SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 25, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Moskowitz, Manzanet-Daniels, Gische, JJ.

9181-
9182 Yanella Gudz, etc.,
Plaintiff-Respondent,

-against-

Jemrock Realty Company, LLC,
Defendant-Appellant.

Index 603555/09

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Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellant.

Bernstein Liebhard LLP, New York (Christian Siebott of counsel), for respondent.

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Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered October 26, 2011, which, upon reargument, adhered to a prior order, same court and Justice, entered June 20, 2011, granting plaintiff's motion for class certification, affirmed, without costs. Appeal from the prior order, dismissed, without costs, as academic.

Plaintiff's rent overcharge claim did not seek a "penalty" within the meaning of CPLR § 901(b), because she waived her right to treble damages under Rent Stabilization Law (RSL) (Administrative Code of City of New York) § 26-516(a). The

waiver was effective, since, unlike the mandatory penalty provided under the Donnelly Act (General Business Law § 340[5]; *see Asher v Abbott Labs.*, 290 AD2d 208 [1st Dept 2002], *lv dismissed* 98 NY2d 728 [2002]), treble damages are not the sole measure of recovery, and an owner found to have overcharged may submit evidence to overcome the statutory presumption of willfulness (*see Downing v First Lenox Terrace Assoc.*, __ AD3d __, and *Borden v 400 E. 55th St. Assoc.*, __ AD3d __ [decided simultaneously herewith]).

Although plaintiff did not waive her right to reimbursement for alleged overcharges and interest, these claims did not render her action an action for a penalty for purposes of CPLR 901(b), even though such recovery is denominated a penalty by the RSL, because they lack a punitive, deterrent and litigation-incentivizing purpose (*see Sperry v Crompton Corp.*, 8 NY3d 204, 212-213 [2007]) and are, in fact, compensatory (*see Mohassel v Fenwick*, 5 NY3d 44, 50-51 [2005]).

Nor did the attorneys' fees request seek a penalty, as the general right to attorneys' fees in landlord-tenant proceedings (Real Property Law § 234) does not apply to administrative proceedings (*see Matter of Blair v New York State Div. of Hous. & Community Renewal*, 96 AD3d 687 [1st Dept 2012]), and the RSL provision should be understood as having the same nonpunitive

purpose as the statute applicable to actions and summary proceedings. Notably, the reference in Rent Stabilization Code (9 NYCRR) § 2526.1(d) to attorneys' fees as an "additional penalty," while otherwise not dispositive, is absent from the attorney fee provision in the legislatively enacted RSL.

Interpreting the requirements of the class action statute liberally, as we must (*see City of New York v Maul*, 14 NY3d 499, 509 [2010]), we agree with the motion that those requirements were satisfied. We reject defendant's contention that plaintiff was required to provide an affidavit focused solely on her financial ability to adequately represent the class, which was adequately shown by counsel's assumption of the risk of costs and expenses in the litigation.

We have considered defendant's other contentions and find them unavailing.

All concur except Moskowitz and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

This appeal requires us to consider what constitutes a "penalty" for purposes of the class action statute, CPLR 901(b), and whether a putative class representative may waive such penalty and still be deemed an adequate class representative.

CPLR 901(b) expressly provides that "[u]nless a statute creating or imposing a penalty, or a minimum measure or recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute *may not be maintained as a class action*" ([emphasis supplied]). CPLR 901(b) thus precludes the maintenance of a class action seeking a penalty.

An award of treble damages under the Rent Stabilization Law (RSL) clearly constitutes a "penalty." For one, such a recovery is denominated a penalty by the RSL (*compare Bogartz v Astor*, 293 NY 563 [1944] [double payment recoverable under Workers" Compensation Law not a penalty because the statute referred to "double compensation"]). RSL (Administrative Code of City of NY) § 26-516(a) states that if DHCR finds that an owner has collected rent in excess of that authorized by the statute, the owner "shall be liable to the tenant for a penalty equal to three times the amount of such overcharge."

While one third of the award constitutes compensation for

actual damages, the remaining two-thirds serves to punish the defendant on account of the willfulness of the violation, acting as a deterrent (*see Sperry v Crompton Corp.*, 8 NY3d 204, 212-213 [2007]). As noted by the Court of Appeals, "These provisions are designed to discourage violations of the Rent Stabilization Law" (*Mohassel v Fenwick*, 5 NY3d 44, 50 [2005]).

Since the enactment of RSL 26-516(a) postdates that of CPLR 901(b), we must assume that the Legislature was aware that by denominating the treble damages award a "penalty" it was foreclosing the maintenance of a class action suit (*see Sperry*, 8 NY3d at 212-213; *Asher v Abbott Labs.*, 290 AD2d 208 [1st Dept 2002], *lv dismissed* 98 NY2d 728 [2002]).

The majority reasons that the statute does not impose a penalty because treble damages are not the "sole" measure of recovery for rent overcharges. It is true that treble damages are not available where an owner proves, by a preponderance of the evidence, that the overcharge was not willful. Nonetheless, it is inescapable – and not disputed by the majority – that treble damages are *mandatory* in the event the owner is found to have overcharged the tenant. A landlord who fails to rebut the statutory presumption of willfulness *will be subject to treble damages*.

The majority finds CPLR 901(b) inapplicable in this case

because the plaintiff class representatives waived the right to seek treble damages under RSL § 26-516(a). However, to permit such a waiver would be to circumvent the clear intent of CPLR 901(b), which is to preclude the maintenance of a class action suit seeking a penalty. Plaintiff's waiver of treble damages is moreover void under Rent Stabilization Code (9 NYCRR) § 2520.13, which provides that "[a]n agreement by the tenant to waive the benefit of *any* provision of the RSL or this Code is void" (*see e.g. Draper v Georgia Props.*, 230 AD2d 455 [1st Dept 1997], *affd* 94 NY2d 809 [1999]; *Drucker v Mauro*, 30 AD3d 37 [1st Dept 2006], *lv dismissed* 7 NY3d 844 [2006]; *Georgia Props., Inc. v Dalsimer*, 39 AD3d 332 [1st Dept 2007]).

I am unpersuaded by the majority's reasoning that 9 NYCRR 2520.13 does not apply because plaintiff purported to "waive" the class members' rights to treble damages, rather than agreeing to do so via lease or stipulation. Whether unilaterally or via agreement, the fact remains that plaintiff has agreed to give up the benefit of a statutory protection, i.e. the treble damages afforded by RSL § 26-516(a), on behalf of not only herself but the class – a far more profound impact than one individual purporting to agree to give up her rights via lease. We have previously held that an agreement "which waives the benefit of a statutory protection *is unenforceable as a matter of public*

policy, even if it benefits the tenant" (*Drucker*, 30 AD3d at 38 [emphasis added]). Since the effect of the waiver is to vitiate a provision integral to the RSL – the exaction of excessive rents by the landlord – I am compelled to conclude that it is void under 9 NYCRR § 2520.13.

Because the penalty imposed by RSL § 26-516(a) is a mandatory one, maintenance of a class action is prohibited (*see e.g. Rudgayzer & Gratt v Cape Canaveral Tour & Travel, Inc.*, 22 AD3d 148, 149 [2d Dept 2005] [class action may not be maintained under the Telephone Consumer Protection Act (47 USC 227) because section 227(e)(5)(A)(1) provides that "[a]ny person that is determined by the Commission . . . to have violated this subsection shall be liable to the United States for a forfeiture penalty"]; *Giovanniello v Carolina Wholesale Off. Mach. Co., Inc.*, 29 AD3d 737 [2d Dept 2006] [same]; *Paltre v General Motors Corp.*, 26 AD3d 481 [2d Dept 2006] [same]; *Weber v Rainbow Software, Inc.*, 21 AD3d 411 [2d Dept 2005] [same]; *Klapak v Pappas*, 79 AD2d 602 [2d Dept 1980] [class action may not be maintained under Social Services Law 131-o where the relevant provisions of the law provide for "recovery of additional punitive damages in an amount equal to twice the amount (of

personal allowance funds) misappropriated or withheld"]).[1]

This case is distinguishable from those cited by plaintiffs, which involve the waiver of discretionary, as opposed to mandatory, penalties (*see e.g. Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604 [2nd Dept 1987] [under consumer protection statute, General Business Law § 349(h), which provides that any plaintiff injured by reason of a violation of the statute may bring an action to recover his actual damages or fifty dollars, whichever is greater, with treble damages recoverable at the court's discretion]; *Ridge Meadows Homeowners Assn v Tara Dev. Co.*, 242 AD2d 947 [4th Dept 1997] [same]). In allowing "waiver," the majority both rewrites the RSL to provide for a discretionary rather than a mandatory penalty, and circumvents the clear purpose of CPLR 901(b), which is to prohibit the maintenance of a class action for a penalty.

I am similarly unpersuaded by the majority's reasoning that there is no statutory violation because an individual class member may opt out of the class to pursue his or her treble damages claim. By allowing a class action to proceed seeking only actual damages, we permit the class to effectively rewrite

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[1]Social Services Law 131-o, similar to RSL § 26-516(a), provides for the recovery of actual damages in the event of non-willful conduct, and punitive damages in the event of intentional misappropriation.

RSL 26-516(a) and undermine the Legislature's purpose in enacting the statute. Further, allowing waiver under these circumstances arguably does not satisfy due process. A putative class member would not assume that his or her rights might be compromised by waiver of potential claims for treble damages since CPLR 901(b) expressly forbids the maintenance of a class action seeking a penalty. Since an award of treble damages pursuant to RSL 26-516(a) unequivocally constitutes a "penalty," no rational class member would presume that a class representative would have the right to waive these claims, and, more importantly, that he or she would be bound by any such waiver and unable to pursue a treble damages claim if he or she, like most absent class members, neglected to opt out.

Finally, the unilateral waiver of a statutorily imposed penalty by a class representative adversely affects his or her ability to act as an adequate class representative (*see Small v Lorillard Tobacco Co.*, 94 NY2d 43, 54 [1999] [affirming finding that plaintiffs were not adequate class representatives where they limited their theory of recovery in "significant ways" and limited their claim for damages "in order to shape a legally de minimis theory of the case"]). Plaintiff's position will conflict with that of some members of the putative class who, unlike plaintiff, may have suffered substantial overcharges, or

whose rent histories may be different, or whose apartments may be classified under a different regulatory category. Since the statute authorizes both actual (in the event the landlord rebuts the presumption of willfulness) and punitive damages, the named representative must seek both in order to adequately represent the interests of the proposed class (see *Klapak*, 79 AD2d at 602).

The putative waiver, moreover, was procedurally defective insofar as it was not accomplished by plaintiff class representative via affidavit or amended pleading, but by plaintiff's attorney in a reply affirmation (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010] ["The proponent of class certification bears the burden of establishing the criteria promulgated by CPLR 901(a) . . . and must do so by the tender of evidence in admissible form"]).

For all of the above reasons, I would find that plaintiff's waiver of the statutory treble damages provisions of the RSL is void and that maintenance of a class action is prohibited under CPLR 901(b).

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Renwick, Freedman, Feinman, JJ.

9284N-
9285N Lorraine Borden, etc., et al.,
Plaintiffs-Respondents,

-against-

400 East 55th Street Associates, L.P.,
Defendant-Appellant.

Index 650361/09

Rosenberg & Estis, P.C., New York (Jeffrey Turkel of counsel), for appellant.

Bernstein Liebhard, LLP, New York (Gabriel G. Galletti of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered April 13, 2012, which, upon renewal, granted plaintiff's motion for class certification and related relief, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered November 10, 2011, which denied plaintiff's motion for class certification, without prejudice to renew upon submission of an affidavit by plaintiff demonstrating that she is a proper class representative, unanimously dismissed, without costs, as academic.

CPLR 901(b), which prohibits a class action to recover a penalty or minimum damages imposed by statute where the statute does not explicitly authorize a class recovery thereof, does not bar plaintiff's putative class action. Plaintiff has waived her

right to treble damages under Rent Stabilization Law (RSL) (Administrative Code of the City of NY) § 26-516(a), and individual class members will be allowed to opt out of the class to pursue their treble damages claims, should they believe there is a lawful basis for doing so (*see Downing v First Lenox Terrace Assoc.*, __ AD3d __; *Gudz v Jemrock Realty Co.*, __ AD3d __ [decided simultaneously herewith]). Although plaintiff did not waive her right to reimbursement for alleged overcharges and interest, and for attorneys' fees, those claims do not render her action an action to recover a penalty for purposes of CPLR 901(b) (*see Downing; Gudz*).

Interpreting the requirements of the class action statute liberally (*see City of New York v Maul*, 14 NY3d 499, 509 [2010]), we find that the motion court did not exercise its discretion improvidently in finding those requirements satisfied (*see Pludeman v Northern Leasing Sys., Inc.*, 74 AD3d 420, 422 [1st Dept 2010]). The issues of when defendant received J-51 benefits, whether defendant deregulated apartments while receiving those benefits, which tenants resided in those apartments during those time periods, and whether defendant wrongfully charged market rents while accepting J-51 benefits are common issues that "predominate," thereby meeting the commonality requirement of CPLR 902(a)(2) (see *id.* at 423). The need to

conduct individualized damages inquiries does not obviate the utility of the class mechanism for this action, given the predominant common issues of liability (*see Godwin Realty Assoc. v CATV Enters.*, 275 AD2d 269, 270 [1st Dept 2000]; *Pruitt v Rockefeller Ctr. Props.*, 167 AD2d 14, 22 [1st Dept 1991]).

Defendant's counterclaim for rent arrears does not cause plaintiff to be an atypical member of the class. Her claim is typical of the claims of all class members in that each flows from defendant's alleged unlawful deregulation of apartments while receiving J-51 benefits *(see Friar v Vanguard Holding Corp.*, 78 AD2d 83, 99 [2d Dept 1980]). "[T]hat the underlying facts of each individual plaintiff's claim vary, or that [defendant's] defenses vary, does not preclude class certification" (*Pludeman*, 74 AD3d at 424). Defendant's counterclaim does not materially add to the complexity or difficulty of resolving plaintiff's individual claim, and defendant's suggestion that plaintiff might be inclined to settle her case to evade liability on the counterclaim is speculative.

The record indicates that plaintiff possesses an "adequate understanding of the case" to enable her to serve as class representative (*Rollin v Frankel & Co.*, 290 AD2d 368, 369 [1st Dept 2002]), and that her attorneys possess the requisite "competence, experience and vigor" to serve as class counsel (*see*

Fiala v Metropolitan Life Ins. Co., 52 AD3d 251, 251 [1st Dept 2008]). Plaintiff's intent to waive treble damages on behalf of the class does not render her an inadequate representative, given that any class member who wishes to pursue a claim for treble damages for willful overcharge may opt out and bring an individual action therefor (*see Gudz*).

We have considered defendant's other contentions and find them unavailing.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Sweeny, Freedman, Feinman, Gische, JJ.

