



federal regulations, is supported by substantial evidence and constitutes grounds for termination of his tenancy (see *Matter of Coleman v Rhea*, 104 AD3d 535 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]; *Matter of Chandler v Rhea*, 103 AD3d 427 [1st Dept 2013]). Under the circumstances, the penalty of termination does not shock one's sense of fairness (see *Matter of Hill v New York City Hous. Auth.*, 111 AD3d 462 [1st Dept 2013]); *Matter of Chandler*, 103 AD3d at 427; *Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630 [1st Dept 2011]), notwithstanding the hardships that might result from termination of his tenancy.

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

ENTERED: JULY 17, 2014

A handwritten signature in black ink, appearing to read "Susan R.", written over a horizontal line.

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accounts of the incident. The People's main witness, Abdul Flynn, testified that on the evening of October 11, 2007, he met defendant on the street and the two decided to panhandle together. Flynn asked to use defendant's cell phone, and after making a call, put the phone in his own pocket. Upshur, whom Flynn claimed not to know, subsequently arrived and the three men started walking toward Washington Square Park.

During the walk, Flynn decided to keep defendant's phone. In furtherance of his plan, Flynn told Upshur to walk defendant down the block and then meet up with Flynn later at a nearby bar. Defendant noticed what was going on and confronted Flynn demanding his phone back. Upshur told defendant to "come here for a minute." The two men moved several feet away from Flynn, and Upshur whispered something to defendant. Flynn testified that several seconds later, defendant "just stabbed [Upshur]." According to Flynn, Upshur had nothing in his hands, never moved his arms, and did not lunge toward defendant. Upshur subsequently died from his injuries.

Defendant presented an entirely different version of events. He testified that on the night of October 11, 2007, while walking in the West Village, he saw Flynn sitting on a stoop. Flynn asked to use defendant's cell phone, and defendant handed the

phone to Flynn. After using the phone, Flynn told defendant he was waiting for a return call. Fifteen minutes passed, and defendant became nervous and asked for his phone back.

Eventually, Upshur arrived with two other men; Flynn greeted Upshur as if they were friends. Defendant again asked for his phone back. When the men did not respond, defendant believed they were going to take his phone.

The group dispersed, and Flynn and Upshur walked away together. Defendant followed them, demanding his phone back loudly so others could hear and hopefully call 911. Flynn refused to return the phone and both Flynn and Upshur told defendant to get away from them. Defendant again demanded the phone back. Upshur "spun around and lunged" at defendant in a "very sudden motion." Defendant saw a "glint" and thought Upshur had a knife in his hand. Defendant, who himself was carrying a knife that evening, testified that, "[a]t this point, it [wa]s a robbery," and that "[i]t was very clear" that "these people were acting in concert to keep what was [his]." Defendant testified that fearing for his life, he blocked Upshur with his right hand, and with his left hand, grabbed his own knife, and "poked" Upshur once in the chest, killing him.

Based on defendant's testimony, the trial court decided to instruct the jury on the defense of justification under two separate theories: the use of deadly physical force to defend against the use or imminent use of deadly physical force (Penal Law § 35.15[2][a]), and the use of deadly physical force to defend against a robbery (Penal Law § 35.15[2][b]).<sup>1</sup> The jury ultimately found defendant guilty of murder in the second degree.

On appeal, defendant argues that the trial court's initial and supplemental charges misstated the law on the use of deadly physical force to defend against a robbery. "In considering a challenge to a jury instruction, the 'crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion'" (*People v Hill*, 52 AD3d 380, 382 [1st Dept 2008], quoting *People v Wise*, 204 AD2d 133, 135 [1st Dept 1994], *lv denied* 83 NY2d 973 [1994]). Where the court's charge creates undue confusion in the minds of the jurors, reversal is warranted (*Hill*, 52 AD3d at 382; *People v Rogers*, 166 AD2d 23 [1st Dept 1991], *lv denied* 78 NY2d 1129 [1991]).

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<sup>1</sup> The People did not object to the court's decision to charge justification.

Guided by these principles, we conclude that the court's instructions on the use of deadly physical force in defense against a robbery were prejudicially defective. Although defendant did not object to the court's erroneous charge in this regard, reversal is warranted in the interest of justice (see *People v Fuller*, 74 AD2d 879 [2d Dept 1980] [court's error in charge on use of force to defend against robbery warranted new trial in interest of justice]).

