and Everest for reimbursement of its defense costs until after its liability had been adjudicated in the underlying actions and — as a result of the exoneration of Brickman Group and Metro — had been determined to fall outside the scope of its additional insured coverage.[22] Under the terms of the ACE policy, the timing of the Port Authority's demand for reimbursement does not defeat its claim for reimbursement of its defense costs through the time its liability was adjudicated in the underlying actions. As previously discussed, the ACE policy entitles the insured to coverage of the costs it incurred in defending "any . . . 'suit' to which this policy applies," and the policy defines the term "suit" to mean an action "in which damages because of 'bodily injury' . . . to which this insurance applies are *alleged*" (emphasis added). To reiterate, until the jury rendered the verdict adverse to the Port Authority, each of the underlying actions remained a "'suit' to which th[e] [ACE] policy applie[d]" by reason of the allegations therein against Brickman Group and Metro.

Accordingly, the order of the Supreme Court, New York County (David B. Cohen, J.), entered on or about June 27, 2018, which,

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[22]We note that, once the $500,000 "retained limit" under the ACE policy was exhausted, nothing in the policy required the Port Authority to wait to press its claim for reimbursement of its defense costs until after its liability had been adjudicated.

to the extent appealed from as limited by the briefs, granted ACE's motion and Everest's cross motion to dismiss the complaint as against each of them, denied the Port Authority's request (deemed by the court to constitute a cross motion) for leave to amend its complaint to assert a cause of action against Brickman Group for breach of an agreement to procure insurance, and denied the Port Authority's cross motion for summary judgment declaring that ACE and Everest are obligated to indemnify it for its liability to the plaintiffs in the underlying actions and to reimburse it for the costs it incurred in defending itself in the underlying actions, should be modified, on the law, to grant ACE and Everest partial summary judgment, on a search of the record, declaring that ACE and Everest have no duty to indemnify the Port Authority for its liability to the plaintiffs in the underlying actions, to grant the Port Authority's cross motion for summary judgment to the extent of declaring that ACE and Everest are obligated, within the limits of their respective policies, to reimburse the Port Authority for the costs it reasonably incurred, in excess of the "retained limit" under the ACE policy, in defending the underlying actions from their inception through April 25, 2017, and to deny ACE's motion and Everest's cross motion to dismiss the complaint as against each of them, and otherwise affirmed, without costs, and the matter remanded to

Supreme Court for further proceedings to determine the amounts due the Port Authority from ACE and Everest for the reimbursement of its defense costs in the underlying actions.

All concur.

Order, Supreme Court, New York County (David B. Cohen, J.), entered on or about June 27, 2018, modified, on the law, to grant ACE and Everest partial summary judgment, on a search of the record, declaring that ACE and Everest have no duty to indemnify the Port Authority for its liability to the plaintiffs in the underlying actions, to grant the Port Authority's cross motion for summary judgment to the extent of declaring that ACE and Everest are obligated, within the limits of their respective policies, to reimburse the Port Authority for the costs it reasonably incurred, in excess of the "retained limit" under the ACE policy, in defending the underlying actions from their inception through April 25, 2017, and to deny ACE's motion and Everest's cross motion to dismiss the complaint as against each of them, and otherwise affirmed, without costs, and the matter remanded to Supreme Court for further proceedings to determine the amounts due the Port Authority from ACE and Everest for the reimbursement of its defense costs in the underlying actions.

Opinion by Friedman, J. All concur.

Friedman, J.P., Sweeny, Webber, Gesmer, Singh, JJ.

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

ENTERED: DECEMBER 12, 2019

DEPUTY CLERK