9546-
9546A Wanda Y. Collins, et al.,
Plaintiffs-Appellants,

-against-

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

Verizon New York Inc., et al.,
Defendants-Respondents.

Index 109726/07

Sullivan Papain Block McGrath & Cannavo P.C., New York (Gabriel A. Arce-Yee of counsel), for appellants.

Leahey & Johnson, P.C., New York (Joanne Filiberti of counsel), for Verizon New York Inc., respondent.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Louis A. Carotenuto of counsel), for Tully Construction Co., Inc., respondent.

Orders, Supreme Court, New York County (Geoffrey D. Wright, J.), entered April 18, 2012, which granted the respective motions of defendants Tully Construction Co., Inc. and Verizon New York Inc. for summary judgment dismissing the complaint as against them, unanimously affirmed, without costs.

This personal injury action arises out of an automobile accident between plaintiffs' car and a van owned and allegedly operated by codefendant the Department of Education (DOE). The accident occurred on West Houston Street in New York City, approaching the intersection with Varick Street. Plaintiff Wanda

Collins testified that she stopped at a red light approximately four car lengths from the Varick Street intersection, and the DOE van pulled up alongside her car in the left lane. Plaintiff unequivocally stated that the van stopped approximately three or four feet before the construction site which occupied the rest of the left lane. When the light turned green, the cars ahead of plaintiff moved forward, and the DOE van merged into plaintiff's lane ahead of her car, resulting in a sideswipe collision.

Defendant Tully had contracted with defendant the City of New York to perform a reconstruction project on Houston Street. The project, which necessitated the closing of multiple lanes of traffic, required adherence to the Manual of Uniform Traffic Control Devices (MUTCD), which required a taper[1] of a minimum of 150 feet for each lane to be merged into another. According to photographs used at the various depositions, the taper provided by Tully was approximately two to three car lengths, and perhaps 50 feet in length – well below the minimum requirement. Plaintiffs' expert stated in an affidavit that the taper is the single most important element of the system of channeling merging traffic, that an inadequate taper will almost always produce

[1]MUTCD 6C-3 provides that "Tapers are created using a series of channelizing devices or pavement markings placed to move traffic out of or into its normal path."

undesirable traffic operations with resulting congestion and possible accidents through the area, and that a proper taper allows motorists time to adjust their speed and find the gaps in the adjacent traffic flow so as to merge safely into the continuing lanes.

The Supreme Court properly found that the alleged negligence of the DOE van's driver was a proximate cause of the accident. Here, as the van was stopped next to plaintiff's vehicle, the length of the taper, created by defendants Tully and Verizon, was entirely unrelated to the occurrence of the accident. As noted, the accident was caused by the alleged improper operation of the DOE vehicle. There is no evidence that the van was unable to safely merge, instead of merely trying to get to the front of the line of traffic moving through the construction zone. A jury would thus be required to speculate that the taper was a proximate cause of the accident. As a result, even assuming the taper in this case did not comply with MUTCD standards, and that it may have furnished the condition or occasion for the occurrence, it was not a proximate cause of it (*see Margolin v Friedman*, 43 NY2d 982, 983 [1978]; *Anton v West Manor Constr. Corp.*, 100 AD3d 523, 524 [1st Dept 2012]; *see also Batista v City of New York*, 101 AD3d 773, 778 [2d Dept 2012]).

Verizon took advantage of Tully's construction site to

perform emergency repair work, and its truck was parked within the work zone. However, even assuming its workers moved traffic barricades and other placement devices in the work zone when they deemed it necessary, the fact that the taper was not a proximate cause of this accident puts Verizon in the same position as Tully and entitles it to summary judgment.

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

ENTERED: APRIL 25, 2013

CLERK

Friedman, J.P., Moskowitz, DeGrasse, Richter, Gische, JJ.

9615 Marilena Katopodis, et al., Index 107743/10
Plaintiffs-Respondents-Appellants,

-against-

Marvin Windows and Doors,
Defendant-Appellant-Respondent,

Marvin Windows of New York, Inc., et al.,
Defendants.

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Greenberg Freeman LLP, New York (Sanford H. Greenberg of counsel), for appellant-respondent.

Gregory A. Sioris, New York, for respondents-appellants.

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Order, Supreme Court, New York County (Anil C. Singh, J.), entered March 22, 2012, which denied defendant Marvin Windows and Door's motion for summary judgment dismissing the first cause of action as time-barred, and denied plaintiffs' cross motion for partial summary judgment on their first cause of action, unanimously modified, on the law, to grant defendant's motion, and otherwise affirmed, without costs.

Defendant's motion for summary judgment dismissing the first cause of action alleging breach of express warranty should have been granted. Defendant argues that the four year statute of limitations runs from the date the windows and doors were delivered in December 2004 or January 2005, which means the action was time-barred when it was filed in June 2010 (UCC 2-

725[2]; *see Richard A. Rosenblatt & Co. v Davidge Data Sys. Corp.*, 295 AD2d 168, 168-169 [1st Dept 2002]). Even if the statute of limitations ran from when the defect was discovered in June 2005, plaintiffs' claim would have expired no later than June 2009, a year before the commencement of this action (*see* UCC 2-725[2]).

There was no basis for the court to extend the statute of limitations based on a September 9, 2009 letter sent by defendant, which offered to provide certain replacement parts pursuant to the terms of the express limited warranty. First, the statute of limitations already had expired at the time the letter was sent. In any event, nothing in the September 9, 2009 letter could be construed as intending, by fraud, misrepresentation or deception, to induce plaintiffs to refrain from timely commencing an action (*see Wiesel v 310 E. 46 LLC*, 62 AD3d 516 [1st Dept 2009]). Thus, the statute of limitations cannot be extended based on an estoppel theory.

Although initially it may seem somewhat unfair for defendant to have given plaintiffs a 10-year warranty and then argue that plaintiffs cannot sue for breach of warranty at any time during that 10-year period, the case law is clear on when this cause of action accrues (*see Heller v U.S. Suzuki Motor Corp.*, 64 NY2d 407, 410 [1985]). Moreover, even if we were to give plaintiffs a

longer period than defendant wants, and determine that the statute of limitations runs from the date the defect was discovered, plaintiffs here still waited too long. In fact, at oral argument, plaintiffs could not explain why they waited several years before commencing this litigation.

Furthermore, plaintiffs do not argue, and therefore we need not reach, whether defendant violated any duty to repair the damaged items. Plaintiffs solely contend that this is a breach of warranty case.

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

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

ENTERED: APRIL 25, 2013

CLERK

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

9650 Deborah Mello, Index 117305/09
Plaintiff-Appellant,

-against-

Narco Cab Corp., et al.,
Defendants-Respondents,

Danny Rebibo,
Defendant.

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Pazer, Epstein & Jaffe, P.C., New York (Matthew J. Fein of counsel), for appellant.

Kathleen C. Waterman, New York, for respondents.

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Order, Supreme Court, New York County (George J. Silver, J.), entered April 11, 2012, which, in this action for personal injuries allegedly sustained in a motor vehicle accident, denied plaintiff's motion for partial summary judgment on the issue of liability as against all defendants, unanimously reversed, on the law, without costs, the motion granted to the extent of finding no culpable conduct by plaintiff on the issue of liability, and the matter remanded for further proceedings.

Plaintiff established that, as a back-seat passenger in a taxi cab that rear-ended a second vehicle, she was free of negligence as a matter of law. Plaintiff testified that just before the accident occurred, her friend, who was with her in the back seat, was in the process of instructing the driver to slow

down. The driver testified he did not hear plaintiff's friend, and there is no basis for finding that plaintiff or her friend did anything to cause the accident or could have prevented it (*cf. Bruni v City of New York*, 2 NY3d 319, 328 [2004]. Since plaintiff was an innocent rear-seat passenger who cannot be found at fault under any version of how the accident occurred, the motion should have been granted to the extent indicated (*see Garcia v Tri-County Ambulette Serv.*, 282 AD2d 206 [1st Dept 2001]; *see also Medina v Rodriguez*, 92 AD3d 850 [2d Dept 2012]).

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

ENTERED: APRIL 25, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9742 American Home Assurance Company, Index 309463/10
Plaintiff-Appellant,

-against-

Rent A Unit NY, Inc., et al.,
Defendants,

Amoco Construction Corp., et al.,
Defendants-Respondents.

[And a Third-Party Action]

_____

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for appellant.

Bronstein, Gewirtz & Grossman, New York (Peretz Bronstein of counsel), for Amoco Construction Corp. and Amost Drywall Inc. respondents.

Finkelstein & Partners, LLP, Newburgh (George A. Kohl, 2nd, of counsel), for Adolfo Estrada, respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered March 5, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff insurer's motion for summary judgment on the third cause of action in its amended complaint seeking a declaration that it has no duty to defend or indemnify defendant Amoco Construction Corp. in the underlying personal injury action, unanimously modified, on the law, to grant, upon a search of the record, summary judgment to defendant Amoco, declaring that plaintiff insurer has a duty to defend and

indemnify Amoco in the underlying personal injury action, and otherwise affirmed, with costs.

Adolfo Estrada, the plaintiff in the underlying personal injury action was employed by Amost Dry Wall Inc., and his injury occurred in the course of his employment. He sued, among others, Amoco, and Amoco sought coverage under a policy issued by the plaintiff in this action. The policy at issue provides coverage where the insured is the employer of the injured worker. The policy defines the insured, "you," as both Amost and Amoco.

We reject plaintiff's contention that because Amoco is not Estrada's direct employer, it need not provide coverage to Amoco under the policy. Defendants Amoco and Amost Drywall Inc. jointly purchased insurance for a joint work site, and the two companies have the same owner and management, and worked together on the same covered location where Estrada was injured. Further, the plain and ordinary meaning of the provisions of the insurance contract clearly cover Amoco with respect to Estrada's claims

because the policy combines Amoco and Amost for purposes of coverage (*see generally White v Continental Cas. Co.*, 9 NY3d 264, 267 [2007]).

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9877 The People of the State of New York, Respondent, Ind. 1927/08

-against-

Damon Jones, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Mitchell J. Briskey of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (David E.A. Crowley of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered May 15, 2009, convicting defendant, after a jury trial, of endangering the welfare of an incompetent or physically disabled person, and sentencing him to a term of one year, unanimously affirmed.

Defendant did not preserve his claim that the People limited themselves to proving that penis-to-anus sexual conduct was the manner in which defendant endangered the victim's welfare, and we decline to review it in the interest of justice. Defendant's motion for a trial order of dismissal did not make this argument (*see People v Gray*, 86 NY2d 10, 19 [1995]), and his motion to set aside the verdict had no preservation effect (*see People v Padro*, 75 NY2d 820 [1990]).

As an alternative holding, we find that the People never

limited their theory of the case to any particular type of endangerment (*see People v Bess*, 107 AD2d 844, 846 [1985]; *compare People v Barnes*, 50 NY2d 375, 379 n 3 [1980]). We similarly find that 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]). Even if the People had been required to prove penis-to-anus contact, the evidence warranted the conclusion that defendant engaged in that behavior.

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9878 Kenneth Vail, Index 307984/08
Plaintiff-Respondent, 84227/09

-against-

1333 Broadway Associates, L.L.C., et al.,
Defendants-Appellants,

Trident Contracting Corp., et al.,
Defendants.
- - - - - -
1333 Broadway Associates, L.L.C., et al.,
Third-Party Plaintiffs-Appellants,

-against-

Sherry Hill Painting Corporation,
Third-Party Defendant-Respondent.

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McGaw, Alventosa & Zajac, Jericho (Dawn C. DeSimone of counsel), for appellants.

Hogan & Cassell, LLP, Jericho (Michael Cassell of counsel), for Kenneth Vail, respondent.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Patrick J. Lawless of counsel), for Sherry Hill Painting Corporation, respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered May 14, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim, and granted the motion of third-party defendant Sherry Hill Painting Corporation (Sherry Hill) for summary judgment dismissing the

third-party contractual indemnification claim, unanimously affirmed, without costs.

Plaintiff was injured when he fell after the six-foot baker's scaffold upon which he was working shifted, despite the fact that he had locked the wheels; it is undisputed that the scaffold lacked guardrails. Such evidence establishes that plaintiff's injuries were proximately caused by defendants' failure to provide proper protection against the elevation-related risk (*see Zengotita v JFK Intl. Air Term., LLC*, 67 AD3d 426 [1st Dept 2009]; *Vergara v SS 133 W. 21, LLC*, 21 AD3d 279 [1st Dept 2005]).

Given that the scaffold was inadequate in the first instance, any failure by plaintiff to hydrate himself could not be the sole proximate cause of his injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 290 [2003]; *Lajqi v New York City Tr. Auth.*, 23 AD3d 159 [1st Dept 2005]).

Dismissal of the contractual indemnification claim against Sherry Hill was proper, since there was no indemnification agreement in existence at the time of the accident, and nothing indicates that the terms and conditions on the back of the purchase order, which contains the indemnification clause, were

to have a retroactive effect (*see Regno v City of New York*, 88 AD3d 610 [1st Dept 2011]; *Temmel v 1515 Broadway Assoc., L.P.*, 18 AD3d 364, 365-366 [1st Dept 2005]).

We have considered defendants' course of conduct argument and find it unavailing.

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9879 In re William Wood,
Petitioner-Respondent,

-against-

Andrea Wood,
Respondent-Appellant.

_____

Greenberg Traurig, LLP, New York (Roy Taub of counsel), for appellant.

Howard M. Lefkowitz, Chappaqua, for respondent.

_____

Order, Family Court, Bronx County (Alma Cordova, J.), entered on or about August 8, 2012, which denied respondent mother's objection to the Support Magistrate's order modifying an order of support, to the extent it awarded petitioner father a credit of 15% or $34.07 per week as an offset against his basic child support obligation for his payment of the child's college room and board expenses, unanimously modified, on the facts, to the extent of adjusting the credit to $28.95 per week, and otherwise affirmed, without costs.

The Support Magistrate properly awarded petitioner the credit toward his child support obligation, since "a noncustodial parent paying child support is entitled to a reduction in that support for the amounts contributed toward room and board expenses during periods when a child lives away from home"

(*Powers v Wilson*, 81 AD3d 803, 803 [2d Dept 2011], *lv denied* 17 NY3d 702 [2011]; *see Azizo v Azizo*, 51 AD3d 438, 439 [1st Dept 2008]). Respondent's argument that there is no mention or contemplation of a credit or offset to child support obligations in the stipulation of settlement is unpersuasive, since the parties never reached an agreement on how the child's college education expenses would be paid. Indeed, the plain language of the college education provision in the stipulation of settlement constituted nothing more than "an unenforceable agreement to agree" (*Schneider v Jarmain*, 85 AD3d 581, 582 [1st Dept 2011]).