Subdivision one of Penal Law § 35.15 provides that, except under certain circumstances not relevant to this appeal, a defendant "may, subject to the provisions of subdivision two, use physical force upon another person when and to the extent he . . . reasonably believes such to be necessary to defend himself . . . from what he . . . reasonably believes to be the use or imminent use of unlawful physical force by such other person."

Subdivision two of Penal Law § 35.15 governs a defendant's use of deadly physical force, and provides that a defendant may use such force, under circumstances specified in subdivision one, in three situations, two of which are pertinent here. Under paragraph (a), a defendant may use deadly physical force if he reasonably believes that the other person is using or about to use deadly physical force (except that the defendant may, under

certain circumstances, have a duty to retreat). Under paragraph (b), a defendant also may use deadly physical force if he reasonably believes that the other person is committing or attempting to commit, among other crimes, a robbery.

In its main charge, the court instructed the jury that "[t]he only difference between the law of self-defense to repel a robbery as opposed to assault<sup>2</sup> [is that] in repelling the robbery, the person has no duty to retreat." This is an incorrect statement of the law because it ignores an additional critical difference between the two grounds for justification, namely, that deadly physical force may be permissible to defend against a robbery even if the alleged robber is using only physical force, and not deadly physical force (see *People v Fuller*, 74 AD2d at 879 ["a person is justified in using deadly physical force if he reasonably believed it necessary to use such force in order to resist his victim's imminent use of [mere] physical force against himself, in the course of a robbery attempt"]; *People v Davis*, 74 AD2d 607, 609 [2d Dept 1980] [jury should have been told that the defendant was justified in using deadly physical force if he reasonably believed it necessary to

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<sup>2</sup> In its charge, the court used the term "assault" to refer to Upshur's purported use of deadly physical force.

do so to resist the imminent use of physical force against him in the course of a robbery attempt])). The court's error was exacerbated when it repeated this erroneous statement in response to a jury note requesting further instructions on the defense of justification.

We reject the People's argument that the court's instructions, as a whole, conveyed the proper standard. Although parts of the charge were correct, the court misstated the law on the most critical issue in the trial – whether defendant was justified in using deadly physical force. The charge, even when viewed in its entirety, was inconsistent and confusing. Despite what the court stated at other points, the court's statement about the difference between the law of self-defense as applied to a robbery as opposed to an "assault" could have left the jury with the erroneous impression that defendant could not use deadly physical force to thwart a robbery unless deadly physical force was being used by the robber. Furthermore, when the jury asked to be reinstructed on the law of justification, the court repeated its error, causing further confusion (see *People v Hill*, 52 AD3d at 382 [reversal warranted where charge created undue confusion in the minds of the jurors])). Defendant's claim that he believed he was being robbed went to "the heart of [his]

proffered defense" (*People v Soriano*, 36 AD3d 527, 529 [1st Dept 2007]), and the jury should have been permitted to evaluate that defense based on a proper legal instruction.

Contrary to the People's argument, the evidence at trial did not overwhelmingly disprove the defense of justification, particularly as it relates to the alleged robbery. The trial presented a credibility contest between defendant and Flynn as to the circumstances of Upshur's death. Defendant testified that he believed he was being robbed, and that Flynn and Upshur were working together to keep his cell phone. Defendant further testified that Upshur, whom defendant thought had a knife, lunged at him when he protested the taking of his cell phone and demanded its return. These facts, if accepted by the jury, could establish that defendant's actions were justified based on a reasonable belief that a robbery was taking place. The only contrary evidence as to what happened at the moment of the stabbing came from Flynn, who testified that defendant just stabbed Upshur with no provocation. Flynn, however, had been drinking that night, had a history of psychiatric problems, and admitted that he was at least committing a larceny against defendant and that Upshur was helping him to do so. Moreover, the medical evidence was equivocal and could have supported both

the People's and defendant's version of events. Under these circumstances, the People's case can hardly be described as overwhelming. Accordingly, no harmless error occurred, and a new trial is warranted.<sup>3</sup>

