SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

FEBRUARY 20, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11782 The People of the State of New York, Ind. 3241/98
Respondent,

-against-

Leon Jones,
Defendant-Appellant.

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

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

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Order, Supreme Court, New York County (Edward J. McLaughlin, J.), entered on or about February 25, 2013, 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.

Regardless of whether points should have been assessed under factor 1 for defendant's use of "forcible compulsion" or because he was "armed with a dangerous instrument," the record supports the court's alternate finding that a discretionary upward departure to level three was warranted under the circumstances

(*see People v Ratcliff*, 107 AD3d 476 [1st Dept 2013], *lv denied* 22 NY3d 852 [2013]; *see also People v Larkin*, 66 AD3d 592, 593 [1st Dept 2009], *lv denied* 14 NY3d 704 [2010]). Clear and convincing evidence established aggravating factors that were not otherwise adequately taken into account by the risk assessment instrument, including the egregiousness of the sex offenses committed against two children and the threats defendant made to his victims to keep them from reporting his crimes.

The court also properly exercised its discretion in denying defendant's application for a downward departure because the mitigating factors asserted by defendant, including his age and lack of prior criminal history, were adequately taken into account by the risk assessment instrument, and were outweighed by the seriousness of the underlying sex crimes (*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: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11783 In re Jahmere G.,

A Child Under the Age of
Eighteen Years, etc.,

Tondalayo G.,
Respondent,

The Administration for Children's Services,
Petitioner-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Family Court, New York County (Susan K. Knipps, J.), entered on or about November 18, 2013,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated January 28, 2014,

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11784 W. B., Index 350779/01
Plaintiff-Appellant,

-against-

D. B.,
Defendant-Respondent.

_____

W. B., appellant pro se.

D. B., respondent pro se.

_____

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered September 27, 2012, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for an order increasing child support and to enforce the parties' stipulation of settlement, and awarded plaintiff $3,000 in counsel fees, unanimously affirmed, without costs.

Plaintiff failed to make a prima facie showing that a substantial, unanticipated change in circumstances has occurred warranting a modification of the child support award (*see Merl v Merl*, 67 NY2d 359, 362 [1986]). Nor did plaintiff show that the needs of the child were not adequately being met (*see Matter of Brescia v Fitts*, 56 NY2d 132, 140 [1982]).

The increase in defendant's income does not constitute an unanticipated change in circumstances warranting an increase in support (*see Friedman v Friedman*, 65 AD3d 1081 [2d Dept 2009]).

In any event, the parties' agreement provides a mechanism for increases every three years based on defendant's income. Plaintiff also failed to provide any evidence to support her claim that she made efforts to find employment commensurate with her training and experience (*see O'Brien v McCann*, 249 AD2d 92 [1st Dept 1998]; *Piernick v Nazinitsky*, 48 AD3d 690 [2d Dept 2008]). In any event, plaintiff's underemployment was not a change in circumstances as she had been unemployed and/or underemployed at the time of the parties' agreement.

In light of the absence of any evidence supporting a modification of the child support award, a hearing is unnecessary (*see Shachnow v Shafer*, 82 AD3d 423, 424 [1st Dept 2011], *lv dismissed* 17 NY3d 935 [2011]).

Supreme Court also properly found that there had been no violation of the provision in the parties' agreement requiring recalculation of child support every three years based on defendant's income. Defendant's bonus received in 2011 was not to be included in the calculation of his income in the three year period between January 1, 2008 and January 1, 2011.

Supreme Court correctly found that defendant was not obligated to pay the child's school transportation costs. The parties' agreement only requires him to pay 63% of the child's private school up to a maximum of $5,000 per year. Defendant

also met his obligation to obtain and provide proof of life insurance in compliance with the parties' agreement.

Supreme Court providently exercised its discretion in awarding plaintiff $3,000 in counsel fees (*see* DRL § 237[a]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11786 Credit Agricole Corporate and Investment Bank New York Branch, formerly known as Calyon New York Branch, et al., Plaintiffs-Respondents, Index 651989/10

-against-

BDC Finance, L.L.C., et al., Defendants-Appellants.

_____

Richards Kibbe & Orbe LLP, Washington, DC (David W.T. Daniels of the bar of the District of Columbia, admitted pro hac vice, of counsel), for appellants.

White & Case LLP, New York (J. Christopher Shore of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered September 6, 2012, which, to the extent appealed from, granted plaintiffs' CPLR 3211(a)(7) motion to dismiss the third counterclaim asserted by defendant BDF Finance, L.L.C. and counterclaim-plaintiffs Black Diamond Capital Management, L.L.C. and Black Diamond CLO 2006-1 (Cayman), Ltd. (collectively, "BD-defendants") sounding in defamation, and directed that the claim be severed and judgment entered thereon, unanimously affirmed, with costs.

The third counterclaim, alleging libel and slander by plaintiffs' counsel in connection with statements he made to a reporter that were printed in an article published in a financial

news publication, was properly dismissed. The article, fairly read, summarized bankruptcy proceedings in which BD-defendants, who held a majority interest in the debtor's credit financing obligations, acquired the right to supervise the liquidation of the debtor's assets. Plaintiffs, the debtor's minority secured lenders, argued that the sale of the debtor's assets at auction using a "credit bid" effectively compromised their security interests in the assets. Plaintiffs further argued that the bankruptcy trustee's motion seeking court approval of the auction sale, in essence, failed to adequately protect their security interests. In this context, plaintiffs' counsel's statement to the reporter that it was his belief that the trustee's motion for court approval was "based upon a misconception that something could be good for a liquidating estate but not for its creditors . . . [and that] [j]ust because the Corleones pay for fireworks in Little Italy doesn't mean they're good guys," would be interpreted by a reasonable reader to be of and concerning the trustee's conduct, not that of BD-defendants (*see Aronson v Wiersma*, 65 NY2d 592, 594 [1985]). Further, this statement is entitled to absolute privilege because it was made in connection with a judicial proceeding (*see Rosenberg v Metlife, Inc.*, 8 NY3d 359, 365 [2007]; New York Civil Rights Law § 74]).