The order is modified to the extent indicated because the subject credit to petitioner was improperly calculated. It appears that the $34.07 amount was arrived at based upon the assumption that petitioner would be paying 100% of the child's room and board expenses. The child's annual expenses for room and board consists of $11,810, and petitioner is obligated to pay

85% of those expenses or $10,038.50. Accordingly, petitioner is entitled to a credit of 15% of this amount or $1,505.77 divided by 52 weeks, which amounts to $28.95 per week.

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

ENTERED: APRIL 25, 2013

CLERK

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

9880 In re Saddiqa Fazal, Petitioner, Index 102293/12

-against-

Matthew M. Wambua, etc., Respondent.

_____

E. Diane Brody, New York, for petitioner.

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

_____

Determination of respondent, dated November 22, 2011, terminating petitioner's participation in the Section 8 Housing Choice Voucher program, 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 [Alexander W. Hunter, Jr., J.], entered July 20, 2012) dismissed, without costs.

The determination was supported by substantial evidence (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). Indeed, joint federal income tax returns filed by petitioner and her husband demonstrate that she intentionally misrepresented the household's income during annual Section 8 recertifications in 2008, 2009, and 2010, resulting in a significant subsidy overpayment.

Given the Court of Appeals' decision in *Perez v Rhea* (__ NY3d __, 2013 NY Slip Op 00953 [2013]), the penalty imposed does not shock our sense of fairness.

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

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

ENTERED: APRIL 25, 2013

CLERK

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

9881 Robert Phillips, Index 303239/10
Plaintiff,

-against-

Atlantic-Hudson, Inc., et al.,
Defendants-Appellants,

The City of New York,
Defendant,

The Sisters of Charity of Saint
Vincent De Paul of New York, etc., et al.,
Defendants-Respondents.

_____

Silverman Shin & Byrne PLLC, New York (Wayne S. Stanton of counsel), for appellants.

Morris Duffy Alonso & Faley, New York (Anna J. Ervolina of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered December 28, 2011, which granted the motion of defendants-respondents (College defendants) for summary judgment dismissing the complaint and all cross claims as against them, unanimously affirmed, without costs.

Plaintiff alleges that he was injured when he slipped on ice as he went to board a bus operated by defendants-appellants. The College defendants, which own the land abutting that sidewalk, established through the deposition testimony of a representative of defendant City of New York that the City's Department of

Sanitation is responsible for clearing the subject area of snow and ice. Since it is clear that the area where plaintiff fell is a designated bus stop maintained by the City, even after enactment of Administrative Code of the City of New York § 7-210, the motion court properly granted the College defendants' motion (*see Fernandez v Highbridge Realty Assoc.*, 49 AD3d 318, 319 [1st Dept 2008]; *cf. Crandell v New York City Tr. Auth.*, 81 AD3d 407 [1st Dept 2011]).

In view of the foregoing, we need not address the remaining contentions.

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9882-
9883 Index 600352/09

U.S. Bank National Association, etc.,
Plaintiff,

Syncora Guarantee Inc., etc., et al.,
Plaintiffs-Appellants,

-against-

GreenPoint Mortgage Funding, Inc.,
Defendant-Respondent.

_____

Allegaert Berger & Vogel LLP, New York (Michael S. Vogel of counsel), for appellants.

Murphy & McGonigle, P.C., New York (James A. Murphy of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Bernard J. Fried, J.), entered April 4, 2012, severing and dismissing plaintiffs-appellants' (plaintiffs) claims against defendant, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered February 28, 2012, which, to the extent appealed from, denied plaintiffs' motion for leave to amend and/or replead and file a third amended complaint, unanimously dismissed, without costs as subsumed in the appeal from the judgment.

Plaintiffs monoline insurers brought claims alleging that defendant, the originator of residential mortgage loans packaged for resale as residential mortgage-backed securities, breached its warranties and representations made in agreements for the

sale of loans that were the collateral in a $1.83 billion securitization transaction.

The insurers, nonparties to the loan sale agreements, lacked standing to bring the claims directly, and given the absence of any clear language on the face of the loan sale agreements evincing an intent to benefit third parties, the insurers failed to allege facts sufficient to sustain the claim that the agreements were intended to give them third-party benefits (*see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108-109 [1st Dept 2001]). The absence of any clear language on the face of the sale agreements regarding any third-party beneficiary rights precludes reliance on subsequent documents to raise an issue of fact (*id.*). Further, the insurers never argued before the motion court that they had standing to sue defendant for breach of other agreements related to the securitization, and we decline to consider the issue.

The order holding that the insurers could not assert claims against defendant for breach of the loan sale agreements because they were neither parties to the agreements nor intended third-party beneficiaries was final and on the merits, and the court properly denied their subsequent motion for leave to file an amended complaint asserting claims for breach of other securitization-related agreements. Under New York's

transactional approach to the doctrine of res judicata, once a claim is brought to a final conclusion on the merits, "all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy" (*Matter of Hunter*, 4 NY3d 260, 269 [2005] [internal quotation marks omitted]).

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9884 The People of the State of New York, Respondent, Ind. 99127/10

-against-

Eric Thomas, Defendant-Appellant.

_____

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

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

_____

Order, Supreme Court, Bronx County (Megan Tallmer, J.), entered on or about February 4, 2011, which adjudicated defendant a level three sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court providently exercised its discretion in declining to grant a downward departure to level two (*see People v Cintron*, 12 NY3d 60, 70 [2009], *cert denied sub nom. Knox v New York*, 558 US 1011 [2009]; *People v Johnson*, 11 NY3d 416, 418, 421 [2008]). Neither defendant's age (late 40s) nor any of the other factors cited by defendant warranted a downward departure, given such factors as the seriousness of his sex offense against two young

children (*see e.g. People v Gajadhar*, 103 AD3d 572 [1st Dept 2013]; *People v Ward*, 83 AD3d 561 [1st Dept 2011], *lv denied* 17 NY3d 707 [2011]).

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9885-
9886 Index 15196/06

Vera Zeldin, etc.,
Plaintiff-Appellant,

-against-

W. Roy Michaelis, M.D., et al.,
Defendants-Respondents.

_____

Mark M. Basichas & Associates, P.C., New York (Aleksey Feygin of counsel), for appellant.

Turken & Heath, LLP, Armonk (Jason D. Turken of counsel), for W. Roy Michaelis, M.D. and Montefiore Medical Group Co-Op City, respondents.

Kaufman Borgeest & Ryan, LLP, Valhalla (Adonaid C. Medina of counsel), for John J. Gelfand, D.O. and Bogart Avenue Medical, P.C., respondents.

Marulli, Lindenbaum, Edelman & Tomaszewski, LLP, New York (Claudia E. Solis of counsel), for Luba Karlin, M.D. and Mohammed K. Nour, M.D., respondents.

_____

Judgment, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered June 1, 2011, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered April 27, 2011, which granted defendants' motions and cross motion for summary judgment dismissing the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff alleges that the four defendant physicians failed to refer plaintiff's decedent to a cardiologist or for testing

and/or to recognize that decedent had a tear in his aorta after a motor vehicle accident on June 20, 2004, which failures eventually led to an aortic dissection, causing his death on September 29, 2004.

Supreme Court properly found that all defendants met their burden on summary judgment. W. Roy Michaelis, Jr., M.D., the internist who treated decedent's hypertension until April 2004, established that he did not depart from accepted medical practice in continuing to prescribe antihypertensive medications for decedent, whose high blood pressure was resistant to treatment. Moreover, the alleged aortic tear, for which there was no record evidence, could only have existed after the motor vehicle accident, after decedent had ended his treatment with Dr. Michaelis (*see Burton v Brown,* 97 AD3d 156 [1st Dept 2012]). As to Montefiore Medical Center, no evidence of malpractice has been submitted.

After his motor vehicle accident, when decedent presented to John Gelfand, D.O., decedent presented no signs or symptoms which would have led Dr. Gelfand to conclude that an aortic tear was present. The symptom of severe chest wall pain was absent. The temporary chest wall pain which decedent did report was easily attributable to another cause, namely, the motor vehicle accident (*see Rivera v Greenstein*, 79 AD3d 564, 568-569 [1st Dept 2010];

Shields v Kleiner, 93 AD3d 710 [2nd Dept 2012]).

Dr. Gelfand referred decedent to Luba Karlin, M.D., for a neurological examination, and to Mohammed K. Nour, M.D., for an orthopedic examination. The orthopedic examination was conducted by Dr. Nour's physician's assistant, Ahmed Jawad. Neither Dr. Karlin nor Dr. Nour had a duty to decedent to refer him to a cardiologist, since their duty was "'limited to those medical functions undertaken by the physician and relied on by the patient'" (*Burtman*, 97 AD3d at 161-162; *Chulla v DiStefano*, 242 AD2d 657, 658 [2nd Dept 1997], *lv dismissed* 91 NY2d 921 [1998]).

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9887- Ind. 551/09
9888 The People of the State of New York, 5604/08
Respondent,

-against-

Shadron Rambert,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (David P. Johnson of counsel), and Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

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Appeals having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Peter Benitez, J.), rendered on or about May 2, 2011, and a judgment, same court, New York County (Richard Carruthers, J.), rendered on or about June 14, 2011,

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

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

ENTERED: APRIL 25, 2013

CLERK

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

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9889 Raymond Hill, et al., Index 302395/07
Plaintiffs-Respondents,

-against-

Lambert Houses Redevelopment Company, et al.,
Defendants-Appellants.

_____

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville (Geoffrey H. Pforr of counsel), for appellants.

Macaluso & Fafinski, P.C., Bronx (Donna A. Fafinski of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (John A. Barone, J.), entered August 31, 2012, which, in this action arising from plaintiff Raymond Hill's alleged slip and fall on stairs in a building owned and/or managed by defendants, to the extent appealed from, denied defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendants' submissions raise triable issues of fact as to whether they had constructive notice of a visible and apparent dangerous condition that existed for a sufficient length of time before the accident to permit them to discover and remedy it (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 [1986]), and whether they had constructive notice of an ongoing and recurring dangerous condition existing in the area of the

accident that they routinely left unaddressed (*see Bido v 876-882 Realty, LLC*, 41 AD3d 311, 312 [1st Dept 2007]; *Irizarry v 15 Mosholu Four, LLC*, 24 AD3d 373, 373-374 [1st Dept 2005]). Indeed, defendants' porter averred that he followed a daily routine in which he inspected and cleaned the hallways and stairwells in the morning, that he would respond to any complaints throughout the day until the end of his shift at 5:00 p.m., and that he did not observe or receive any complaints of urine in the stairwell on the date of the accident. However, plaintiff and two nonparty witnesses testified that urine and other debris were nearly always present in the hallways and stairwells of the building. Further, plaintiff testified that while he did not see the urine before he slipped on it, he smelled it in the stairwell nearly two hours earlier. In addition, a nonparty tenant testified that she saw urine on the steps in the location of plaintiff's fall 15 hours before the accident and again nearly 5 hours before the accident, at which time the condition of the steps had worsened, as even more urine and other debris were present. She further testified that the porter rarely cleaned and did not adhere to a regular schedule, and that she and other tenants had complained to defendants about the dangerous condition of the stairwell, including a day or two before the accident, to no avail. She and another witness also

testified that they had slipped on urine in the stairwell on multiple occasions.

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

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Romàn, Feinman, Clark, JJ.

9890 Angelo Meimeteas, Index 100857/11
Plaintiff-Appellant,

-against-

Carter Ledyard & Milburn LLP, et al.,
Defendants-Respondents.

_____

John K. Weir Law Offices, LLC, New York (John K. Weir of counsel), for appellant.

Quirk and Bakalor, P.C., New York (Liza R. Fleissig of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered January 19, 2012, which granted defendants' motion to dismiss the complaint and denied plaintiff's cross motion to amend the complaint, unanimously affirmed, without costs.

Plaintiff's malpractice claim was properly dismissed because he could not allege a but-for causal link between defendants' delay in commencing a proceeding in court or arbitration and the subsequent denial of the pro se claim he asserted against Lehman Brothers in bankruptcy court (*see AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]). His claim under Judiciary Law § 487 is barred because that statute only applies (except where there is deceit directed against a court) where the alleged deceit takes place during the course of a pending judicial proceeding, and there was no pending proceeding here (*Costalas v*

Amalfitano, 305 AD2d 202, 204 [1st Dept 2003]). Plaintiff's fiduciary duty claim was properly dismissed because it was based on the same conduct as the malpractice claim (*CVC Capital Corp. v Weil, Gotshal, Manges*, 192 AD2d 324, 325 [1st Dept 1993]). In light of these defects, repleading would be futile, and none of the defects are cured by the proposed second amended complaint. As such, the cross motion to amend was properly denied.

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9891 Jeffrey S. Levinson, Index 305074/09
Plaintiff-Appellant,

-against-

Mohiuddin Mollah, et al.,
Defendants-Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for appellant.

Thomas Torto, New York (Jason Levine of counsel), for Mohiuddin Mollah and Point West Trans Inc., respondents.

Burke, Gordon & Conway, White Plains (Stephane D. Martin of counsel), for Jonathon D. Morse and George Morse, respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered February 23, 2012, which granted defendants Mohiuddin Mollah and Point West Trans Inc.'s motion and defendant Jonathon Morse's cross motion for summary judgment dismissing the complaint on the ground that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants met their prima facie burden of showing that plaintiff did not sustain a serious injury to his cervical spine and lumbar spine by submitting a neurologist's affirmation stating that, upon conducting an examination of plaintiff, she found a full range of motion in every plane of both body parts,

and compared plaintiff's values to normal (*see Steinbergin v Ali*, 99 AD3d 609 [1st Dept 2012]). Contrary to plaintiff's argument, defendants' expert was not required to specifically address the diagnostic findings in plaintiff's medical records (*see Robinson v Joseph*, 99 AD3d 568 [1st Dept 2012]; *Fuentes v Sanchez*, 91 AD3d 418, 419 [1st Dept 2012]; *Clemmer v Drah Cab Corp.*, 74 AD3d 660, 660-661 [1st Dept 2010]). Plaintiffs' remaining arguments attempting to undermine that affirmation are unpreserved for review and, in any event, unpersuasive (*see Feliz v Fragosa*, 85 AD3d 417, 418 [1st Dept 2011]).

Plaintiff failed to raise an issue of fact in opposition. The only sworn evidence plaintiff proffered was an affidavit from his chiropractor who, following an examination conducted shortly after the one performed by defendants' neurologist, acknowledged that both body parts exhibited a full range of motion in every plane, and offered no qualitative assessment of any limitations. Even if plaintiff's unaffirmed MRI reports showing bulging discs could be considered, his showing would be insufficient because "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*Wetzel v Santana*, 89 AD3d 554, 55 [1st Dept 2011]). Further, findings based on subjective complaints of pain are insufficient to raise

a triable issue of fact (*Arenas v Guaman*, 98 AD3d 461 [1st Dept 2012]).