Defendant also contends that his statements should have been suppressed because they were obtained in violation of his right to counsel. In connection with that claim, defendant argues that the court refused to permit his lawyer to give critical testimony at the suppression hearing. Sergeant Risorto, one of the supervisors assigned to the case, testified at the hearing that on October 16, 2007, defense counsel Glenn Garber, who had represented defendant in a prior matter, telephoned the police and asked to speak to Detective Terrizzi. When Risorto told him that Terrizzi was not available, according to Risorto, defense counsel then said: "I'm an attorney . . . and I don't want [defendant] questioned." Shortly after that phone conversation, Risorto told Terrizzi that defense counsel had called looking for him. Terrizzi testified that he could not remember if Risorto

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<sup>3</sup> In light of our reversal in the interest of justice, we need not decide whether the court's repeated references to "commensurate" and "excessive" force were improper or confusing. We note, however, that those terms are not contained in Penal Law § 35.15 or the criminal jury instructions for that section.

also had told him that defense counsel said he represented defendant. According to Terrizzi, defendant later told him that defense counsel did not represent defendant on this case. Defendant subsequently waived his *Miranda* rights and made statements to the police and prosecutor.

In support of the contention that defendant should not have been permitted to waive his *Miranda* rights without counsel present, defense counsel sought to testify as to his conversation with Risorto. The court declined to allow counsel to testify. Defense counsel, whose testimony had been excluded, submitted an affirmation attesting that he told Risorto "that I represented [defendant], and that he was not to be questioned in my absence." The court denied the suppression motion, finding that defendant's right to counsel did not attach when defense counsel called the police and, therefore, the right to counsel had not been violated.

The Court of Appeals has held that "an attorney enters a criminal matter and triggers the indelible right to counsel when the attorney . . . notifies the police that the suspect is represented by counsel" (*People v Grice*, 100 NY2d 318, 324 [2003] [internal quotation marks omitted]). Once the police have reason to know that the suspect is represented by counsel in the case

under investigation, the right to counsel cannot be waived unless the suspect does so in the presence of counsel (*id.* at 320-322). An attorney does not need to enter the case in person, but can communicate his representation to the police by phone, "at which point the police are required to cease all questioning" (*id.* at 321, citing *People v Gunner*, 15 NY2d 226, 231-232 [1965]).

Here, the court erred in precluding defense counsel from testifying about the critical conversation with Risorto. The police testimony, along with defense counsel's affirmation, raised questions as to what defense counsel actually said to Risorto and, in particular, whether defense counsel told Risorto that he "represented" defendant in the case for which defendant was to be questioned. The court should not have made a factual finding that implicitly accepted Risorto's account, without giving defendant the opportunity to challenge that account. The error, however, was harmless because the People did not use the statements during their case-in-chief. Therefore, reversal is not warranted on this basis. If, at the retrial, the People intend to introduce defendant's statements on their case-in-chief, a new suppression hearing is required (*see People v McCutcheon*, 96 AD3d 580, 580-581 [1st Dept 2012]).

Defendant complains that the People improperly gained access to his prior sealed cases. Before defendant's arraignment in criminal court, the People applied, ex parte, for an order unsealing the case files related to two prior prosecutions of defendant, both of which involved a stabbing and claim of justification. One of the cases resulted in an acquittal after trial and the other ended with a grand jury dismissal. The motion court (Berkman, J.) granted the motion for the limited purpose of allowing law enforcement to determine whether to arrest defendant, and ordered that any other use by the People would require a further application on notice to defense counsel. The People subsequently asked the trial court to unseal the cases for the People's use at trial. The trial court granted the motion to the limited extent of directing that the case files be provided to the court for an in camera determination of what may be turned over to the People if defendant testified.

The second unsealing order, issued after the criminal proceeding commenced, should have been denied (see CPL 160.50[1][d][i], [ii]); *Matter of Katherine B. v Cataldo*, 5 NY3d 196, 203-205 [2005]). However, reversal on this ground is unwarranted because defendant suffered no prejudice. The trial transcript does not show that the People introduced any of the

evidence contained in the unsealed records. Even if the first unsealing order was improper, defendant similarly suffered no prejudice. There is no support for defendant's speculative claim that the prosecutor reviewed the case files in violation of the limitation contained in that order. Nor is there any merit to defendant's claim that evidence from the records may have been presented to the grand jury. Our review of the grand jury minutes shows that no such evidence was introduced or discussed during the presentation.<sup>4</sup>

The verdict was not against the weight of the evidence. In light of our remand, we need not address defendant's remaining contentions. These claims involve issues unique to this trial, such as objections to the People's summation, or evidentiary issues that may or may not arise on retrial.