Another statement contained in the article, asserting that

"the plan proponents" argue that the "sale motion gives Black Diamond at least $126 million in value that belongs to secured lenders in exchange for a mere $4.6 million payout to unsecured lenders" is also alleged to be defamatory. This statement is also privileged (*id.*), and, in any event, is non-actionable since it has not been pleaded with the requisite particularity. BD-defendants have not adequately alleged the statement's falsity nor have they sufficiently asserted that it was made by plaintiff's counsel, rather than any of the members of plaintiffs, to whom the statement is attributed.

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11787 Michael Leopold, etc., Index 107342/11
Plaintiff-Appellant,

-against-

United Capital Corp., et al.,
Defendants-Respondents.

_____

Kaplan Fox & Kilsheimer LLP, New York (Jeffrey P. Campisi of counsel), for appellant.

Olshan Frome Wolosky LLP, New York (Jeffrey A. Udell of counsel), for respondents.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered November 8, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

In this action governed by Delaware law, plaintiff alleges that the individual defendants who are owners and/or directors of the corporate defendant breached their fiduciary duties by delisting and deregistering the corporation's common stock and by structuring a tender offer through an unfair process for inadequate consideration. The motion court properly dismissed

plaintiff's claims as derivative, since they allege wrongs affecting both him and the corporation rather than "direct injury . . . independent of any alleged injury to the corporation" (*Tooley v Donaldson, Lufkin & Jenrette, Inc.*, 845 A2d 1031, 1039 [Del 2004]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11788 The People of the State of New York, Ind. 2238/11
Respondent,

-against-

Anthony Wright,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about November 23, 2011,

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: FEBRUARY 20, 2014

CLERK

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

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11789 Marbru Associates, et al., Index 102117/12
Plaintiffs-Appellants,

-against-

William J. White, et al.,
Defendants-Respondents.

_____

Kaufman Friedman Plotnicki & Grun, LLP, New York (Howard Grun of counsel), for appellants.

The Price Law Firm, LLC, New York (Joshua C. Price of counsel), for respondents.

_____

Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered April 16, 2013, which, insofar as appealed from, denied plaintiffs landlords' motion to direct defendants tenants to pay for use and occupancy of the subject apartment and granted defendants' cross motion for leave to amend their answer to assert an affirmative defense requesting transfer of this action to Civil Court and counterclaims for attorney's fees and for harassment and discrimination, unanimously modified, on the law, to grant plaintiffs' motion to the extent of awarding use and occupancy pendente lite at the rate of $1,595.53 per month, and awarding use and occupancy arrears retroactive to January 13, 2012, and remanding the matter for calculation of the amount of retroactive arrears, and otherwise affirmed, without costs.

Plaintiffs are entitled to an order requiring defendants to

pay use and occupancy pending the determination of this action (*see Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 403 [1st Dept 2005]; *MMB Assoc. v Dayan*, 169 AD2d 422 [1st Dept 1991]). The amount sought, $1,595.53 per month, is the amount of monthly rent under the last lease effective between the parties, and, as such, is fair (*see Eli Haddad Corp. v Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984]). Plaintiffs are also entitled to an award of use and occupancy arrears as indicated (*see Shoshany v Goldstein*, 20 Misc 3d 687, 689 [Civ Ct, NY County 2008]).

The motion court did not abuse its discretion in granting defendants leave to assert a request for transfer to Civil Court as an affirmative defense. Whether the action should actually be transferred is a matter to be decided by Supreme Court, in its discretion, should either party affirmatively move for such relief. "The Civil Court is the preferred forum for resolving landlord-tenant issues" (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]), and where, as here, the "primary relief sought is repossession of the premises," the addition of a prayer for declaratory or equitable relief does not negate the presumption that Civil Court is the preferred forum (*Waterside Plaza v Yasinskaya*, 306 AD2d 138, 139 [1st Dept 2003] [internal quotation marks omitted]).

Since no party has produced a copy of the original lease,

the motion court did not abuse its discretion in granting defendants leave to assert a counterclaim for attorney's fees hypothetically, "[i]n the event that" there is a lease between the parties "containing an applicable legal fees clause" (*see* CPLR 3014). The motion court also providently exercised its discretion in granting defendants leave to amend their answer to assert a counterclaim for harassment and race-based discrimination.

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11790 Angela Best, Index 309600/09
Plaintiff-Appellant,

-against-

1482 Montgomery Estates, LLC,
Defendant-Respondent.

_____

Spiegel & Barbato, LLP, Bronx (Brian C. Mardon of counsel), for appellant.

Armienti, DeBellis, Guglielmo & Rhoden, LLP, New York (Harriet Wong of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered November 21, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motion denied.