We need not determine whether defendant Morse's cross motion for summary judgment was timely, because once it was established by defendants Mollah and Point West that plaintiff did not meet the serious injury threshold, the complaint would be dismissed as to all codefendants as well (*see Britton v Villa Auto Corp.*, 89 AD3d 556 [1st Dept 2011]).

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: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9892 Crossroads ABL LLC, Index 651268/11
Plaintiff,

Crossroads Financial Services, LLC,
Plaintiff-Respondent,

-against-

Canaras Capital Management, LLC, et al.,
Defendants,

Quad-C Funding, LLC,
Defendant-Appellant.

_____

Brill & Meisel, New York (Rosalind S. Fink of counsel), for appellant.

Kennedy Berg LLP, New York (Gabriel Berg of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered June 11, 2012, which granted partial summary judgment to plaintiff-respondent Crossroads Financial Services, LLC on its claim for the advancement of litigation expenses, ordered the advancement of expenses for plaintiffs' prosecution of their first through fifth causes of action and for defending against defendant-appellant Quad-C Funding, LLC's counterclaims, referred the determination of the reasonableness of the expenses demanded to a special referee, and denied Quad-C's cross motion to dismiss the fifth cause of action, including Crossroads' claims for indemnification and advancement of all litigation

expenses related to this case, unanimously affirmed, with costs.

Indemnification and advancement of legal fees are two distinct corporate obligations (*see Ficus Invs., Inc. v Private Capital Mgt., LLC*, 61 AD3d 1, 9 [1st Dept 2009]), and given these separate purposes, the motion court properly determined that the servicing agreement distinguished between the relief available to a corporate officer at the conclusion of the proceedings and that which is available while the proceedings are ongoing.

Here, the language of the contract, negotiated by two commercially sophisticated parties, reinforces this Court's recognition of the distinction between the two remedies. As in *Ficus Invs.* (61 AD3d at 9), under Section 8(b)(ii) of the servicing agreement, all that is required for Crossroads to be advanced its legal fees by Quad-C is a statement that Crossroads agrees to reimburse Quad-C "in the event it is ultimately determined by a court of competent jurisdiction that such Crossroads Indemnified Party is not entitled to be indemnified by the company." Until that question is ultimately resolved, the motion court properly held that Quad-C is required to advance Crossroads' legal fees.

Nor does the indemnification provision at issue preclude intra-party claims. To the contrary, the indemnification provision does not include an exhaustive list of actions for

which indemnification is required, nor are there any other provisions in the servicing agreement that would be rendered meaningless if the indemnification provision is read to include any claims - intra-party or otherwise - that involve Crossroads by reason of its services to, or on behalf of, or management of the affairs of, Quad-C. Rather, this indemnification provision is, as noted above, extremely broad, applying to "any and all claims, demands, actions, suits or proceedings," provided that Crossroads' involvement therein is by reason of its service, etc. to Quad-C. The parties chose to use highly inclusive language in their indemnification provision, which they chose not to limit by listing the types of proceedings for which indemnification would be required. Therefore, while the rule set forth in *Hooper Assoc. v AGS Computers* (74 NY2d 487 [1989]) applies in those cases where the parties' intent is not evident from the plain language of the agreement, that is not the case here.

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: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9893 Michael Jaliman, et al., Index 123882/93
Plaintiffs-Appellants,

-against-

D.H. Blair & Co. Inc., also known as Harris & Parks, Inc.,
Defendant-Respondent.

_____

John Ciampoli, Albany, for appellants.

Moses & Singer LLP, New York (Steven R. Popofsky of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered February 17, 2011, which (1) granted defendant's motion to reargue and, upon reargument, vacated its prior order, entered September 30, 2010, permitting plaintiffs to amend their complaint to add D.H. Blair Investment Banking Corp. (Investment Banking) as a defendant and to add a cause of action for fraudulent conveyance, and (2) denied as moot plaintiffs' cross motion for leave to amend, unanimously affirmed, without costs.

When the court made its September 2010 order, plaintiffs had not yet submitted their proposed amended complaint. Therefore, the court did not improvidently exercise its discretion (*see Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]) by granting reargument, even though defendant raised the statute of limitations for the first time on its motion to reargue.

The court properly found that plaintiffs' proposed fraudulent conveyance claim – based on the sale of assets from defendant to Investment Banking, allegedly without fair consideration – was time-barred. The affidavit that plaintiff Michael Jaliman submitted in opposition to defendant's motion to reargue clarified that plaintiffs were relying on Debtor and Creditor Law § 273. That statute involves constructive fraud, not actual fraud (*see Wall Street Assocs. v Brodsky,* 257 AD2d 526, 529 [1st Dept 1999]). "New York law provides that a claim for constructive fraud is governed by the six-year limitation set out in CPLR 213(1), and that such a claim arises at the time the fraud or conveyance occurs" (*Wall St. Assoc. v Brodsky*, 257 AD2d 526, 530 [1st Dept 1999]). The conveyance occurred in 1992. Thus, the statute of limitations on plaintiffs' fraudulent conveyance claim ran in 1998, more than a decade before they moved to amend their complaint in 2009. The court did not have to reach the issue of inquiry notice because that concept applies only to claims of actual – as opposed to constructive – fraud (*see e.g. Wall St. Assoc.*, 257 AD2d at 529).

Even if, arguendo, plaintiffs had pleaded a fraudulent conveyance claim based on actual fraud, they had a duty of inquiry which arose in 1999, when they learned that defendant had been sold (*see generally Gutkin v Siegal*, 85 AD3d 687, 688 [1st

Dept 2011]; *TMG-II v Price Waterhouse & Co.*, 175 AD2d 21, 22-23 [1st Dept 1991], *lv denied* 79 NY2d 752 [1992]).

Second, even if, arguendo, plaintiffs' fraudulent conveyance claim was timely, the bare allegation in the amended complaint that "[t]here was a fraudulent conveyance of assets from [defendant] to Investment [B]anking" fails to state a cause of action for fraudulent conveyance (*see e.g. NTL Capital, LLC v Right Track Rec., LLC*, 73 AD3d 410, 412 [1st Dept 2010]). In addition, plaintiffs' mere belief that defendant transferred assets to Investment Banking without fair consideration does not suffice (*see C&K Realty Co. v ISFC Fabrics Corp.*, 66 AD2d 697, 698 [1st Dept 1978]).

Third, even if – hypothetically – plaintiffs' fraudulent claim were both timely and properly pleaded, defendant and Investment Banking would be prejudiced by the addition of a new theory of liability because discovery on the original claims has been closed, a date for filing the note of issue has been set, and plaintiffs have sought to assert their new theory sixteen years after filing their original complaint (*see Panasia Estate, Inc. v Broche*, 89 AD3d 498 [1st Dept 2011]; *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 22-23 [1st Dept 2003]).

We turn to the question of whether Investment Banking should be added as a defendant on plaintiffs' original claims, i.e. the

claims other than fraudulent conveyance. The court has already allowed plaintiffs to add Harris & Parks Inc. as a defendant on the theory that Harris & Parks is defendant's successor. It would be odd if defendant had two successors (Harris & Parks and Investment Banking). In any event, plaintiffs' proposed amended complaint does not satisfy the requirements for successor liability set forth in *Schumacher v Richards Shear Co.* (59 NY2d 239, 244-245 [1983]); plaintiffs have "failed to allege facts that would support [their] successor liability claim" (*Worldcom Network Servs. v Polar Communications Corp.*, 278 AD2d 182, 183 [1st Dept 2000]).

Plaintiffs' argument that they should be allowed to add Investment Banking as a defendant based on the relation back doctrine (*see* CPLR 203[b]) is improperly raised for the first time in their appellate reply brief (*see e.g. Shia v McFarlane*, 46 AD3d 320, 321 [1st Dept 2007]). Were we to reach the merits, we would find that plaintiffs fail to satisfy the requirements of *Buran v Coupal* (87 NY2d 173, 178 [1995]). For example, defendant and Investment Banking are not united in interest because one is not vicariously liable for the other, even if they have the same officers (*see Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002], *lv denied* 98 NY2d 611 [2002]).

In light of our disposition, plaintiffs' request that we

direct the IAS court to compel discovery on the transfer of assets from defendant to Investment Banking and the relationship between the two companies is moot. In any event, it would be improper because the order appealed from does not concern discovery.

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9894 The People of the State of New York, Respondent, Ind. 2552/10

-against-

Patricia Tufano, Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Ronald A. Zweibel, J. at suppression hearing; Arlene D. Goldberg, J. at jury trial and sentencing), rendered April 7, 2011, convicting defendant of criminal possession of a weapon in the third degree, and sentencing her, as a second felony offender, to a term of two to four years, unanimously affirmed.

The court properly denied defendant's suppression motion. The police had, at least, a founded suspicion that defendant was involved in her companions' criminal activity, thereby justifying a common-law inquiry. The record establishes that the officers did not exceed the bounds of such an inquiry. When defendant approached an officer to ask why he was detaining her friends, the officer told her to remain with her friends, who were near a wall, while he questioned them. The record establishes that the

police had reasonable suspicion to warrant a level three detention. During defendant's encounter with the police an officer saw what he recognized as a gravity knife protruding from defendant's pocket, and this provided probable cause for her arrest.

Since defendant received the minimum sentence permitted by law, we have no authority to reduce it unless we find, as a matter of constitutional law, that the sentence constituted cruel and unusual punishment. Defendant's constitutional challenge to her sentence is unpreserved (*see People v Ingram*, 67 NY2d 897, 899 [1986]) and without merit (*see People v Thompson*, 83 NY2d 477, 480 [1994]; *People v Broadie*, 37 NY2d 100 [1975], *cert denied* 423 US 950 [1975]).

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9895 Marianne E. Belziti, et al., Index 300625/11
Plaintiffs-Respondents,

-against-

Brian Langford, et al.,
Defendants,

Robert R. Klein,
Defendant-Respondent,

Eardley W. Green,
Defendant-Appellant.

_____

Hodges Walsh & Slater, LLP, White Plains (Paul E. Svensson of counsel), for appellant.

Giuffré Law Offices, P.C., Garden City (S. Joonho Hong of counsel), for Marianne E. Belziti and Richard Belziti, respondents.

Richard T. Lau & Associates, Jericho (Keith E. Ford of counsel), for Robert R. Klein, respondent.

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Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about March 29, 2012, which denied the motion of defendant Eardley W. Green for summary judgment dismissing the complaint and all cross claims as against him, unanimously affirmed, without costs.

Green's motion for summary judgment was properly denied as premature, since limited discovery has taken place and Green himself has not yet been deposed in this matter (*see Blech v West Park Presbyt. Church*, 97 AD3d 443 [1st Dept 2012]). In any

event, the existing record presents triable issues of fact as to whether Green's vehicle was stopped prior to being struck in the rear by a vehicle operated by codefendant Macio. Although Green testified in a different action regarding the underlying accident that he had stopped several seconds before he was struck in the rear, Macio testified that when the accident occurred, he was lowering his speed because the cars ahead of him were slowing down. Moreover, in opposition to Green's motion, codefendant Brian Langford, the driver of the second car in this five-car collision, submitted an affidavit averring that Green's vehicle struck the rear of his vehicle before Green was rear-ended by Macio. In light of the differing versions as to how the accident occurred and the possible contributions by the various defendants, summary disposition was not warranted (*see Lewis v Konan*, 39 AD3d 319 [1st Dept 2007]).

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Acosta, Román, Feinman, Clark, JJ.

9897 The People of the State of New York, Respondent, Ind. 1826/08

-against-

Wendy Gabriel, Defendant-Appellant.

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Stanley Neustadter, Cardozo Appeals Clinic, New York (Philip A. Wellner of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Anthony Lekas of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Judith Lieb, J.), rendered November 20, 2009, as amended December 16, 2009, convicting defendant, after a jury trial, of assault in the second degree, aggravated criminal contempt (two counts) and endangering the welfare of a child (two counts), and sentencing him to an aggregate term of seven 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 evaluation of any inconsistencies in testimony. The fact that the jury acquitted defendant of charges arising from other incidents does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

The court properly exercised its discretion in admitting a

recording of a 911 call, which qualified as both an excited utterance and a present sense impression. The tape's probative value outweighed any potential prejudicial effect (*see e.g. People v Harris*, 99 AD3d 608 [1st Dept 2010]). The People were not required to make a showing of necessity (*see People v Buie*, 86 NY2d 501, 509 [1995]), and the tape was not inflammatory. To the extent the tape demonstrated the caller's emotional distress, this tended to enhance the tape's reliability as an excited utterance. Finally, any error was harmless, particularly because defendant was acquitted of all charges arising from the incident to which the tape related.

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

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Román, Feinman, Clark, JJ.

9898N In re John Kapon, et al., Index 102660/12
Petitioners-Appellants,

-against-

William I. Koch,
Respondent-Respondent.

_____

Zuckerman Spaeder LLP, New York (Paul Shechtman of counsel), for appellants.

Morvillo Abramowitz Grand Iason & Anello P.C., New York (Edward M. Spiro of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Michael D. Stallman, J.), entered October 18, 2012, which denied the petition to quash out-of-state subpoenas served on petitioners or, in the alternative, for a protective order, and dismissed the proceeding, unanimously affirmed, without costs.

A heightened standard of review does not apply to applications brought pursuant to CPLR 3119(e) for a protective order or to quash an out-of-state subpoena. Rather, the statute expressly states that the standards that are generally applicable to depositions set forth in CPLR article 31 are also applicable to out-of-state subpoenas issued under CPLR 3119(b) (*see* CPLR 3119[d]). Accordingly, so long as the information sought is "material and necessary" to the prosecution or defense of an action, it shall be disclosed (CPLR 3101[a]). Here, the court

providently exercised its discretion in denying petitioners' motion, since petitioners failed to show that the requested deposition testimony is irrelevant to the prosecution of the California action (*see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-408 [1968]; *Ledonne v Orsid Realty Corp.*, 83 AD3d 598 [1st Dept 2011]). Further, petitioners failed to articulate a sufficient, nonspeculative basis for postponing their depositions or imposing restrictions on the scope and use of their deposition testimony.

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

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9899 The People of the State of New York, Respondent, Ind. 6678/00

-against-

Cornelius Scott, Defendant-Appellant.

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

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

_____

Judgment of resentence, Supreme Court, New York County (Michael J. Obus, J.), rendered July 20, 2011, as amended July 25, 2011, resentencing defendant, as a second felony offender, to a term of 14 years, with 5 years' postrelease supervision, unanimously affirmed.

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

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9900 In re Robert Goodman, Index 114317/11
Petitioner-Appellant,

-against-

Chief Judge of the Office of
Administrative Trials and Hearings
of the City of New York, et al.,
Respondents-Respondents.