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

ENTERED: JULY 17, 2014



CLERK

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<sup>4</sup> Defendant makes no other complaints on appeal about the grand jury presentation.





unanimously modified, on the law, to deny the motion with respect to the Connecticut parcels and the funds paid at closing for the purchase of the Park Avenue apartment from the parties' joint account, and to declare that plaintiff is not entitled to separate property credits with respect to those items, and is not entitled to separate property credits with respect to the joint Goldman Sachs and JP Morgan accounts and the interest in Greycroft Partners, and otherwise affirmed, without costs.

The parties' prenuptial agreement provides, in pertinent part, that "[i]n the event of an Operative Event, Marital Property [as defined elsewhere in the agreement] shall be distributed equally between [the parties] in accordance with the following provisions, except that if the parties have been married for ten (10) years or less and either party is able to identify One Million (\$1,000,000) Dollars or more of Separate Property that was used for the acquisition of the Marital Property, that party shall first receive the amount of his or her contribution of Separate Property prior to the division of the remaining value of such property, if any" (§ 6[e]). "Operative Event" is defined as, inter alia, "the delivery by [either party] to the other of written notification ... of an intention to terminate the marriage" (§ 5[a]).

Construing the parties' prenuptial agreement in accord with the plain meaning of its terms, and interpreting every part of the agreement "with reference to the whole" (see *Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]), we find that eligibility for a separate property credit upon the distribution of marital property in the event of an "Operative Event" is determined at the time of the "Operative Event" and that the party seeking the credit must have contributed \$1 million or more of his or her own separate property directly to the acquisition of the particular item of marital property at issue.

It is implicit in paragraph 6(e) that the length of the parties' marriage is to be calculated as of the date of the Operative Event, and not, as the wife urges, as of the date on which the marital property is distributed. Moreover, the date of the Operative Event provides certainty that the date of distribution does not provide, and it is reasonable to infer that the parties intended that there be certainty with respect to the date their rights to separate property credits (and other rights and obligations) are determined. Support for this construction is also provided by clauses stating that "the Marital Property shall be valued as near as practicable to the time of the Operative Event" (§ 6[e][i]) and that "the distribution

contemplated by this paragraph shall occur as quickly as practicable following the happening of an Operative Event” (§ 6[e][iv]). Since the Operative Event occurred before the parties had been married 10 years, the husband is eligible for separate property credits to the extent he contributed \$1 million or more of separate property to the acquisition of any marital property.

We conclude that the wife is correct in regard to the husband’s recouping of his separate property; the husband must show that he contributed \$1 million or more of separate property to the acquisition of each item of marital property to be distributed, rather than that he contributed \$1 million or more in the aggregate. To ascertain the parties’ intentions in regard to the operation of the separate property credit, we consider the phrasing of the separate property credit exception of 6(e), interpreting it with reference to the apparent purpose of paragraph 6 and the general purpose of the entire agreement as a whole (see generally *Beal Sav. Bank v Sommer*, 8 NY3d at 324-325). The general purpose of the agreement is to provide a degree of protection to both parties. In the event the marriage lasted less than 10 years, the agreement protects the husband from the absolute loss of large amounts of separate funds he contributed to the marriage, while also protecting the wife from having

everything that was purchased for their use as a married couple reclaimed by the husband.

The language of the agreement's exception to the rule of dividing marital property equally provides:

"[I]f the parties have been married for ten (10) years or less and either party is able to identify One Million (\$1,000,000) Dollars or more of Separate Property that was used for the acquisition of *the Marital Property*, that party shall first receive the amount of his or her contribution of Separate Property prior to the division of the remaining value of *such property*, if any" (emphasis added).

The use of the definite article before "Marital Property," and the later reference to "such property," reflect an intent to apply the credit to each piece of marital property as it is being divided, a view supported by the subparagraphs that immediately follow, which specifically contemplate an item-by-item consideration of the marital property for purposes of its division. Moreover, paragraph 4(d) defines "Marital Property," *inter alia*, as "all property used jointly by the parties with a cost value of \$100,000, or less," but under the aggregation theory the husband would get all the proceeds of every sale, and the wife would lose the benefit of the provision, rendering it meaningless. Indeed, given the husband's enormous wealth and the parties' stated intention to reside in New York, under the

aggregation theory, the husband's contribution of more than \$1 million to a marital residence alone would meet the threshold, rendering the creation of a threshold provision meaningless.