Defendant failed to establish its entitlement to judgment as a matter of law in this action for personal injuries sustained by plaintiff when sheetrock from the ceiling of her apartment fell on her; defendant owned the building. Defendant's submissions included plaintiff's testimony that she had called the office of defendant's building manager several times before the collapse to complain that her bedroom ceiling had a crack and leaked water (*see Govan v Ft. Sheri Realty Co.*, 267 AD2d 99 [1st Dept 1999]; *cf. Figueroa v Goetz*, 5 AD3d 164 [1st Dept 2004]). That the building manager's employee denied receiving any such complaints,

only created credibility questions for a jury to resolve (*see Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 527 [1st Dept 2013]). It cannot be said that plaintiff's testimony was incredible as a matter of law (*see Espinal v Trezechahn 1065 Ave. of the Ams., LLC*, 94 AD3d 611 [1st Dept 2012]), or that it consisted only of feigned issues of fact (*see Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *compare Beahn v New York Yankees Partnership*, 89 AD3d 589, 590 [1st Dept 2011]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11791 Lee Hunter, et al., Index 110147/11
Plaintiffs-Appellants,

-against-

Seneca Insurance Company, Inc.,
Defendant-Respondent.

_____

Neal S. Dobshinsky, LLC, New York (Neal S. Dobshinsky of counsel), for appellants.

Ken Maguire & Associates PLLC, Garden City (Kenneth R. Maguire of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered August 2, 2012, which granted defendant's motion to dismiss the complaint, unanimously modified, on the law, to deny defendant's motion to dismiss, and to declare in defendant's favor, and otherwise affirmed, without costs.

Plaintiffs allege that they were insured under a policy issued by defendant that included Builders Risk Coverage with regard to a three-family home, owned jointly by them. Among other conditions, the policy required the insureds to provide a "signed, sworn proof of loss containing the information we request to settle the claim within 60 days after our request."

In January 2010, plaintiffs allegedly sustained water damage to their property and, that same month, made a claim to defendant under the policy. On July 16, 2010, defendant, by its attorneys,

sent plaintiffs written notice requesting a Sworn Statement In Proof of Loss, together with the appropriate forms, pursuant to plaintiffs' policy of insurance. In November 2010, more than 60 days after the proof of loss was demanded and plaintiffs had failed to return a proof of loss, defendant denied plaintiff's property claim.

Plaintiffs' failure to file proof of loss within 60 days after receipt of defendant's notice is an absolute defense to an action on the policy, absent waiver of the requirement by the insurer or conduct on its part estopping its assertion of the defense (*Igbara Realty Corp. v New York Prop. Ins. Underwriting Assn.*, 63 NY2d 201, 209-210 [1984]). The fact that the written notice demanding a proof of loss was provided by counsel for defendant, rather than defendant itself, does not render the demand ineffective or excuse plaintiffs from complying with the policy's requirement (*see Pioneer Ins. Co. v Deleo*, 167 AD2d 795, 797 [3d Dept 1990]; *see also Anthony Marino Constr. Corp. v INA Underwriters Ins. Co.*, 69 NY2d 798, 800 [1987]).

We modify solely to declare in defendant's favor, rather

than dismiss the complaint (*see Maurizzio v Lumbermens Mut. Cas. Co.*, 73 NY2d 951, 954 [1989]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11794 The People of the State of New York, Ind. 698/08
Respondent,

-against-

Alexander Santana,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), and Weil, Gotshal & Manges LLP, New York (David J. Schwartz of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Ann M. Donnelly, J.), rendered June 25, 2010, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him, as a second felony offender, to a term of 20 years, unanimously affirmed.

Except as indicated, defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record, including counsel's strategic choices and the circumstances of counsel's review of a surveillance videotape (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). Accordingly, since defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may

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

The only aspect of defendant's ineffective assistance claim that is reviewable on the present record is his claim relating to the argument that his counsel made in opposition to the People's request for a missing witness charge. We agree that counsel's argument that an uncalled witness's testimony would incriminate defendant did not militate against a missing witness charge (*see generally People v Savinon*, 100 NY2d 192 [2003]), and that counsel thus demonstrated a misunderstanding of the law. However, defendant has not established that counsel's error caused any prejudice. The court denied the People's request for the missing witness charge, and only permitted the People to make a very limited summation argument in this regard. Defendant has not shown how this limited argument affected the outcome of the

case or deprived him of a fair trial. We note that the evidence of defendant's guilt was overwhelming.

We perceive no basis for reducing the sentence.

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11795 Sebrina Trent-Clark, Index 15485/07
Plaintiff-Appellant, 84147/10

-against-

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

J.P. Morgan Chase & Co., et al.,
Defendants-Respondents.

[And a Third-Party Action]

_____

Law Offices of Michael S. Lamonsoff, PLLC, New York (Ryan Lawlor of counsel), for appellant.

Russo & Toner, LLP, New York (Marcin J. Kurzatkowski of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered on or about July 2, 2013, which granted the motion of defendants J.P. Morgan Chase Bank, NA, s/h/a J.P. Morgan Chase & Co. and Manhattan Banking Corporation (collectively Chase) for summary judgment dismissing the complaint as against Chase, unanimously affirmed, without costs.

Chase established entitlement to judgment as a matter of law in this action for injuries sustained by plaintiff after she tripped and fell at the curb "near the exit of the driveway of the Chase on 233rd." on or in a defect in the road. Plaintiff testified that although she could not recall exactly where her

feet were when she fell, she was on "kind of like a curb" near "the exit driveway of . . . Chase" and had stepped off the curb onto the street.