_____

Robert Goodman, New York, appellant pro se.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter, Jr., J.), entered March 27, 2012, denying the petition seeking to annul a determination of respondent City of New York, effected on January 13, 2011, which terminated petitioner's employment as a per diem administrative law judge/hearing officer with the Environmental Control Board, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

Since petitioner had no administrative remedies, the applicable four-month statute of limitations period (*see* CPLR 217[1]) began to run immediately upon his termination on January 13, 2011 (*see Matter of De Milio v Borghard*, 55 NY2d 216, 219-220 [1982]; *Portlette v Metropolitan Transp. Auth.*, 25 AD3d 389, 391

[1st Dept 2006]). Accordingly, this CPLR article 78 proceeding, commenced over 11 months later in December 2011, was untimely. Petitioner's pre-petition efforts to seek reinstatement, including his direct written request to the Chief Administrative Law Judge, made on August 18, 2011, did not toll or restart the limitations period (*see De Milio*, 55 NY2d at 222; *Matter of Kan v New York City Envtl. Control Bd.*, 262 AD2d 135 [1st Dept 1999], *lv dismissed and denied* 94 NY2d 857 [1999]). Even assuming that petitioner's direct request for reinstatement constituted an "administrative remedy" for purposes of the statute of limitations, it was also untimely since it was made over seven months after his termination (*see Matter of Densmore v Altmar-Parish-Williamstown Cent. School Dist.*, 265 AD2d 838, 839 [4th Dept 1999], *lv denied* 94 NY2d 758 [2000]).

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9903 The People of the State of New York, Respondent, Ind. 1389/10

-against-

Ramon Diaz, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Marisa K. Cabrera of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Juan M. Merchan, J.), rendered March 1, 2011, convicting defendant, after a jury trial, of bail jumping in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant's challenge to the court's charge is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find that the court, which followed the Criminal Jury Instruction, correctly instructed the jury on all the necessary elements of second-degree bail jumping (Penal Law § 215.56).

We have considered and rejected defendant's ineffective

assistance of counsel argument (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]).

We perceive no basis for reducing the sentence.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9904 Dennis Ortiz, etc., et al., Index 28541/01
Plaintiffs-Appellants,

-against-

New York City Housing Authority,
Defendant-Respondent.

_____

Brian J. Isaac, New York, for appellants.

Herzfeld & Rubin, P.C., New York (Linda M. Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered November 30, 2011, which granted defendant New York City Housing Authority's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

NYCHA established prima facie entitlement to summary judgment by submitting evidence showing that it was not aware that a tenant had been harboring the pit bull that attacked infant plaintiff (*see Strunk v Zoltanski*, 62 NY2d 572, 575 [1984]). Even if knowledge of the dog's presence could be imputed, the evidence shows that NYCHA neither knew nor should have known of the dog's vicious propensities (*see id.*; *Rivers v New York City Hous. Auth.*, 264 AD2d 342 [1st Dept 1999]).

The affidavit of another tenant, Edwin Ortiz, submitted by plaintiffs, failed to raise triable issues of fact sufficient to

defeat summary judgment. Even if Ortiz's averment that the development knew that Rivera owned the dog is sufficient to establish notice of the dog's presence, Ortiz's averment that he was aware of the dog's reputation for being aggressive, and that he knew of two prior attacks by the dog before the subject incident sets forth only third parties' knowledge and observations, which is insufficient to impute knowledge of the dog's vicious propensities to NYCHA (*see LePore v DiCarlo*, 272 AD2d 878, 879 [4th Dept 2000], *lv denied* 95 NY2d 761 [2000]; *Wilson v Bruce*, 198 AD2d 664 [3d Dept 1993], *lv denied* 83 NY2d 752 [1994]; *Plue v Lent*, 146 AD2d 968 [3d Dept 1989]). Also, vicious propensities may not be inferred solely from the fact that the dog was of the pit bull breed (*see Joe v Orbit Indus.*, 269 AD2d 121, 122 [1st Dept 2000]; *Carter v Metro N. Assoc.*, 255 AD2d 251 [1st Dept 1998]; *compare Plue*, 146 AD2d 968).

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9905 Tatyana Oxman, Index 106110/07
Plaintiff-Appellant,

-against-

Mountain Lake Camp Resort Inc., et al.,
Defendants/Third-Party
Plaintiffs-Respondents,

-against-

Ulster Heights Lake, Inc., et al.,
Third-Party Defendants-Respondents.

_____

William Pager, Brooklyn, for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (Leslie G. Abele of counsel), for Mountain Lake Camp Resort Inc. and Richard Parzoch, respondents.

Milber, Makris, Plousadis & Seiden, LLP, Woodbury (Samantha B. Lansky of counsel), for Ulster Heights Lake, Inc., respondent.

Schondebare & Korcz, Ronkonkoma (Christopher L. Grayson of counsel), for Nina Zilberman and Alexander Senderovich, respondents.

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Order, Supreme Court, New York County (Martin Shulman, J.), entered May 6, 2011, which, to the extent appealed from, upon renewal, granted defendants' motion for summary judgment dismissing the complaint, and denied plaintiff's motion for recusal, unanimously affirmed, without costs.

In support of their motion for renewal, defendants submitted third-party defendant Ulster Heights Lake, Inc.'s answer to the

third-party complaint, in which the lakefront homeowner's association admitted that it owned the beach property where plaintiff fell and was injured. This new fact was not offered on the prior motion because Ulster Heights did not serve its answer until after the court's prior determination was issued (*see* CPLR 2221[e]).

The fact that Ulster Heights, and not defendants, owned the beach, coupled with the testimony of defendant Parzoch, the owner of defendant Mountain Lake Camp Resort Inc., that Ulster Heights managed the lake and controlled access to it, that he did not maintain, manage or inspect the beach, that he had no obligation to do so, and that Mountain Lake never told its guests that it maintained the beach, establishes prima facie that defendants had no duty to plaintiff to maintain the beach (*see Lopez v Allied Amusement Shows, Inc.*, 83 AD3d 519 [1st Dept 2011]). In any event, there is no evidence that defendants created the condition complained of or had notice of it, and no evidence, contrary to plaintiff's contention, that the condition resulted from any negligence on their part in maintaining the beach gratuitously (*see Darby v Compagnie Natl. Air France*, 96 NY2d 343 [2001]; *Garner v City of New York*, 6 AD3d 387 [2d Dept 2004], *lv denied* 3 NY3d 609 [2004]).

In opposition, plaintiff failed to raise a triable issue

whether defendants either owned or had a possessory interest in the beach, or had assumed a formal obligation to maintain it, or made special use of it (*see Poirier v City of Schenectady*, 85 NY2d 310, 314-315 [1995]).

Nothing in the record suggests that the motion court's "impartiality might reasonably be questioned" (*see* 22 NYCRR 100.3[E][1]). Plaintiff did not move for recusal until after the court had ruled against her (*see Glatzer v Bear, Stearns & Co., Inc.*, 95 AD3d 707 [1st Dept 2012]), and the ruling reflects no bias against her (*see Matter of Anderson v Harris*, 73 AD3d 456, 458 [1st Dept 2010]). We reject plaintiff's complaints about the courts actions.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9907 The People of the State of New York, Respondent, Ind. 4438/05

-against-

Thomas Poole, Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Kerry S. Jamieson of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Arlene D. Goldberg, J.), entered May 24, 2011, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

A level three adjudication is appropriate. Both the court's upward departure to level three, which formed an alternative basis for the adjudication, and its refusal to grant a downward departure were provident exercises of discretion. "[T]he level suggested by the [risk assessment instrument] is merely presumptive and a SORA court possesses the discretion to impose a lower or higher risk level if it concludes that the factors in the RAI do not result in an appropriate designation" (*People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *see also People v Johnson*, 11

NY3d 416, 421 [2008]).

The fact that defendant consciously chose a victim who was asleep and thus was particularly vulnerable is a significant aggravating factor. Furthermore, defendant has a serious criminal record, and the fact that he committed sex crimes against children in separate incidents, years apart, suggests a dangerous propensity. The mitigating factors asserted by defendant in support of his request for a downward departure were adequately taken into account by the risk assessment instrument, and were outweighed by the aggravating factors (*see e.g. People v Melendez*, 83 AD3d 448 [1st Dept 2011]).

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9910 The People of the State of New York, Ind. 1573/08
Respondent,

-against-

Sam Allen,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Orrie A. Levy of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret M. Clancy, J.), rendered on or about September 28, 2010,

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

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

ENTERED: APRIL 25, 2013

CLERK

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

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9911 American Guarantee and Liability Insurance Company, Plaintiff-Respondent, Index 600172/10

-against-

Chicago Insurance Company, Defendant-Appellant.

_____

Tressler LLP, New York (Courtney E. Scott of counsel), for appellant.

Steinberg & Cavaliere, LLP, White Plains (Kevin F. Cavaliere of counsel), for respondent.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 22, 2012, which granted plaintiff's motion for summary judgment and denied defendant's cross motion for summary judgment, unanimously reversed, on the law, without costs, plaintiff's motion denied, and defendant's cross motion granted to the extent of declaring that defendant was not obligated to provide coverage to Roger A. Giuliani for two underlying actions (the Twomey action and the Bergmann action) and therefore is not obligated to reimburse plaintiff for payments made on Giuliani's behalf in those actions.

Plaintiff insurer seeks to hold defendant insurer liable for claims it covered on behalf of their mutual insured, nonparty Roger A. Giuliani, Esq. Giuliani had engaged in a mass market

mail campaign targeting senior citizens for estate planning legal services. Once the offer for legal services was accepted, Giuliani also offered to refer his clients to financial services representatives. Following the referrals, four clients became the victim of theft and fraud by the financial services representatives.

Each victim filed suit against Giuliani and the financial services representatives, alleging against Giuliani legal malpractice based on his failure to oversee the representatives. Two victims filed suit during the professional liability policy period covered by defendant, and two filed suit during the period covered by plaintiff (the Twomey and Bergmann actions). Giuliani also tendered the defense of the latter two to defendant, which denied coverage based on the claims being made outside the policy period.

Plaintiff settled those claims and then commenced this action, claiming that under defendant's "claims-made" policy, the latter claims were the "same and/or related" to the first two claims and that defendant should have provided coverage to Giuliani and therefore should reimburse it. The motion court agreed, finding that because the victims' relationship with Giuliani and the financial services professionals originated with the mass mailing campaign, the claims were related. We disagree.

A claims-made policy is designed to protect the policyholder during the life of the policy upon "notice to the carrier within the policy period" (*American Home Assur. Co. v Abrams*, 69 F Supp 2d 339, 346 [D Conn 1999]). The policy provides "the distinct advantage for the insurer of providing certainty that, when the policy period ends without a claim having been made, the insurer will be exposed to no further liability" (*id.*). This certainty permits an insurer, in calculating premiums, to "discount the risk of a claim [being] filed long after the policy period has ended, with the attendant dangers of unexpected inflation, changes in applicable law, and upward trends in jury awards," and to pass those savings on to the insured in the form of lower premiums (*Calocerinos & Spina Consulting Engineers, P.C. v Prudential Reins. Co.*, 856 F Supp 775, 777-778 [WD NY 1994]).

Moreover, courts interpreting "same or related" claims provisions in the context of lawyer's professional liability policies have declined to find that the claims were the same or related where an attorney has provided separate services to multiple clients (*see e.g. Chicago Ins. Co. v Lappin*, 58 Mass App Ct 769, 781-782, 792 NE2d 1018, 1028 [2003], *lv denied* 440 Mass 1105, 798 NE2d 286 [2003]). Here, there are substantial differences between the victims, including the amounts of their claims and the fact that the financial services professional who

allegedly committed the fraud was not the same in each circumstance. Accordingly, the claims are not the same or related.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9912 & M-1393 Joseph W. Powers, etc., Plaintiff-Respondent, Index 102526/10

-against-

31 E 31 LLC, et al., Defendants-Appellants.

Mauro Lilling Naparty LLP, Woodbury (Timothy J. O'Shaughnessy of counsel), for appellants.

Weitz & Luxenberg, P.C., New York (Alani Golanski of counsel), for respondent.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 24, 2012, which denied defendants' motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Plaintiff Joseph Powers was injured when, while intoxicated, he fell off a setback roof of a building owned and managed by defendants. The setback roof, which ran the length of the rear of the building, was five-feet wide, and accessible by climbing through the window of plaintiff's friend's apartment. Although most of the setback abutted either a wall or a setback roof from the adjacent building, a portion abutted an air shaft that terminated below ground level. The setback had gutters, but no

parapet walls or guardrails.

An accident is unforeseeable as a matter of law where the conduct or chain of events was so extraordinary that the defendant's duty did not extend to preventing it (*see Di Ponzio v Riordan*, 89 NY2d 578, 583-584 [1997]). Here, given the nature and location of the setback, it was unforeseeable that individuals would choose to access it, and thus defendant had no duty to guard against such an occurrence (*compare Lesocovich v 180 Madison Ave. Corp.*, 81 NY2d 982 [1993] [rooftop that was large enough to host a cookout, and contained its own porch]). Indeed, defendants' superintendent testified that he had never been on the setback, nor had he ever observed anyone using it.

Regarding allegations of statutory violations, defendants demonstrated that the building, constructed as a loft in 1909 and converted to multiple dwelling in 1979, was grandfathered out of the 1968 and 2008 Building Codes by submission of the 1979 Certificate of Occupancy (*see Hyman v Queens County Bancorp, Inc.*, 3 NY3d 743 [2004]; *compare Lesocovich* at 985). Plaintiff failed to adduce any evidence in opposition, such as the conversion costing more than 60% of the value of the property (*see* Administrative Code of City of NY § 27-115), that would create a question of fact concerning the applicability of the 1968 Building Code, namely Administrative Code § 27-334.

Plaintiff also failed to raise a question of fact as to defendants' reliance on Administrative Code § 27-120.

Furthermore, the Certificate of Occupancy satisfied defendants' burden of showing that the Multiple Dwelling Law was not violated, since the 1979 certificate provided that the building "conform[ed] substantially ... to the requirements of all applicable laws, rules and regulations for the uses and occupancies specified herein." Plaintiff's argument, that the use and occupancy of the building was somehow changed by an alleged bar on smoking is unsupported.

M-1393 - *Powers v 31 E 31 LLC, et al.,*

Motion to stay trial pending appeal denied as academic.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9913 The People of the State of New York, Respondent, Ind. 4729/07

-against-

Gregory Hall, Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David C. Bornstein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered May 13, 2008, convicting defendant, after a jury trial, of two counts of criminal possession of stolen property in the fourth degree and criminal possession of stolen property in the fifth degree, and sentencing him, as a second felony offender, to an aggregate term of 1½ to 3 years, unanimously affirmed.

When the deliberating jury returned to the courtroom to receive supplemental instructions, the court did not coerce a verdict when it directed the court clerk to ask whether the jury had reached a verdict on the stolen property counts (*see People v Brown*, 1 AD3d 147 [1st Dept 2003], *lv denied* 1 NY3d 625 [2004]; *People v Mendez*, 221 AD2d 162 [1st Dept 1995], *lv denied* 87 NY2d 923 [1996]). The jury was not told that it was required to

announce a verdict, and there is no indication that the jurors felt compelled to reach a verdict against their will. To the contrary, the jury foreperson freely answered, without hesitation, that the jury had reached a partial verdict. Moreover, the jurors were each polled as to the verdict, and all of them agreed with it.