The prenuptial agreement provides that separate property transferred into any form of joint ownership becomes marital property (§ 4[a]). That is, separate property placed into joint ownership does not retain its character as separate property. Thus, the husband also must show that he contributed separate property directly to the acquisition of the marital property at issue, not merely that he placed his separate property into a joint account from which funds were subsequently withdrawn and used for the purchase of marital property. Paragraph 4 of the agreement, which defines marital property as property transferred into joint ownership, makes no exception for transfers made as a convenience.

The husband failed to demonstrate that he contributed \$1 million or more in separate property to the acquisition of the Connecticut parcels and to the parties' interest in Greycroft Partners. Thus, he is not entitled to a separate property credit for his contributions to the acquisition of those properties.

Nor is the husband entitled to a credit for separate property he transferred into the parties' joint Goldman Sachs and

JP Morgan accounts. In contrast with paragraph 4, which specifies that the category includes property "transferred by either party into any form of joint ownership" as well as property "acquired with joint funds, acquired out of joint accounts or acquired by use of credit cards in joint name," the separate property credit provision is phrased to apply only to separate property used directly for the "acquisition" of marital property. Contrary to the husband's contention, it is not reasonable to interpret the term "acquisition" so broadly as to include the act of obtaining marital property via transfer.

To the extent marital property is to be distributed under the agreement, each party is entitled to appreciation on his or her share, which includes post-Operative Event appreciation on the Goldman Sachs and JP Morgan accounts.

Since the husband showed that approximately \$5 million of his separate property was used to acquire the Connecticut residence, he is entitled to a separate property credit for that contribution.

The husband is not entitled to a credit for the \$8.5 million paid from the parties' joint account at closing on the Park Avenue apartment. Although those funds were previously his separate property, they became marital property when he

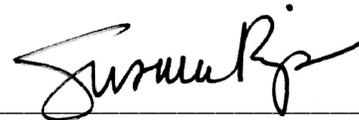
transferred them into the joint account. Since the husband's transfer of separate funds into a joint account transformed those funds into marital property for all purposes, when funds from that joint account were then used for the purchase of the parties' apartment, there was no use of separate property for the acquisition of the apartment. In any event, there is no evidence that the joint account was established only for convenience, or that the fund transfer was merely transitory, since the funds remained in the joint account for a month (*cf. Wade v Steinfeld*, 15 AD3d 390 [2d Dept 2005] [money kept in joint account for three days]).

The husband is entitled to a credit for the \$2.3 million he paid from his separate property for renovation costs on the Park Avenue apartment. We find that the renovation costs expended by the husband from his separate property were inextricably bound to

the acquisition of the apartment itself. A separate property credit is therefore also properly claimed for the \$910,00 down payment on the Park Avenue apartment that the husband paid from his separate property since the \$1 million threshold for the separate property contribution to the apartment has been met.

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

ENTERED: JULY 17, 2014

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Sweeny, J.P., Renwick, Andrias, Richter, Kapnick, JJ.

12808 American States Insurance Company, Index 652062/12  
Plaintiff-Respondent,

-against-

Gregory G. Huff, et al.,  
Defendants,

Alleviation Medical Services,  
P.C., et al.,  
Defendants-Appellants.

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The Rybak Firm, PLLC, Brooklyn (Damin J. Toell of counsel), for appellants.

Burke, Gordon & Conway, White Plains (Philip J. Dillon of counsel), for respondent.

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Order, Supreme Court, New York County (Carol R. Edmead, J.), entered on or about March 22, 2013, which, insofar as appealed from as limited by the briefs, granted so much of plaintiff's motion for summary judgment as sought a declaration that plaintiff properly disclaimed coverage of its insured, defendant Gregory Huff (defendants Alleviation Medical Services, P.C. and Great Health Care Chiropractic P.C.'s assignor, based, inter alia, on Huff's breach of a condition precedent to coverage under the policy, and a permanent stay of any arbitration or court hearing for no-fault benefits arising from the underlying alleged accident involving Huff, and declared, among other things, that

the disclaimer is proper, unanimously affirmed, with costs.