The photographic evidence submitted by plaintiff indicates that the purported defect is on the curb, where the driveway exiting Chase's parking lot meets the roadway. It would not be Chase's responsibility to maintain the curb or correct a defect on it unless Chase engaged in some special use of the area (*see Ascencio v New York City Hous. Auth.*, 77 AD3d 592 [1st Dept 2010]).

Moreover, Chase submitted evidence showing that it neither created the subject defect nor had actual or constructive notice of it. Chase's witness testified that he did not recall the premises having any issues around its exterior within the six months prior to the accident, that there were no complaints regarding the property in the year prior to the accident, and that he did not recall hiring anyone to work on the sidewalk or curb prior to plaintiff's fall (*see Burko v Friedland*, 62 AD3d 462 [1st Dept 2009]).

Although a driveway running over a sidewalk constitutes a special use, there is no evidence that the defect alleged here was caused by cars driving over the curb for Chase's sole

commercial benefit (*see O'Brien v Prestige Bay Plaza Dev. Corp.*, 103 AD3d 428, 429 [1st Dept 2013]; *see also Balsam v Delma Eng'g Corp.*, 139 AD2d 292, 299 [1st Dept 1988], *lv dismissed in part, denied in part* 73 NY2d 783 [1988]). Plaintiff's argument that the weight of the traffic from the driveway may have been a cause of the accident, is unavailing. The argument is speculative and based solely upon her attorney's affirmation. Plaintiff failed to submit any expert affidavit or testimony as to the cause or alleged nature of the defect and Chase's culpability therefor (*see Joseph v Pitkin Carpet, Inc.*, 44 AD3d 462, 464 [1st Dept 2007]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11796 The People of the State of New York, Ind. 36440C/12
Respondent,

-against-

Uzima Kinda Bora,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, Bronx County (Leonard Livote, J.), rendered on or about July 9, 2012, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: FEBRUARY 20, 2014

CLERK

Gonzalez, P.J., Tom, Saxe, Freedman, Manzanet-Daniels, JJ.

11799N Amir Toos, Index 111390/10
Plaintiff-Appellant,

-against-

Leggiadro International, Inc., et al.,
Defendants-Respondents.

_____

Law Offices of Vincent E. Bauer, New York (Vincent E. Bauer of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Louis B. York, J.), entered November 30, 2012, which denied plaintiff's motion to renew his motion to vacate an order granting defendants' motion to dismiss upon default, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion to vacate granted, and the matter remanded for oral argument of the motion to dismiss.

Defendants' motion to dismiss plaintiff's complaint alleging discrimination in employment was granted upon default, after plaintiff's counsel failed to appear at oral argument. Defendants did not oppose plaintiff's motion seeking to restore the matter for oral argument, which was made within a week after the default order was issued, on the ground that plaintiff's counsel had not received notice of the scheduling of oral

argument. The motion was denied on the procedural ground that it was incorrectly denominated as a motion to reargue, rather than a motion to vacate pursuant to CPLR 5015(a).

The parties' attorneys then entered into a written stipulation agreeing to vacate the default and restore the matter for oral argument, which was filed with the clerk of the court. After being informed by a court employee that the stipulation alone would not result in the matter being restored, plaintiff moved to vacate the default.

Plaintiff's counsel set forth the excuse for his default in appearing at oral argument and plaintiff provided an affidavit of merits, incorporating by reference the detailed allegations of the complaint. Defendants, while acknowledging that they had entered into a stipulation agreeing to vacate the default order, opposed the motion on the ground that the affidavit of merits was inadequate and that they were prejudiced due to the passage of time. The motion court denied the motion on the ground that, although plaintiff had provided an adequate excuse for the default, his affidavit of merits was insufficient.

Plaintiff then moved to renew, contending that the parties' stipulation alone was sufficient to vacate the default under CPLR 5015(b), and, alternatively, seeking leave to renew the motion to vacate on grounds of reasonable excuse (CPLR 5015[a][1]) based on

an affidavit of merits setting forth the detailed allegations of the complaint verbatim. The court denied the motion to renew, finding that plaintiff's counsel had failed to provide a reasonable explanation for the failure to provide an adequate affidavit of merits on the original motion, and had been less than diligent in seeking to have the default vacated and bringing the stipulation to the court's attention.

Contrary to the parties' apparent understanding, the procedure provided in CPLR 5015(b) for vacating defaults by stipulation filed with the clerk is inapplicable here, because it is limited, by its express terms, to default judgments entered pursuant to CPLR 3215, that is, following a defendant's default in answering the complaint (*see* David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C5015:12). Nevertheless, the written stipulation entered into by the parties' attorneys is "binding" on the parties (CPLR 2104), and such stipulations concerning the conduct of the litigation are generally enforced by the courts (*Mitchell v New York Hosp.*, 61 NY2d 208, 214 [1984]). A party will only be relieved from the consequences of a stipulation made during litigation when there is sufficient cause to invalidate a contract, such as fraud, collusion, or mistake (*see Hallock v State of New York*, 64 NY2d 224, 230 [1984]), which has not been shown here.