Although the court did not comply with CPL 310.70(1) when it failed to direct the jury to resume deliberations on the remaining trespass count, defendant was not prejudiced, since that count was dismissed (*see People v Rodriguez*, 52 AD3d 319 [1st Dept 2008], *lv denied* 11 NY3d 741 [2008]; *People v Stewart*, 210 AD2d 161 [1994], *lv denied* 85 NY2d 980 [1995]). Defendant's argument that further deliberations might have led the jury to reconsider its guilty verdicts on the stolen property counts rests on speculation.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9914 Norex Petroleum Limited, Index 650591/11
Plaintiff-Appellant,

-against-

Leonard Blavatnik, et al.,
Defendants-Respondents.

_____

Simpson Thacher & Bartlett LLP, Los Angeles, CA (Jonathan M. Weiss of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

White & Case LLP, New York (Owen C. Pell of counsel), and Sullivan & Cromwell, New York (Darryl A. Libow and Christopher M. Viapiano of counsel), for respondents.

_____

Order, Supreme Court, New York County (Eileen Bransten, J.), entered September 17, 2012, which, to the extent appealed from, granted defendants Leonard Blavatnik, Victor Vekselberg, Simon Kukes, Access Industries, Inc., Alfa Group Consortium, Renova, Inc., Oao Tyumen Oil Company and TNK-BP Limited's and defendant BP PLC's motions to dismiss the complaint as against them, and denied plaintiff's motion to supplement the record on defendants' motions, unanimously affirmed, with costs.

On February 26, 2002, plaintiff, a resident of Alberta, Canada, commenced an action against all but one of the instant defendants (BP) in the United States District Court for the Southern District of New York, asserting violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC

§ 1961 *et seq.*) (*see Norex Petroleum Ltd. v Access indus., Inc.*, 304 F Supp 2d 570 [SD NY 2004], *vacated and remanded* 416 F3d 146 [2d Cir 2005], *cert denied* 547 US 1175 [2006]). Plaintiff amended the complaint, on December 21, 2005, to add BP as a defendant and to add two claims under Russian law, although not as against BP.

The instant action, which plaintiff commenced in 2011, is barred as untimely under Alberta law, which limits the time to bring claims for the torts alleged by plaintiff to within two years from the date on which the claimant first knew or should have known that an injury had occurred, that the injury was attributable to defendants, and that the injury warranted bringing a proceeding (*see* RSA 2000, c L-12, § 3), and which, more importantly, does not have a provision that would toll the limitations period in favor of a previously filed action.

28 USC § 1367, which gives the federal courts supplemental jurisdiction over all other claims related to the claims in a federal action (28 USC § 1367[a]) and, for any of those claims that are dismissed, tolls the limitations period for 30 days after they are dismissed, "unless State law provides for a longer tolling period" (28 USC § 1367[d]), is not applicable to this action, because New York law provides for a tolling period of six months (*see* CPLR 205[a]). CPLR 205(a) could not save plaintiff's

claims in any event, because New York's borrowing statute requires the courts to apply Alberta's limitations period (*see* CPLR 202; *Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 529 [1999]). Alberta's limitations periods for plaintiff's state law and Russian-law claims expired, at the latest, in 2004 and 2007, respectively.

Even if 28 USC § 1367 applied to plaintiff's claims, the claims would still have to be dismissed. Plaintiff first asserted its state-law claims in 2011, more than eight years after the original (federal) complaint was filed, and more than five years after the complaint was amended. Plaintiff first asserted its two Russian-law claims more than two years after the original complaint was filed. Nor, contrary to its argument, can plaintiff avail itself of the relation-back doctrine to add six entirely new state-law claims eight years after filing the original federal complaint, five years after amending that complaint (when presumably it knew it had state-law claims), and after its federal complaint was dismissed for failure to state a claim – a dismissal on the merits (*see* 631 F3d 29, 32 [2d Cir 2010]), which bars plaintiff from bringing the state claims that it alleges "are based upon the same transaction or occurrence or

series of transactions or occurrences it pled in its federal action."

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: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9915 The People of the State of New York ex rel. Risa Gerson on behalf of George Oliveras, Petitioner-Appellant, Index 251537/12

-against-

Dora B. Schriro, etc., Respondent-Respondent.

_____

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

Robert T. Johnson, District Attorney, Bronx (Mary Jo L. Blanchard of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Patricia Anne Williams, J.), entered October 9, 2012, denying the writ of habeas corpus and dismissing the petition, unanimously affirmed, without costs.

The habeas court properly found that the bail court (Robert A. Sackett, J.) did not abuse its discretion in denying bail pending petitioner's retrial for second-degree murder, a retrial that had been ordered by this Court in *People v Oliveras* (90 AD3d 563 [1st Dept 2011], *lv granted* 2012 NY Slip Op 74825[U] [May 31, 2012]). "The record supports the bail court's determination, based upon the factors enumerated in CPL 510.30(2)(a), that petitioner is a flight risk, given the severity of the crime charged (murder) [and] the likelihood of a conviction and lengthy

sentence" (*People ex rel. Litman v Warden of Manhattan House of Detention*, 23 AD3d 258, 258 [1st Dept 2005], *lv denied* 6 NY3d 708 [2006]).

The record fails to support petitioner's assertion that the court based its determination entirely on the possibility that further appellate review might result in reinstatement of petitioner's conviction. In any event, the possibility of reinstatement was an important consideration.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9916N Jessica Book, Index 108696/11
Plaintiff-Respondent, 300084/11

-against-

Horizon Asset Management, et al.,
Defendants-Appellants,

Mark Wszolek,
Defendant.

- - - - -

9917N Jessica Book,
Plaintiff-Appellant,

-against-

Horizon Asset Management, et al.,
Defendants,

Mark Wszolek,
Defendant-Respondent.

_____

Whiteman Osterman & Hanna LLP, Albany (Robert T. Schofield of counsel), for Horizon Asset Management and Linda Collins, appellants.

Norman A. Olch, New York, for Jessica Book, appellant/respondent.

Kaufman Borgeest & Ryan LLP, New York (Joan M. Gilbride of counsel), for Mark Wszolek, respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 22, 2011, which, in this action alleging, among other things, discrimination, denied the motion of defendants Horizon Asset Management and Linda Collins (the Horizon defendants) to change venue from Bronx County to New York County,

unanimously reversed, on the law, without costs, and the motion granted. Appeal from order, Supreme Court, Bronx County (Julia Rodriguez, J.), entered June 18, 2012, which granted defendant Mark Wszolek's motion to change venue from Bronx County to New York County, unanimously dismissed, without costs, as academic.

The untimeliness of the Horizon defendants' motion to change venue is excusable because plaintiff's counsel and pleadings misleadingly indicated that she resided in Bronx County (*see Mann v Janyear Trading Corp.*, 83 AD3d 566 [1st Dept 2011]). Furthermore, the record shows that the Horizon defendants promptly moved to change venue after receiving medical records indicating that plaintiff's statements were misleading (*see id.*).

The Horizon defendants' motion should have been granted on the merits. Defendants met their initial burden of showing that the venue chosen by plaintiff was improper, by submitting evidence showing that she was residing in North Carolina at the time she commenced this action and had never previously lived in Bronx County (*see Castro v New York Hosp. Med. Ctr. of Queens*, 52 AD3d 251, 251-252 [1st Dept 2008]). In opposition, plaintiff failed to submit documentary evidence demonstrating her residence in Bronx County (*id.* at 252). Indeed, she provided only a self-serving and conclusory affidavit stating that she moved into her sister's apartment in the Bronx on an unspecified date in January

2011, the month she filed this action (*see Rivera v Jensen*, 307 AD2d 229, 230 [1st Dept 2003]; *Martinez v Semicevic*, 178 AD2d 228, 229 [1st Dept 1991]). This was insufficient to satisfy her burden to "establish a bona fide intent to retain Bronx County as a residence for some length of time and with some degree of permanency" (*Gladstone v Syvertson*, 186 AD2d 400, 401 [1st Dept 1992] [internal quotation marks and brackets omitted]).

Given the foregoing determination, plaintiff's appeal, on the basis of law of the case, from from the order entered June 18, 2012, which granted defendant Wszolek's motion to change venue from Bronx County to New York County, is academic.

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

ENTERED: APRIL 25, 2013

CLERK

Andrias, J.P., Saxe, DeGrasse, Richter, Gische, JJ.

9918 Ind. 389/12

[M-1628] In re Adrian Golding,
Petitioner,

-against-

Hon. Juan M. Merchan, etc., et al.,
Respondents.

_____

Jessica A. Horani, New York, for petitioner.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Juan M. Merchan, respondent.

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

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The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: APRIL 25, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Abdus-Salaam, JJ.

7661-
7662 Index 100725/10

Elise Downing, et al.,
Plaintiffs-Appellants,

-against-

First Lenox Terrace Associates, et al.,
Defendants-Respondents.

_____

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

Pryor Cashman LLP, New York (David C. Rose of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about November 15, 2011, reversed, on the law, without costs, the motion denied, and the matter remanded for further proceedings to determine whether the allegations in the amended complaint satisfy the criteria for a class action set forth in CPLR 901(a). Appeal from order, same court and Justice, entered October 25, 2011, dismissed, without costs, as superseded by the appeal from the order entered on or about November 15, 2011.

Opinion by Andrias, J. All concur except DeGrasse, J. who concurs in part and dissents in part in an Opinion.

Order filed.

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

8606-
8607 Index 652109/10

In re Pine Street Associates, L.P.,
Petitioner-Appellant,

-against-

Southridge Partners, L.P., et al.,
Respondents-Respondents.

_____

Becker & Poliakoff, LLP, New York (Lance Gotthoffer of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Lawrence S. Hirsh of counsel), for respondents.

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Orders, Supreme Court, New York County (Bernard J. Fried, J.), entered October 6, 2011 and September 12, 2011, reversed, on the law, and the matter remanded for a hearing to determine the value of the stock tendered to petitioner by respondent Southridge Partners, L.P., and for entry of a money judgment in petitioner's favor in the amount, if any, of the difference between the value of the stock as determined and the corresponding legal interest that Southridge was obligated to pay petitioner within 90 days of the issuance of the January 18, 2010 arbitration award.

Opinion by Acosta, J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Rolando T. Acosta
David B. Saxe
Helen E. Freedman, JJ.

8606-8607
Index 652109/10

_____x

In re Pine Street Associates, L.P.,
Petitioner-Appellant,

-against-

Southridge Partners, L.P., et al.,
Respondents-Respondents.

_____x

Petitioner appeals from the orders of the Supreme Court, New York County (Bernard J. Fried, J.), entered October 6, 2011 and September 12, 2011, which, in this CPLR article 75 proceeding, directed them, in accordance with a prior order, to submit a satisfaction of judgment on notice.

Becker & Poliakoff, LLP, New York (Lance Gotthoffer of counsel), and Reed Smith LLP, New York (Gil Feder and John L. Scott, Jr. of counsel), for appellant.

Robinson Brog Leinwand Greene Genovese & Gluck, P.C., New York (Lawrence S. Hirsh of counsel), and Moses & Singer LLP, New York (Steven R. Popofsky and Jason Canales of counsel), for respondents.

ACOSTA, J.

The primary issue in this case is whether the tender of securities to petitioner by respondent Southridge Partners L.P., an investment fund (the fund), satisfies respondent's obligation under an arbitral award to complete the redemption of petitioner's interest in the fund in cash or in kind. We hold that Southridge owes petitioner the same dollar amount regardless of whether it chooses to satisfy its obligation "in cash" or "in kind." We thus reverse Supreme Court's orders and remand for an evidentiary hearing to determine whether the obligation has been met.

In 2005, petitioner Pine Street Associates, L.P., invested approximately $8.3 million in the fund. In 2008, Pine Street requested a "full redemption" of its investment from Southridge, effective December 31, 2008. Under the terms of Southridge's Sixth Amended and Restated Limited Partnership Agreement (the agreement), withdrawal of a limited partner occurs upon the partner's request for redemption of all of its interest. Southridge acknowledged Pine Street's request and reported that the value of Pine Street's distributive class of interest at redemption was approximately $8,076,457.85. In March 2009, Southridge informed Pine Street of its decision to postpone redemption of Pine Street's class of interests pursuant to

Section 7.2(f) of the Agreement.[1]

In April 2009, Pine Street filed a demand for arbitration, alleging that Southridge engaged in bad faith in failing to honor its request to redeem. Following a two-day arbitration hearing, the arbitrator rendered an award, dated January 18, 2010, interpreting the Agreement as permitting Southridge to exercise its discretion as to when to redeem "only . . . under certain defined circumstances and [if] exercised reasonably in good faith." The arbitrator then found that "[Southridge] failed to establish a credible evidentiary basis for the existence of those defined circumstances, or the reasonableness of their exercising discretion, that delayed the redemption of [Pine Street's] interest then or now." On the basis of that finding, the arbitrator rendered the following award in favor of Pine Street:

> 1. Notwithstanding any other provision of the Agreement, (a) within thirty (30) days from the date of this Award, [Southridge] shall redeem no less than forty percent (40%) of the balance of [Pine Street's] interest in [the Fund] in cash; and (b) within ninety (90) days from the date of this Award, [Southridge] shall complete the redemption of [Pine Street's] interest in [the Fund] in

[1]Section 7.2(f)provides, in pertinent part: "The General Partner [Southridge] shall have the right, exercisable from time to time in the General Partner's sole and absolute discretion, to suspend or postpone the payment and effective date of any redemption of Interests in any Class for the whole or any part of a period..."

> cash or in kind, plus interest at the legal rate on said balance then remaining from October 1, 2009, until paid in full.
>
> 2. Within forty five (45) days from the date of this Award, [Southridge] shall provide [Pine Street] with an accounting of [Pine Street's] interest and position in [the Fund] (represented to be $8,079,457.85 [*sic*] as of December 31, 2008) from January 1, 2008, to said date."

On February 17, 2010, in compliance with paragraph 1 of the arbitration award, Southridge paid Pine Street $3,195,064 in cash, representing approximately 40% of the stated value of Pine Street's remaining interest in the fund ($7,987,660.19).

On April 20, 2010, Southridge also transferred a variety of stock certificates (whose value is disputed) to Pine Street. In a cover letter, Southridge informed Pine Street that it had delivered the stock certificates, "almost entirely" completing the redemption of Pine Street's interest in the fund in kind. The letter also stated that "[a]n additional certificate, representing only a single-digit percentage of the remaining redemption value [would be forwarded] shortly. Upon such delivery, the award will have been satisfied in full." On May 27, 2010, Southridge assigned to Pine Street a portion of its rights, in the amount of $151,258.80 plus interest, in a promissory note due December 31, 2009, and in two stock certificates, each for 500,000 shares in Akers Biosciences, Inc.