The instant action arises out of an automobile accident that occurred on or about April 28, 2011, involving a vehicle insured by plaintiff. The vehicle's owner and driver, defendant Gregory Huff, assigned his no-fault insurance benefits to defendant medical providers. Plaintiff commenced this action, in effect, seeking a declaration that it is not obligated to pay these no-fault benefits to defendants because, among other reasons, Huff failed to complete an examination under oath (EUO), as required by the subject insurance policy. Thus, plaintiff asserts that Huff breached a condition precedent to coverage under the policy, and defendant medical providers are not entitled to recover Huff's no-fault benefits.

We find that Supreme Court properly granted summary judgment in plaintiff's favor. In support of its motion, plaintiff relied primarily upon Huff's EUO, which was corroborated by the affidavit of plaintiff's investigator who was present at the examination. The EUO established that Huff appeared for his EUO, but departed before questions regarding the accident and his injuries had been asked. The aborted EUO of Huff, the named insured, established a prima facie case that Huff had breached a condition precedent to coverage under the policy.

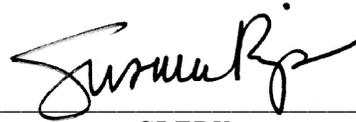
In opposition, defendants do not dispute what occurred at the EUO. Instead, defendants argue that the transcript of the EUO was inadmissible. We find, however, that the EUO transcript of Huff was admissible evidence on the motion for summary judgment as it was certified by the court reporter and is considered a party admission (see *Zalot v Zieba*, 81 AD3d 935, 936 [2nd Dept 2011], *lv denied* 117 NY3d 703 [2011])). Even if this were not the case, the affidavit of plaintiff's investigator confirms that Huff did not seek another EUO, a fact the insured does not dispute. Insofar as defendants complain that plaintiff did not seek another EUO, the record demonstrates that Huff, represented by counsel, was advised of the ramifications of his refusal to continue the EUO, and confirmed that he understood.

An assignee "stands in the shoes" of an assignor and thus acquires no greater rights than its assignor (see *Arena Const. Co. v Sackaris & Sons*, 282 AD2d 489 [2d Dept 2001]; see also *Dilon Med. Supply Corp. v Travelers Ins. Co.*, 7 Misc3d 927, 930 [Civ Ct, Kings County 2005])). Since the defense of the breach of a condition precedent to coverage under the policy may indisputably be raised by plaintiff against Huff, it is available

as against defendants, who accepted assignments of no-fault benefits (see *Hammelburger v Foursome Inn Corp.*, 54 NY2d 580, 586 [1981]; *Losner v Cashline, L.P.*, 303 AD2d 647, 648 [2nd Dept 2003]).

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the property, decedent's death could have been avoided. Prior to the fatal fire, defendant BNY had foreclosed on the property. The complaint alleges that defendant Cedano had abandoned the property for some time prior to April 25, 2011, and allowed it to remain in disrepair, creating a fire hazard. It further alleges that defendant BNY "knew full well from its dealing with" Cedano that he had abandoned the property, and that no one had been appointed to inspect or maintain the premises that was occupied by several tenants.

In lieu of an answer, defendant BNY moved pursuant to CPLR 3211(a)(1) and (7), to dismiss the claims asserted against it that BNY was liable for causing the fire that resulted in the decedent's death in the subject premises pursuant to RPAPL 1307(1), based upon documentary evidence that purportedly established that it had no duty to maintain the subject property. Supreme Court granted the motion. We now reverse.

In a pre-answer motion to dismiss under CPLR 3211(a)(1) and (7), this Court is obliged "to accept the complaint's factual allegations as true, according to plaintiff the benefit of every possible favorable inference, and determining only whether the facts as alleged fit within any cognizable legal theory" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10

AD3d 267, 270 [1st Dept 2004] [internal quotation marks omitted]). Dismissal is warranted only if the documentary evidence submitted "utterly refutes plaintiff's factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Greenapple v Capital One, N.A.*, 92 AD3d 548, 550 [1st Dept 2012]), and "conclusively establishes a defense to the asserted claims as a matter of law" (*Weil, Gotshal*, 10 AD3d at 270-271, [internal quotation marks omitted]).