Accordingly, the court improvidently exercised its discretion in denying plaintiff's renewed motion to vacate the default pursuant to CPLR 5015(a), based on the parties' stipulation and plaintiff's showing of a reasonable excuse and a potentially meritorious cause of action. The undisputed assertion of plaintiff's counsel that he did not receive notice of the scheduling of oral argument provided a reasonable excuse for the default in appearing at oral argument of the fully briefed motion to dismiss the complaint (*see Tribeca Tech. Solutions, Inc. v Goldberg*, 110 AD3d 536 [1st Dept 2013]; *Rugieri v Bannister*, 22 AD3d 299 [1st Dept 2005], *affd in relevant part* 7 NY3d 742 [2006]). Assuming arguendo that plaintiff's initial affidavit of merits was inadequate in the procedural context of this case, the court improvidently exercised its discretion in denying plaintiff's motion to renew in order to present an affidavit correcting any procedural error (*see Cruz v Bronx Lebanon Hosp. Ctr.*, 73 AD3d 597 [1st Dept 2010]; *Rancho Santa Fe Assn. v Dolan-King*, 36 AD3d 460 [1st Dept 2007]; *Shaw v Looking Glass Assoc., LP*, 8 AD3d 100 [1st Dept 2004]; *Garner v Latimer*, 306 AD2d 209 [1st Dept 2003]).

The court's finding that plaintiff's counsel was dilatory in prosecuting the action and seeking to enforce the stipulation is belied by the record, showing no undue delay in seeking to vacate

the inadvertent default (*see Tribeca Tech.*, 110 AD3d at 537). Vacating the default and restoring the motion for oral argument are consistent with "the strong public policy of this State to dispose of cases on their merits" (*Berardo v Guillet*, 86 AD3d 459, 459 [1st Dept 2011]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Mazzarelli, J.P., Saxe, Moskowitz, DeGrasse, Gische, JJ.

11100-
11101 Index 650127/12

In re Colorado Energy Management, LLC,
Petitioner-Respondent,

Centennial Energy Holdings, Inc.,
Petitioner-Intervenor-Respondent,

-against-

Lea Power Partners, LLC,
Respondent-Appellant.

_____

Paul Hastings, LLP, Washington, DC (Charles A. Patrizia of the bars of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for appellant.

Cooley, LLP, New York (Alan Levine of counsel), for respondents.

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Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered July 2, 2013, awarding petitioner Colorado Energy Management, LLC (CEM) $1,000,000 pursuant to an order, same court and Justice, entered April 11, 2013, which granted petitioner's motion to confirm the portion of an arbitration award dated January 13, 2012, awarding CEM $1,000,000 and to vacate the portion awarding respondent Lea Power Partners, LLC (LPP) damages in the amount of $22,043,302, unanimously affirmed, with costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

LPP demanded arbitration through the American Arbitration

Association (AAA) pursuant to an arbitration clause in an Engineering, Procurement and Construction (EPC) Agreement between itself and CEM. In the demand, LPP alleged that CEM committed gross negligence consisting of nine alleged breaches of the EPC Agreement. In the accompanying AAA notice of arbitration, LPP described the dispute by stating that "CEM failed to perform in a manner of a qualified and experienced EPC Contractor, and its failures were so significant as to be gross negligence resulting in the project construction costs increasing from $272,000,000 to $415,000,000 currently." The damages sought by LPP consisted of cost overruns and consequential damages. CEM counterclaimed for a cost bonus incentive fee of $12,596,173 allegedly due under the EPC Agreement, a $1 million development fee that was allegedly due under a separate Joint Development Agreement (JDA), and defamation.

CEM moved the AAA for a dismissal of LPP's claim on the ground that, absent gross negligence, LPP's claims for damages were barred by the provisions of the EPC Agreement. CEM cited paragraph 4.4.3 of the agreement which provides that CEM's obligation to share responsibility for overruns in the manner prescribed by articles 4.3 and 4.4 was to be CEM's only obligation and LPP's exclusive remedy for a contract sum that exceeds the target price set forth in the agreement. CEM also

relied upon paragraph 12.7 of the agreement which capped CEM's total liability at $22,043,302, except for liability arising out of gross negligence and other exceptions that are not relevant to this appeal. Accordingly, CEM argued before the AAA that, in the absence of gross negligence, its liability under the EPC Agreement should be limited to the loss of $9,447,129 in incentive fees that it had already forfeited and the additional forfeiture of the $12,596,173 cost bonus incentive fee that was the subject of its first counterclaim.

LPP opposed the motion to dismiss its claims, arguing at the end of its memorandum of law:

> "Assuming the veracity of these factual allegations, as is required, the Arbitrator can only conclude that LPP's claims are sufficient to fit within a cognizable legal theory of gross negligence. Given CEM's experience and the assurances provided to LPP about its capabilities, CEM's failures meet the defined standard of gross negligence."

By order dated May 11, 2010, Steven A. Arbittier, the originally assigned arbitrator, denied CEM's motion to dismiss LPP's claims as well as LPP's motion to dismiss CEM's counterclaims. In denying CEM's motion, Mr. Arbittier reasoned:

> "The allegations in LPP's demand for arbitration, which must be taken as true at this stage of the case, state a claim for gross negligence which, if proven, could

> form *the basis*[1] for the recovery of causally related damages notwithstanding the limitations on liability and damages in the EPC contract [emphasis added]."

Mr. Arbittier also determined that CEM's claim for a $1 million development fee was arbitrable under paragrapn 11.1.1 of the EPC Agreement because it involved the parties and arose out of a related contract. It is undisputed that Mr. Arbittier's decision was never vacated and has not been challenged in the court below.