On or about November 24, 2010, approximately 10 months after the arbitrator issued the arbitration award, Pine Street filed a petition to confirm the award and for entry of judgment. In response, Southridge argued that the motion was belated, and that because it had satisfied the award some time before, confirmation was unnecessary. Pine Street did not dispute Southridge's representation that the award had been paid in full. Supreme Court granted the petition to confirm the award, and on May 12, 2011 entered judgment.

By order to show cause dated May 18, 2011, Southridge moved to enjoin and restrain Pine Street from seeking to enforce the judgment entered, "unless and until the Court determined that the judgment has not in fact been satisfied and has delineated the terms and conditions of any such enforcement." Southridge stated that it had just recently learned that Pine Street's position was that Southridge had not satisfied the award. In his affidavit in support of the motion, counsel stated that Pine Street had refused Southridge's proposal to litigate the issue of whether the award had been satisfied. In opposition, Pine Street argued that the in-kind portion paid in securities was worth far less than the $4.5 million (the remaining 60%) to which it was entitled under the award, its expert had valued the tendered securities at no more than $245,000. In reply, Southridge

disputed the $245,000 amount, but it made no claim that the tendered securities were worth $4.5 million.

Supreme Court granted a temporary restraining order on May 18, 2011, enjoining Pine Street from seeking to enforce the judgment. By order entered September 7, 2011, the court granted Southridge's motion to enjoin Pine Street from enforcing the judgment pending the determination as to whether the award had been satisfied. The court first noted that Southridge's motion did not seek a ruling whether it had already satisfied the judgment, although it evidently intended to seek such a ruling, and that "Pine Street never questioned the adequacy of Southridge's payments in satisfaction of the award, either before the arbitrator or before [this] Court, until about a year after those payments were made." The court further found that "the securities that would satisfy the in-kind portion of the judgment should have been 60% of Pine Street's security interests in [the Fund] as of January 18, 2010" since the in-kind portion "did *not* specify that the securities had to equal a particular dollar amount." Having defined "in kind" in that manner, the court concluded that the record was insufficient to determine whether the securities rendered by Southridge in the spring of 2010 represented at least 60% of Pine Street's interests in the Fund as of January 18, 2010. The parties were directed to settle an

order and appear for a conference on October 6, 2011. Pine Street thereafter filed a notice of appeal.

In a letter dated September 28, 2011, Pine Street, through its attorney, communicated to the court that, "with a full reservation of all of its rights," it did not intend to further litigate the issue of whether Southridge had complied with the court's directives, i.e., satisfied the arbitration award, but would pursue its position on appeal. On October 6, 2011, the court held a conference during which the parties agreed that a satisfaction of judgment should be entered and the case closed, subject to any determination made concerning the order on appeal. On the same day, the court entered an order directing Pine Street to submit a satisfaction of judgment on notice. Pine Street filed a notice of appeal from that order.

As a threshold matter, we begin by observing that a party may oppose an arbitral award either by motion pursuant to CPLR 7511(a) to vacate or modify the award within 90 days after delivery of the award or by objecting to the award in opposition to an application to confirm the award notwithstanding the expiration of the 90-day period (*see Matter of Brentnall v Nationwide Mut. Ins. Co.*, 194 AD2d 537, 538 [2nd Dept 1993]). Here, respondent did neither. Indeed, it was petitioner who appealed the lower court's refusal to enforce the judgment.

Under such circumstances, contrary to our dissenting colleague, we do not have the authority to grant a non-appealing party relief that it did not seek by vacating a judgment entered against it (*see Hecht v City of New York*, 60 NY2d 57, 61-62 [1983]). Moreover, we are not empowered to remit the matter to the arbitrator for clarification (*see Matter of Plein [Charcat]*, 53 Misc 2d 162, 164-165 [Sup Ct, NY County 1966]).

Where a dispute exists as to the meaning of an arbitration award that has been confirmed in a judgment, it becomes "the Court's function to determine and declare the meaning and intent of the arbitrator []" (*Board of Educ., Farmingdale Union Free School Dist. v Farmingdale Fedn. of Teachers*, 92 AD2d 599, 601 [2d Dept 1983] [quotation marks omitted]). To that end, a court may review the text of the arbitrator's award in conjunction with whatever findings, if any, the arbitrator has made (*see id.; International Assn. of Machinists, Lodge 917 v Air Prods. & Chems., Inc.*, 341 F Supp 874, 877 [ED Pa 1972]). In so doing, a court should adopt the most reasonable meaning of the text by avoiding any potential interpretations of the award that would render any part of its language superfluous or lead to an absurd result (*cf Matter of Tamaron Invs. (Raia)*, 167 Misc 2d 125, 128 [Sup Ct, NY County 1996]; *New York City Omnibus Corp. v Quill*, 189 Misc 892, 894 [Sup Ct, New York County 1947], *affd* 272 App

Div 1015 [1st Dept 1947], *affd* 297 NY 832 [1948]). Furthermore, the award must be interpreted in the light most favorable to the prevailing party (*see D.E.I., Inc. v Ohio and Vic. Regional*, 296 F Supp 2d 881, 885 [ND Ohio 2003], *affd* 155 Fed Appx 164 [6th Cir 2005]).

Here, there is no dispute that the award was satisfied in part. Southridge made a $3.1 million cash payment in fulfillment of its obligation to pay "forty percent (40%) of the balance of [Pine Street's] interest in [the Fund] in cash." What is at issue is Supreme Court's interpretation of the phrase "complete the redemption of Pine Street's interest in [the fund] in cash or in kind" in the arbitral award as permitting Southridge to satisfy its obligations by tendering "60% of Pine Street's security interests in [Southridge] as of January 18, 2010."

The arbitral award makes clear that the arbitrator found that the balance of Pine Street's interest in Southridge, after Southridge made a partial redemption of $88,797.66, was $7.9 million. Significantly, the arbitrator emphasized specific dollar amounts in the award. Nowhere did he equate Pine Street's interest with a certain amount of stock.[2] Thus, Supreme Court's

[2] Tellingly, the arbitrator awarded Pine Street interest. If he did not equate Pine Trust's interest in Southridge with a specific dollar amount, we do not understand why he would have awarded Pine Street interest.

conclusion that Pine Street's interest consists of a certain amount of stock was in error.

Supreme Court also erred by finding that the term "in kind" did not have to equal a certain dollar amount. The term "in kind" has a well defined legal meaning: "[]in a similar way; with an equivalent of what has been offered or received" (Black's Law Dictionary 857 [9th ed 2009]). Given that the arbitrator defined Pine Street's interest in Southridge as a fixed dollar amount equaling around $7.9 million redeemed and that Southridge owed 60% of that amount, it is inconceivable, viewing the award in the light most favorable to Pine Street, that an award in Pine Street's favor would allow Southridge to pay Pine Street less than 60% of $7.9 million. The patently absurd result would be to give Southridge the a choice of paying $4,792,596.11 (along with legal interest on that amount) in cash or far less than that "in kind." We do not believe that that is the result intended. Rather, we conclude that Southridge was given the option of redeeming Pine Sreet's interest by tendering either $4,792,596.11 (along with the corresponding legal interest due on that amount) in cash or an amount of whatever stock it held that would equal $4,792,596.11 (along with the corresponding amount of legal interest due on that amount).

We note that Supreme Court expressed concern that Pine

Street waited one year after Southridge made the payments and the transfer of securities - i.e. until the award had been confirmed - to claim that the award had not been satisfied. However, Pine Street had the right to decide when to bring its confirmation action within the statute of limitations period. Similarly, Pine Street was not required to voice, in its petition to confirm, its dissatisfaction with the amount it received in payment from Southridge (*see* CPLR 7510). "[I]t is irrelevant in a proceeding to confirm an award whether there is a dispute about whether the award has been fully satisfied" (*Matter of Bernstein Family Ltd. Partnership v Sovereign Partners, L.P.*, 66 AD3d 1, 8 [1st Dept 2009]). A party may very well claim that an award has not been satisfied before bringing suit or in its petition for confirmation; however, it does not have an obligation to make the claim before seeking enforcement of the award (*id.*).

Accordingly, the order of the Supreme Court, New York County (Bernard J. Fried, J.), entered October 6, 2011, which, in this CPLR article 75 proceeding, directed petitioner, in accordance with a prior order, same court and Justice, entered September 12, 2011, to submit a satisfaction of judgment on notice, and the September 12, 2011 order, should be reversed, on the law, and the matter remanded for a hearing to determine the value of the stock tendered to petitioner by respondent Southridge Partners, L.P.

and for entry of a money judgment in petitioner's favor in the amount, if any, of the difference between the value of the stock as determined and $ 4,792,596.11 with the corresponding legal interest that Southridge was obligated to pay petitioner within 90 days of the issuance of the January 18, 2010 arbitration award.

All concur except Tom, J.P. who dissents in an Opinion:

TOM, J.P. (dissenting)

The culmination of more than two years of litigation that followed the arbitration award rendered in this proceeding is a judgment in favor of petitioner in the total sum of $505.[1] This is an anomalous outcome in a dispute concerning the redemption of an investment account assessed by the parties at some $8 million. The paltry judgment results from the absence, in the arbitration award, of any valuation of the securities held in the investment account on which judgment could be entered.

This omission is not the consequence of any inadvertence by the arbitrator, but rather results from his recognition that a monetary award was beyond his power to make – because petitioner did not submit the issue of valuation to arbitration and perhaps because, under the rules of the American Arbitration Association, a commercial claim seeking more than $1 million is required to be heard before a panel of three arbitrators unless the parties consent to submit their dispute to a single arbitrator (*see*

[1] The judgment provides, in material part, that petitioner shall recover "forty percent of the balance of Petitioner's interest in Southridge Partners L.P. as of the date of the Award in cash, plus the remaining sixty percent of Petitioner's interest in Southridge Partners L.P. as of the date of the Award in cash or in kind, plus interest at the legal rate on said balance remaining as of October 1, 2009, together with costs and disbursements in the amount of $505.00 as taxed by the Clerk, for the total amount of $505.00, and that Petitioner have execution therefor."

Ansonia Copper & Brass, Inc. v Ampco Metal SA, 419 F Supp 2d 186, 188 [D Conn 2006]). Finally, as the transcript of the proceedings makes clear, the limit on the arbitrator's authority is the immediate result of petitioner's representation, both on its application for arbitration and on its statement of claim, that it sought a "non-monetary" award.[2]

If the award is construed as requiring payment of a particular amount, as the majority holds, then the award is in excess of the arbitrator's power, because the issue of valuation was not submitted for his determination, and since the award neither identifies the securities that will satisfy respondents' obligations to petitioner nor establishes any value that those securities must have, it represents so imperfect an execution of the arbitrator's authority that no final and definite award on the subject matter was rendered (CPLR 7511[b][1][iii]). Under either interpretation, the award must be vacated.

At the outset of the hearing, the arbitrator briefly addressed petitioner's claim, noting that "they weren't seeking a particularly monetary [*sic*] – I know that causes a problem that I got to dance around and deal with." Later, he reminded the

[2] Since petitioner classified its claim as non-monetary, the question of whether the dispute should be heard before one or three arbitrators was never reached.

participants that

> "there is a different problem here that everybody has been tap dancing around for good and sufficient reason because, one, it shouldn't be on the record and, two, it is not before me.
>
> "But the elephant in the room is the value that was placed on the position and who and why. That is the elephant in the room. And you have -- I congratulate both counsel for that, avoiding the elephant in the room . . . you've made sure that that's not in front of me . . . ."

Thus, it is clear that the arbitrator recognized that the question of the valuation of petitioner's interest in the investment fund was not before him and that he lacked the power to determine the issue.

Notwithstanding the infirmity of the award, the majority, under the pretext of interpretation, bestows on petitioner a monetary judgment in a sum that the arbitrator did not award and, within the exercise of his power, could not award, granting petitioner the very relief it purported not to seek.[3] The majority thereby makes a judicial determination of a controversy that the parties, by agreement, consigned to the arbitral forum, in violation of the rule that in deciding any issue in connection with arbitration "the court shall not . . . pass upon the merits

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[3] Supreme Court properly rejected a judgment proposed by petitioner in the amount of $7,990,660.19.

of the dispute" (CPLR 7501; *see Matter of Beleggingsmaatschappij Wolfje, B.V. v AES Ecotek Europe Holdings, B.V.*, 21 AD3d 858 [1st Dept 2005]; *Matter of Sims v Siegelson*, 246 AD2d 374, 376 [1st Dept 1998]).

It is well settled that an arbitrator may not rule on a matter not submitted for determination (*Matter of Joan Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp.*, 13 NY3d 168, 173 [2009]). It is axiomatic that if an issue was not ruled upon by the arbitrator, a court cannot, under the guise of confirmation pursuant to CPLR 7511, decide the issue and enter judgment thereon. Even if the defect in an award is limited to the inability to decipher the meaning and intent of the arbitrator, the award must be vacated – precisely the result reached in *Board of Educ., Farmingdale Union Free School Dist. v Farmingdale Fedn. of Teachers* (92 AD2d 599 [2d Dept 1983] [advisory arbitration]), cited by the majority, which likewise involved the scope of the arbitrator's authority. Nor is clarification of an issue that was not before an arbitrator available, even if it involves the same contract provision at issue (*Matter of Joan Hansen & Co., Inc.*, 13 NY3d at 174). The parties' remedy is to raise the undecided issue in a new arbitration proceeding (*see id.* at 175 n 3).

As the Court of Appeals has observed, arbitration is favored

and encouraged, to promote the announced policy of conserving judicial resources, as well as the time and resources of the parties to the arbitration agreement. Consistent with this policy, the courts are accorded only a limited role in the arbitral process. To avoid becoming embroiled in issues collateral to the dispute that the parties have agreed to arbitrate, the courts are admonished "'to prevent parties to such agreements from using the courts as a vehicle to protract litigation'" (*Matter of Nationwide Gen. Ins. Co. v Investors Ins. Co. of Am.*, 37 NY2d 91, 95 [1975], quoting *Matter of Weinrott [Carp]*, 32 NY2d 190, 199 [1973]). As this Court has observed, the minimal oversight of the arbitral process assigned to the courts is intended to "preclude[] the parties to an arbitration agreement from simultaneously pursuing their claims before the courts and thus playing one forum off against the other" (*Avon Prods. v Solow*, 150 AD2d 236, 238 [1st Dept 1989]). The majority's disposition does not advance this salutary purpose by allowing the parties to this proceeding to engage in extensive litigation over the very dispute they agreed to submit to arbitration.