Initially, we find that the complaint adequately pleads a claim against defendant BNY pursuant to RPAPL § 1307(1). Moreover, pursuant to CPLR 3211(a)(1), we find that the purported documentary evidence submitted by defendant BNY in support of the motion to dismiss is insufficient to conclusively establish as a matter of law that the subject property was not abandoned. Thus, defendant BNY was not entitled to pre-answer dismissal under CPLR 3211(a)(1) and (7).

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Gonzalez, P.J., Tom, Andrias, Saxe, JJ.

11917-

Index 100053/08

11918

103129/11

11919 Larry D. Martin,  
Plaintiff-Appellant,

-against-

Daily News L.P., et al.,  
Defendant-Respondent,

Ravi Batra,  
Defendant.

- - - - -

Larry D. Martin,  
Plaintiff-Appellant,

-against-

Daily News L.P., et al.,  
Defendants-Respondents.

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Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander and Harold L. Schwab of counsel), for appellant.

Davis Wright Tremaine LLP, New York (Laura R. Handman of counsel), for respondents.

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Judgment, Supreme Court, New York County (Martin Shulman, J.), entered June 11, 2013, affirmed, without costs. Appeal from order, same court and Justice, entered December 5, 2012, dismissed, without costs, as subsumed in the appeal from the judgment. Order, same court and Justice, entered February 10, 2012, affirmed, without costs.

Opinion by Saxe, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.  
Peter Tom  
Richard T. Andrias  
David B. Saxe, JJ.

11917-11918-11919  
Index 100053/08  
103129/11

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Larry D. Martin,  
Plaintiff-Appellant,

-against-

Daily News L.P., et al.,  
Defendant-Respondent,

Ravi Batra,  
Defendant.

- - - - -

Larry D. Martin,  
Plaintiff-Appellant,

-against-

Daily News L.P., et al.,  
Defendants-Respondents.

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Plaintiff appeals from the judgment of the Supreme Court, New York County (Martin Shulman, J.), entered June 11, 2013, dismissing the complaint in the first action (Index No. 100053/08) as against defendants Daily News L.P. and Errol Louis, from the order, same court and Justice, entered December 5, 2012, granting said defendants' motion for summary judgment in the first action, and from the order, same

court and Justice, entered February 10, 2012, which granted defendants' motion to dismiss the complaint in the second action (Index No. 103129/11).

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander and Harold L. Schwab of counsel), for appellant.

Davis Wright Tremaine LLP, New York (Laura R. Handman of counsel), and Daily News, L.P., New York (Mathew A. Leish of counsel), for respondents.

SAXE, J.

In this defamation case, plaintiff Larry D. Martin, a Justice of the New York State Supreme Court, Kings County, alleges that defendants Daily News and its columnist Errol Louis published two columns that falsely accused him of presiding over a \$20 million real estate litigation despite a conflict of interest, and suggested that he was corrupt. The issues raised on this appeal include whether Justice Martin, a public figure, satisfied the standard of *New York Times Co. v Sullivan* (376 US 254, 279-280 [1964]), by showing that Louis and the Daily News acted with a reckless disregard for the truth.

The columns at issue, published by the Daily News in both its print and on-line editions, reported on a lawsuit that businessman Martin Riskin and his wife, represented by attorney Ravi Batra, brought against attorney Jerome Karp. Batra and Karp are both active in Brooklyn politics; according to the complaint, Karp was the long-time chairman of the Judicial Screening Committee of the Kings County Democratic Party, and Batra had served on the Committee.

The *Riskin v Karp* complaint, on which Louis based his columns, charged Karp with fraud, abuse of process, and violation of Judiciary Law § 487, in connection with Karp's alleged role of "shadow counsel" for an individual identified as Ted Singer in a

group of real-estate-related lawsuits in Kings County between Riskin and Singer. As they relate to Justice Martin, the allegations concerned the Justice's conduct in the course of presiding over a separate foreclosure proceeding Riskin had brought against another individual -- to which Singer was not a party -- encaptioned *Martin Riskin v Johnny Belinda*.

*Riskin v Belinda*

The *Belinda* foreclosure action, assigned to Justice Martin in 1999, was brought by Riskin as mortgagee against the mortgagor on a piece of property. On July 25, 2000, Singer, represented by attorney Sol Mermelstein, made a motion to intervene in the *Belinda* foreclosure proceeding. The motion was returnable August 8, 2000, and adjourned to October 10, 2000. However, by letter to the court dated September 12, 2000, Mermelstein asked to withdraw the motion due to a bankruptcy petition filed by the mortgagor, which stayed the foreclosure action. Riskin, represented by Batra, objected to the unilateral withdrawal of Singer's motion, so at the October 10, 2000 court appearance, the court heard and granted Singer's application to be permitted to withdraw his intervention motion.