Mr. Arbittier passed away in May 2011 and the arbitration hearing was conducted in September of that year before Peter B. Bradford, the successor arbitrator. In rendering his reasoned award, Mr. Bradford concluded that LPP's cost overruns were not the result of gross negligence on the part of CEM. Mr. Bradford, however, concluded that CEM "breached the EPC agreement causing cost overrun damages well beyond the $22 million cap." Accordingly, Mr. Bradford awarded LPP $22,043,032 and awarded CEM $1,000,000 on its counterclaim under the JDA. The awards were recited to be in full settlement of the remaining claims and counterclaims. The IAS court granted CEM's petition by vacating

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[1]We take the decision's statement that gross negligence, if proven, could form "the basis" rather than "a basis" for recovery as a clear indication that Mr. Arbittier found gross negligence to be the only theory upon which LPP would have been entitled to an award in arbitration (*cf. Argentina v Emery World Wide Delivery Corp.*, 93 NY2d 554, 561 n 2 [1999]; *Fox v Tedesco*, 15 AD3d 538, 539 [2005]).

the $22,043,032 award to LPP and confirming the $1 million award to CEM. We affirm.

Under the Federal Arbitration Act (9 USC § 1 *et seq*.), which the parties invoke, an arbitration award may be vacated where the arbitrators exceeded their powers (*Fahnestock & Co., Inc. v Waltman*, 935 F2d 512, 515 [2d Cir 1991], *cert denied* 502 US 942 [1991]). Accordingly, where arbitrators rule on issues not presented to them by the parties, they have exceeded their authority and the award must be vacated (*id*.). The arbitration demand, the pre-hearing motion practice and Mr. Arbittier's decision make it clear that gross negligence was the only claim by LPP that was presented to Mr. Bradford for a hearing. Therefore, Mr. Bradford exceeded his authority by finding that CEM breached the EPC Agreement and awarding damages for cost overruns. Notwithstanding that we reject CEM's arguments that Mr. Bradford's determination was in manifest disregard of the law or that it was affected by an evident material miscalculation, we find that the award for cost overruns was properly vacated.

LPP's argument that Mr. Bradford lacked jurisdiction over CEM's claim for the development fee under the JDA is unpreserved as it was not made before the court below. In any event, Mr. Arbittier properly found the claim to be arbitrable because it involved the parties and arose under a contract that was related

to the EPC Agreement. LPP's argument that CEM lacked standing to maintain this proceeding was rendered moot by the unopposed intervention of its guarantor, Centennial Energy Holding, Inc. (CEHI). As LPP conceded below, CEHI had standing to seek relief from the arbitration award.

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

ENTERED: FEBRUARY 20, 2014

CLERK

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

11180-
11180A Sariel Abad, an Infant by his Mother and Natural Guardian, Yris Morales,
Plaintiff-Appellant,

-against-

New York City Health and Hospitals Corporation, etc.,
Defendant-Respondent.

Index 6365/06

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Fitzgerald & Fitzgerald, P.C., Yonkers (Mitchell Gittin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Drake A. Colley of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered November 18, 2010, dismissing the complaint, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 26, 2010, which denied plaintiff's motion addressed to his notice of claim and granted defendant's cross motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff appeals from the motion court's denial of his motion under General Municipal Law § 50-e(5) for leave to serve a late notice of claim on defendant for alleged obstetrical malpractice more than seven years after the claim accrued upon

his discharge from defendant's hospital on September 13, 2002, six days after his birth. Plaintiff also appeals from the court's grant of defendant's cross motion for an order dismissing the complaint.

Under General Municipal Law § 50-e, the 90-day period for plaintiff to serve defendant with a notice of claim expired on December 14, 2002. In June 2004, plaintiff, then aged 21½ months, was diagnosed with pervasive developmental disorders (PDD), but it was not until May 2005 that plaintiff's attorneys served a purported notice of claim on defendant alleging that plaintiff's injury was caused by defendant's malpractice. In January 2006, plaintiff commenced this action, but then waited until October 2009 to move for an order deeming the 2005 notice timely served nunc pro tunc, or, alternatively granting leave to file another late notice of claim.

We find that the motion court providently exercised its discretion in denying plaintiff's application. Section 50-e(5) of the General Municipal Law confers a court with broad discretion whether to grant leave to serve late notice (*see Diallo v City of New York*, 224 AD2d 339, 340 [1st Dept 1996]), and on appeal the court's determination will not be disturbed absent a clear abuse of that discretion (*Kirtley v Albany Co. Airport Auth.*, 67 AD3d 1317, 1318 [3d Dept 2009]). In

determining whether to grant leave, the court is required under General Municipal Law § 50-e(5) to consider whether the public corporation had actual knowledge of the facts constituting the claim within 90 days of its accrual or shortly thereafter. Under the statute, the court must take into account all other relevant facts and circumstances, including the plaintiff's infancy, whether a reasonable excuse for the late notice was offered, and whether the delay substantially prejudiced the defendant's defense on the merits (*see* General Municipal Law § 50-e(5); *Williams v Nassau Co. Med. Ctr.*, 6 NY3d 531 [2006]).

Here, the motion court properly found that plaintiff's nearly seven-year delay in seeking leave to serve a notice of claim prejudiced defendant and plaintiff had failed to show otherwise (*see Matter of Catuosco v City of New York*, 62 AD3d 995, 997 [2d Dept 2009]). Defendant was prejudiced, given that neither the contemporaneous hospital records nor any subsequent event served to notify defendant of the facts constituting the claim because the records did not link defendant's actions with plaintiff's injury, which was diagnosed nearly two years after defendant last treated plaintiff. In connection with a malpractice claim against a municipal hospital, for the medical records to provide notice of a plaintiff's claim, "the essential facts underlying the claim, *including that the plaintiff was*

injured, must be documented in the defendant's own medical record" (*Cartagena v New York City Health & Hosps. Corp.*, 93 AD3d 187, 188 [1st Dept 2012] [emphasis added]).