With respect to vacating an award as nonfinal or indefinite, the Court of Appeals has stated, "An award is deficient in this regard and subject to vacatur only if it leaves the parties

unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy" (*Matter of Meisels v Uhr*, 79 NY2d 526, 536 [1992]). The award rendered in this matter directs respondents to pay 40% of the value of petitioner's interest in the investment fund in cash within 30 days of the date of the award and 60% "in cash or in kind" within 90 days. The parties dispute whether securities transferred to petitioner as in-kind payment of its 60% interest are of sufficient value to discharge their obligations under the award. Because the award neither provides guidance as to the value of the in-kind transfer nor indicates the arbitrator's intent as to the identity and number of the securities petitioner is to receive, the award fails to resolve their dispute and, further, creates a new controversy concerning whether respondents have satisfied their responsibilities under the judgment entered on the award. Thus, it is deficient and subject to vacatur.

Accordingly, I would vacate the judgment confirming the award and the judgment entered thereon.

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

ENTERED: APRIL 25, 2013

CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Dianne T. Renwick
Leland G. DeGrasse
Sheila Abdus-Salaam, JJ.

7661-7662
Index 100725/10

_____x

Elise Downing, et al.,
Plaintiffs-Appellants,

-against-

First Lenox Terrace Associates, et al.,
Defendants-Respondents.

_____x

Plaintiffs appeal from the orders of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about November 15, 2011 and October 25, 2011, which to the extent appealed from as limited by the briefs, upon renewal, granted defendants' motion to dismiss plaintiffs-tenants' action.

Emery Celli Brinckerhoff & Abady LLP, New York (Matthew D. Brinckerhoff and Adam R. Pulver of counsel), and Himmelstein, McConnell, Gribben, Donoghue & Joseph, New York (William Gribben, David Hershey-Webb and Ronald S. Languedoc of counsel), for appellants.

Pryor Cashman LLP, New York (David C. Rose, Donald S. Zakarin and Todd E. Soloway of counsel), and Michael B. Kramer & Associates, New York (Michael B. Kramer of counsel), for respondents.

ANDRIAS, J.

In this putative class action, plaintiffs, 13 tenants or former tenants of a residential complex owned by defendants, allege that defendants unlawfully deregulated their apartments under the luxury decontrol provisions of Rent Stabilization Law (Administrative Code of City of NY) § 26-501 *et seq.*, while receiving tax incentive benefits under the City of New York's J-51 program (*see Roberts v Tishman Speyer Props., L.P.*, 13 NY3d 270, 280 [2009]). Plaintiffs seek, among other things, a declaration that all apartments in the complex are subject to rent stabilization, injunctive relief, and a money judgment. While plaintiffs demanded treble damages pursuant to Rent Stabilization Law § 26-516(a) in their amended complaint, they have since waived that request and seek only reimbursement of the alleged rent overcharges plus interest.

Supreme Court erred when it dismissed the putative class action pursuant to CPLR 901(b) and the individual claims on the ground that they should be brought before the Division of Housing and Community Renewal (DHCR). Because plaintiffs now seek to recover only their actual damages plus interest, rather than enhanced damages, and because Supreme Court has concurrent jurisdiction with DHCR with respect to overcharge claims, defendants' motion to dismiss should be denied.

Pursuant to Rent Stabilization Law § 26-516(a), "[i]f it is determined that the owner's decision to charge the excessive rent was deliberate, or done knowing that the rent as charged was unlawful, a finding of willfulness is entered and a penalty equal to three times the amount of the overcharge must be imposed" (*Matter of H.O. Realty Corp. v State of N.Y. Div. of Hous. & Community Renewal*, 46 AD3d 103, 107 [1st Dept 2007]). "If the owner establishes by a preponderance of the evidence that the overcharge was not willful," the tenant must be awarded the amount of the overcharge, plus interest "from the date of the first overcharge . . . at the rate of interest payable on a judgment pursuant to section 5004 of the [CPLR]" (Rent Stabilization Code [9 NYCRR] § 2526.1[a][1]).

Pursuant to CPLR 901(b), "[u]nless a statute creating or imposing a penalty, or a minimum measure of recovery specifically authorizes the recovery thereof in a class action, an action to recover a penalty, or minimum measure of recovery created or imposed by statute may not be maintained in a class action." However, even where a statute creates or imposes a penalty, the restriction of CPLR 901(b) is inapplicable where the class representative seeks to recover only actual damages and waives the penalty on behalf of the class, and individual class members are allowed to opt out of the class to pursue their punitive

damages claims (*see Cox v Microsoft Corp.*, 8 AD3d 39 [1st Dept 2004]; *Pesantez v Boyle Envtl. Servs.*, 251 AD2d 11, 12 [1st Dept 1998]; *Ridge Meadows Homeowners' Assn. v Tara Dev. Co.*, 242 AD2d 947 [4th Dept 1997]; *Super Glue Corp. v Avis Rent A Car Sys.*, 132 AD2d 604, 606 [2d Dept 1987]).

Relying on *Asher v Abbott Labs.* (290 AD2d 208 [1st Dept 2002], *lv dismissed* 98 NY2d 728 [2002]), defendants argue that the penalties of Rent Stabilization Law § 26-516(a) are mandatory and cannot be waived. In *Asher*, this Court held that

> "private persons cannot bring a class action under the Donnelly Act because the treble damages remedy provided in General Business Law § 340(5) is a 'penalty' within the meaning of CPLR 901(b), the recovery of which in a class action is not specifically authorized and the imposition of which cannot be waived" (290 AD2d at 208).

However, under General Business Law § 340(5), treble damages are awarded upon a finding of liability; the statute does not require a finding of willfulness or bad faith. In contrast, Rent Stabilization Law § 26-516(a) only requires treble damages where the landlord cannot demonstrate that it did not act willfully, and is analogous to Labor Law 198(1-a), under which plaintiffs have been allowed to waive their right to liquidated damages to preserve the right to maintain a class action, provided that putative class members are given the opportunity to opt out of the class in order to pursue their own liquidated damages claims

(*see Pesantez*, 251 AD2d at 12]).

Rent Stabilization Code (9 NYCRR) § 2520.13, which states that "[a]n agreement by the tenant to waive the benefit of any provision of the RSL or this Code is void," does not require a different result. "[P]laintiffs are seeking to waive their entitlement to treble damages unilaterally, not through agreement. Thus, allowing the class action to proceed would not frustrate the RSC's purpose of [avoiding] situations whereby the landlord attempts to circumvent the [RSC's] benefits" (*Rebibo v Axton Owners, Inc.*, 2012 NY Slip Op 32624[U], n2 [Sup Ct, NY County 2012] [internal citation and quotation marks omitted]).

Significantly, plaintiff's waiver of treble damages will not subvert a protection afforded by the rent stabilization scheme. On behalf of the putative class, plaintiffs seek a declaration that their apartments are subject to rent stabilization and the rent regulatory provisions of the Rent Stabilization Law, that any petitions for deregulation submitted by defendants to DHCR are invalid, and that any deregulation orders issued by DHCR are null and void. Plaintiffs also seek an injunction barring defendants from deregulating apartments at the complex pursuant to vacancy decontrol or luxury decontrol while receiving J-51 benefits and ordering defendants to revise all leases to provide that the units are subject to rent regulation at legal rents and

to register the subject apartments with DHCR as required by law. Although plaintiffs now seek to recover only the amount of the overcharge, plus interest, individual class members will be allowed to opt out of the class to pursue their treble damages claims should they believe there is a lawful basis for doing so.

Nor is there merit to the argument that the putative class action must be dismissed under CPLR 901(b) because reimbursement of rent overcharges plus interest is also a penalty as that term is used in § 26-516(a). While § 26-516(a) refers to an award of the amount of the overcharge plus interest as a penalty, "[t]he determination of whether a certain provision constitutes a penalty may vary depending on the context" and "[t]he nature of the problem" (*Sperry v Crompton Corp.*, 8 NY3d 204, 213 [2007]). "[A] statute imposes a penalty when the amount of damages that may be exacted from the defendant would exceed the injured party's actual damages" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 901 at 104).

"By any reasonable measure, treble damages amount to a substantial penalty. It is punitive in nature and obviously designed to severely punish owners who deliberately and systematically charge tenants unlawful rents, while deterring other owners of stabilized premises who might be similarly inclined" (*H.O. Realty Corp.,* 46 AD3d at 108]). In contrast,

"'interest is not a punishment arbitrarily levied upon a culpable party. Instead, an award of interest is simply a means of indemnifying an aggrieved person. It represents the cost of having the use of another person's money for a specified period'" (*Mohassel v Fenwick*, 5 NY3d 44, 51 [2005], quoting *Matter of Aurecchione v New York State Div. of Human Rights*, 98 NY2d 21, 27 [2002]). Thus, while treble damages under Rent Stabilization Law § 26-516(a) is a true penalty, allowable only where the overcharge is willful, the award of interest on the overcharge is compensatory in nature in that a tenant is only getting a return on the actual amount he or she was overcharged, which would correspond to the landlord's reasonable use of the money while it was in the landlord's possession.

The applicability of CPLR 901(b) may be addressed at this procedural stage. It has been held that it is premature to dismiss class action allegations before an answer is served or pre-certification discovery has been taken (*see e.g. Bernstein v Kelso & Co.*, 231 AD2d 314, 323 [1st Dept 1997]). However, it has also been held that a motion to dismiss may be made before a motion to determine the propriety of the class and a hearing under CPLR 902 where "it appears conclusively from the complaint and from the affidavits that there was as a matter of law no basis for class action relief" (*Wojciechowski v Republic Steel*

Corp., 67 AD2d 830, 831 [4th Dept 1979), *lv dismissed* 47 NY2d 802 [1979]). Here, the issue presented is whether, as a matter of law, plaintiffs are barred from bringing a class action by CPLR 901(b) because Rent Stabilization Law § 26-501, which does not specifically authorize recovery in a class action, imposes a penalty, that cannot be waived.

Accordingly, plaintiffs, who have waived the penalty of treble damages, should be allowed to proceed by way of a class action to recover their actual damages plus interest, provided class members are allowed to opt out and pursue individual actions, and plaintiffs otherwise satisfy the criteria of CPLR 901(a).

The argument that the individual claims must be dismissed because the Legislature intended that they be brought on an individual basis before DHCR is unavailing. Supreme Court has concurrent jurisdiction with DHCR to entertain an action to recover rent overcharges (*see Wolfisch v Mailman*, 196 AD2d 466 [1st Dept 1993], *lv denied* 82 NY2d 661 [1993]; *see also Nezry v Haven Ave. Owner LLC*, 28 Misc 3d 1226[A] [Sup Ct, New York County 2010]).

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered on or about November 15, 2011, which, to the extent appealed from as limited by the briefs, upon

renewal, granted defendants' motion to dismiss plaintiffs-tenants' action, should be reversed, on the law, without costs, the motion denied and the matter remanded for further proceedings to determine whether the allegations in the amended complaint satisfy the criteria for a class action set forth in CPLR 901(a). The appeal from the order of the same court and Justice, entered October 25, 2011, should be dismissed, without costs, as superseded by the appeal from the order entered on or about November 15, 2011.

All concur except DeGrasse, J. who concurs in part and dissents in part in an Opinion:

DeGRASSE, J. (concurring in part and dissenting in part)

I agree with the majority that the motion court erroneously granted defendants' motion to dismiss the amended complaint. I write separately because the issue of whether plaintiffs could have waived their claims to penalties recoverable under Administrative Code of the City of New York § 26-516(a) and Rent Stabilization Code (9 NYCRR) § 2526.1(a)(1) should not be addressed at this time, given the posture of this case.

The court granted defendants' renewed motion for an order dismissing the complaint. Defendants had moved for dismissal on the ground that this action could not be maintained as a class action because the amended complaint calls for an award of the aforementioned penalties.[1] Defendants invoked the statute of limitations as an additional ground for dismissal. CPLR 902 requires a plaintiff who commences a class action to move for permission to maintain the action as a class action within 60 days after the time for service of a responsive pleading has expired. In this case, defendants made their motion before serving their answer and before plaintiffs moved for class action

[1]CPLR 901 (b) provides that "[u]nless a statute creating or imposing a penalty . . . specifically authorizes the recovery thereof in a class action, an action to recover a penalty . . . created or imposed by statute may not be maintained as a class action."

certification. In my view, plaintiffs correctly argue that the court prematurely dismissed the amended complaint's class action allegations.

A court may not determine whether an action is entitled to class action status until a plaintiff applies for class action certification under CPLR 902 (*see Long Is. Region Natl. Assn. for Advancement of Colored People v Town of N. Hempstead*, 102 Misc 2d 704, 710 [Sup Ct, Nassau County 1979], *affd* 75 AD2d 842 [2nd Dept 1980]; *see also Matter of Knapp v Michaux*, 55 AD2d 1025 [4th Dept 1977]). The court's dismissal of the amended complaint was premature for the additional reason that defendants' answer had not been served (*see Bernstein v Kelso & Co.*, 231 AD2d 314, 323 [1st Dept 1997], *followed in Pludeman v Northern Leasing Sys., Inc.*, 40 AD3d 366, 369 [1st Dept 2007], *affd* 10 NY3d 486 [2008]). Whether the statutory penalties can be waived is a matter that should be addressed upon plaintiffs' motion for leave to maintain this action as a class action. In any event, the motion court's decision does not suffice for purposes of determining class action status because it does not disclose consideration of the requirements for class certification set forth under CPLR 902 (*see Matter of Non-Emergency Transporters of N.Y. v Hammons*, 249 AD2d 124, 128 [1st Dept 1998]). Specifically, as a matter of statutory law, the court "shall consider" the following factors,

among others, in determining whether an action may proceed as a class action:

> "1. The interest of members of the class in individually controlling the prosecution or defense of separate actions;
>
> "2. The impracticality or inefficiency of prosecuting or defending separate actions;
>
> "3. The extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
>
> "4. The desirability or undesirability of concentrating the litigation of the claim in the particular forum;
>
> "5. The difficulties likely to be encountered in the management of a class action" (CPLR 902).

The majority directs "further proceedings to determine whether the allegations in the amended complaint satisfy the criteria for a class action set forth in CPLR 901(a)." As I see it, a motion duly made under CPLR 902 would be the only vehicle that would allow the court to efficaciously make the required determination.

Although raised by defendants and not addressed by the majority or the motion court, the rent overcharge claims of plaintiffs Lois Henry, Larry McMillan, Albert Taylor, Mary White, Barbara Jones, Risa Schneider and George Starckey were time-barred because the statute of limitations began to run from the time of the first overcharge alleged (*see Direnna v Christensen*, 57 AD3d 408 [1st 2008], citing CPLR 213-a). Said plaintiffs'

remaining causes of action are also time-barred because they are incidental to the overcharge claims (*see Matter of Brinckerhoff v New York State Div. of Hous. & Community Renewal*, 275 AD2d 622 [1st Dept 2000], *appeal dismissed* 96 NY2d 729 [2001], *lv denied* 96 NY2d 712 [2001]). Accordingly, I would modify the motion court's order to reinstate the remaining plaintiffs' claims that are not time-barred, without prejudice to a motion for class certification pursuant to CPLR 902.

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

ENTERED: APRIL 25, 2013

CLERK