The court properly found that nothing in the hospital records would have alerted defendant to any claim of malpractice during the delivery or of any lasting injury. Although plaintiff's expert, Dr. Bruce Halbridge, a Texas practitioner, opined that the unproductive labor that plaintiff's mother underwent before a cesarean section reduced the oxygen reaching the fetus, nothing in the chart supports a hypoxic event. In fact, fetal rate patters were classified as "reassuring" at all times. Plaintiff's Apgar scores both at his birth and five minutes later were recorded as eight on a scale of ten, which score falls within the normal range (*see e.g. Williams,* 6 NY3d at 536-537 [affirming denial of leave to file late notice where hospital records provided "scant" notice of lasting harm to infant who, after difficult delivery, scored eight one minute after birth and nine after five minutes]; *compare with Medley v Cichon*, 305 AD2d 643, 644 [2d Dept 2003] [hospital had notice of injury where infant had zero Apgar score and had to be resuscitated at birth]).

Records of plaintiff's postnatal treatment would not have alerted defendant to plaintiff's claimed injuries. When the

hospital transferred plaintiff to the neonatal intensive care unit because of placental abruption and anemia, he responded favorably to oxygen and a blood transfusion. Upon his discharge on September 13, he was clinically stable and all problems had been resolved.

The motion court acknowledged that plaintiff's infancy favored his application, but that factor was outweighed by plaintiff's lack of a reasonable excuse for waiting seven years before he applied for late service, coupled with defendant's lack of knowledge of the claim. While plaintiff's mother claimed that she was ignorant of the law, her counsel, who had been aware of this case since at least May 2005, did not offer any excuse for the delay in commencing this action in 2006 and moving for leave in 2009. The court also noted that the purported notice of claim that plaintiff's counsel had filed in May 2005 was a legal nullity because it had been served without leave of the court

(*see Croce v City of New York*, 69 AD3d 488 [1st Dept 2010]).

Accordingly, we affirm the motion court's denial of leave to file a late notice and the dismissal of the complaint.

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

ENTERED: FEBRUARY 20, 2014

CLERK

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

11628 Michael Seleman, Index 101072/11
Plaintiff-Appellant,

-against-

Barnes & Noble, Inc.,
Defendant-Respondent.

_____

Rosenberg, Minc, Falkoff & Wolff LLP, New York (Carmen A. Mesorana of counsel), for appellant.

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

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered February 13, 2013, which granted defendant's motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and defendant's motion denied.

Plaintiff alleges that he slipped and fell backwards on a wet and greasy substance after stepping onto a descending escalator on defendant's premises. In response to these allegations, defendant made a prima facie showing of its entitlement to judgment as a matter of law. Specifically, defendant submitted, among other things, an expert affidavit purporting to show that the manner in which plaintiff allegedly fell was not physically possible, because both the tread and riser configuration of the escalator steps prevent a slippery

surface (*see Santoni v Bertelsmann Prop., Inc.*, 21 AD3d 712 [1st Dept 2005]). The expert further stated the treads' coefficient of friction, either wet or dry, exceeded the applicable standard for slip resistance (*see Ridolfi v Williams*, 49 AD3d 295 [1st Dept 2008]; *compare Friedman v BHL Realty Corp.*, 83 AD3d 510 [1st Dept 2011]).

However, in response, plaintiff raised a triable issue of fact to rebut defendant's prima facie showing. Plaintiff stated in his affidavit and his deposition testimony that he saw water on the marble floor near the escalator and that the escalator felt slippery and greasy as he stepped onto it. In addition, a nonparty witness averred that she saw a wet and slippery condition on the escalator about 45 minutes to an hour before the accident, and that as a result, she decided to take the stairs rather than use the escalator (*see Morabito v 11 Park Place LLC*, 107 AD3d 472 [1st Dept 2013]; *Spitzer v 2166 Bronx Park E. Corps.*, 284 AD2d 177 [1st Dept 2001]). This evidence was

sufficient to establish defendant's constructive notice of the specific wet condition that allegedly caused plaintiff's fall (*see Jones v New York City Hous. Auth.*, 293 AD2d 371 [1st Dept 2002]).

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

ENTERED: FEBRUARY 20, 2014

CLERK

Tom, J.P., Friedman, DeGrasse, Feinman, Gische, JJ.

11654-
11655 Index 602224/08

Paul Kocourek,
Plaintiff-Appellant,

-against-

Booz Allen Hamilton Inc., et al.,
Defendants-Respondents.

_____

Bingham McCutchen LLP, New York (Mark M. Elliott of counsel), for appellant.

Latham & Watkins LLP, New York (Everett C. Johnson of counsel), for respondents.

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Order, Supreme Court, New York County (Lawrence K. Marks, J.), entered April 9, 2013, which granted plaintiff's motion for leave to reargue defendants' motion to dismiss the second amended complaint and upon reargument, adhered to the prior order, same court and Justice, entered September 17, 2012, granting defendants' motion for an order pursuant to CPLR 3211(a)(5) dismissing the second amended complaint on the basis of a release, unanimously affirmed, with costs. Appeal from the September 17, 2012 order, unanimously dismissed, without costs, as academic.

Plaintiff sues for breach of a written agreement for stock and other incentive benefits between himself and defendant Booz Allen Hamilton Inc., his former employer. The claims made here

were also asserted by plaintiff in a related action that was brought in the United States District Court for the Southern District of New York (*see Boudinot v Shrader*, 2013 WL 1481226, 2013 US Dist LEXIS 51640 [SD NY 2013]). The defendants in both actions assert that plaintiff released them from his claims by way of a letter of transmittal that he executed on July 25, 2008. In this action, the motion court erred in concluding that the effect of the subject release was to be determined under state law as opposed to the Federal Employee Retirement Income Security Act (29 USC § 1001 *et seq.*)(ERISA). ERISA preempts state law to the extent plaintiff's breach of contract claims seek to remedy the denial of benefits under an ERISA-regulated pension plan (*Aetna Health Inc. v Davila*, 542 US 200, 204 [2004]).

The motion court correctly found that by executing the letter of transmittal plaintiff voluntarily and conclusively released the claims set forth in the second amended complaint. One day after the motion court's second order was entered, the district court granted the defendants' motion for summary judgment in the federal action (*Boudinot*, 2013 WL 1481226 at *1, 2013 US Dist LEXIS 51640 at *2). Although we affirm, we reject defendants' argument that the district court's order has a collateral estoppel effect. Collateral estoppel may not be

invoked for the first time on appeal (*Sandiford v City of New York Dept. of Educ.*, 94 AD3d 593, 595 [1st Dept 2012], *affd* 22 NY3d 914 [2013]).

We are not persuaded by plaintiff's argument that defendants have waived the affirmative defense of release. Where applicable, CPLR 3211(e) provides that a defense based on a ground set forth in CPLR 3211(a)(5), i.e. release, is waived unless raised by way of a CPLR 3211(a) motion or in a responsive pleading. No waiver has occurred by virtue of the fact that defendants have moved for a dismissal of the second amended complaint pursuant to CPLR 3211(a)(5). Even if they had not done so, the defense could have been raised in defendants' answer to the second amended complaint (*see* CPLR 3025[d] and CPLR 3211 [f]). Finally, the "single motion rule" (CPLR 3211[e]) does not bar defendants' motion because the cause of action based on a written agreement, now asserted in the second amended complaint,

was not set forth in plaintiff's prior complaints (*see e.g. Barbarito v Zahavi*, 107 AD3d 416, 420 [1st Dept 2013]).

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: FEBRUARY 20, 2014

CLERK

Sweeny, J.P., Andrias, Freedman, Richter, Clark, JJ.

11666 The People of the State of New York, etc., Plaintiff-Appellant, Index 451586/10

-against-

Ernst & Young, LLP, Defendant-Respondent.

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Eric T. Schneiderman, Attorney General, New York (Richard Dearing of counsel), for appellant.

Latham & Watkins LLP, New York (Miles N. Ruthberg of counsel), for respondent.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about January 10, 2013, which granted defendant's motion to dismiss the claim for disgorgement of fees received from Lehman Brothers Holdings Inc., unanimously reversed, on the law, without costs, and the motion denied.

In this action by the Attorney General brought under New York's Executive Law and Martin Act (General Business Law art 23-A), it was error to dismiss a claim for the equitable remedy of disgorgement at the pleading stage (*see Matter of People v Applied Card Sys., Inc.*, 11 NY3d 105, 125-126 [2008], *cert denied sub nom Cross Country Bank, Inc. v New York*, 555 US 1136 [2009]).

Defendant argues that the remedies provided in both General Business Law § 353 (the Martin Act) and Executive Law § 63 do not

include disgorgement. Rather, the statutes specify that the remedies available are injunctive relief, restitution and cancellation of a business certificate. It also avers that restitution may be obtained in a class action settlement that would be duplicative of remedies sought here.

However, where, as here, there is a claim based on fraudulent activity, disgorgement may be available as an equitable remedy, notwithstanding the absence of loss to individuals or independent claims for restitution (*see Applied Card Sys.*, 11 NY3d at 125-126). Disgorgement is distinct from the remedy of restitution because it focuses on the gain to the wrongdoer as opposed to the loss to the victim (*id.* at 125). Thus, disgorgement aims to deter wrongdoing by preventing the wrongdoer from retaining ill-gotten gains from fraudulent conduct. Accordingly, the remedy of disgorgement does not require a showing or allegation of direct losses to consumers or the public; the source of the ill-gotten gains is "immaterial" (*see SEC v Commonwealth Chem. Sec., Inc.*, 574 F2d 90, 102 [2d Cir 1978]; *see also Excelsior 57th Corp. v Lerner*, 160 AD2d 407, 408-409 [1st Dept 1990] [in a fiduciary duty context]).

Therefore, while the Attorney General does not allege direct injury to the public or consumers as a result of defendant's alleged collusion with Lehman Brothers in committing fraud, the

equitable remedy of disgorgement is available in this action, and it was premature to categorically preclude it at the pleading stage.

Nor would ordering disgorgement be tantamount to an impermissible penalty, since the "wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct" (Restatement [Third] of Restitution & Unjust Enrichment § 51, Comment k; *see also Matter of Blumenthal [Kingsford]*, 32 AD3d 767, 768 [1st Dept 2006], *lv denied* 7 NY3d 718 [2006]).

We further note that maintaining disgorgement as a remedy within the court's equitable powers is crucial, particularly where the Attorney General may be precluded from seeking restitution and damages if defendant settled the private class action against it (*see Applied Card Sys.*, 11 NY3d at 125-126).

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

ENTERED: FEBRUARY 20, 2014

CLERK