More than eight months later, on June 27, 2001, while the court was still treating the *Belinda* proceeding as stayed by the bankruptcy petition, Riskin made a motion under Rules of the

Chief Administrator of the Courts [22 NYCRR] § 130-1.1 for sanctions against Singer and Mermelstein, contending that the intervention motion in the *Belinda* matter was frivolous; Singer cross-moved for sanctions against Riskin and Batra. The motions were administratively handled as stayed pursuant to the bankruptcy filing.

On October 12, 2000, the Commission on Judicial Conduct began an investigation of Justice Martin, and on November 1, 2000, Justice Martin retained Karp to represent him before the Commission. The matter concluded in a public admonition dated June 6, 2002,<sup>1</sup> at which time Karp's representation of Justice Martin ceased.

On January 24, 2005, the *Riskin v Belinda* foreclosure proceeding was restored to active litigation status, and the sanctions motions were restored to Justice Martin's motion calendar. However, the motions were repeatedly adjourned over the months that followed. At no time throughout these months did Karp appear on behalf of Singer.

It was in the context of these adjournments of the sanctions motions between Riskin and Singer in *Riskin v Belinda* during 2005

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<sup>1</sup> The Commission sustained the charges that in two separate criminal matters, Justice Martin wrote letters directly to the assigned judges, seeking favorable consideration for the defendants, each of whom was a son of long-time family friends.

that Karp's name and connection to Singer was first interjected into the discussion with Justice Martin. After an adjournment of the motions from the July 15, 2005 calendar, the attorney then acting as counsel for Singer, Regina Felton, protested in a July 22, 2005 letter to the Administrative Judge, with a copy to Justice Martin, that Batra's application for the adjournment had been granted "despite Mr. Batra's default," and requested that Riskin's motion be marked off the calendar. Batra's responsive letter of July 25, 2005 referred to "a possible problem I have been intending to raise before J. Martin." Batra's letter then referred to a January 2005 application, made not in the *Belinda* mortgage foreclosure before Justice Martin but in *Singer v Riskin*, over which another justice was presiding. In that matter, attorney Robert Allan Muir, Jr. asked to be relieved as counsel for Singer, and in his application he referred to Karp as "the referring attorney." Batra's July 25, 2005 letter concluded, "My clients await your Honor's guidance," and did not ask for Justice Martin's recusal.

On August 12, 2005, the sanctions motions in the *Belinda* matter were before Justice Martin. Batra did not appear, but sent a substitute attorney to ask for a further adjournment to allow Mr. Batra to appear and argue the matter. Because the matter had been marked final and all parties had been so

notified, the application for a further adjournment was denied. At that point the substitute attorney, Howard Birnbach, made an oral application for Justice Martin's recusal, based on the claim that Karp represented both Singer and Justice Martin. Justice Martin denied the application. He subsequently denied both sanctions motions on August 3, 2006.

The foregoing procedural summary makes it clear that while Justice Martin handled *Riskin v Belinda*, there was no objective basis for him to believe that Karp had any connection to that matter.

#### *Riskin v Karp*

The *Riskin v Karp* complaint, dated November 8, 2006, essentially alleged that Karp had used his connections with the judiciary for the benefit of Singer as he secretly orchestrated Singer's "global" litigation against Riskin. As relevant to Justice Martin's defamation claim, the complaint alleged that (1) Justice Martin presided over *Riskin v Belinda*; (2) Karp represented Justice Martin in a matter before the Commission on Judicial Conduct during 2000-2001; (3) Singer made a motion in 2000 to intervene in *Riskin v Belinda*; (4) Karp was secretly serving all along as "illegal shadow counsel" to Singer in his many lawsuits involving Riskin; (5) by letter dated February 2, 2005, Singer formally retained Karp to act as his agent for the

purpose of attempting to negotiate a global settlement of his legal disputes with Riskin; and (6) on August 12, 2005, Justice Martin denied a request by Riskin's counsel to recuse himself in *Riskin v Belinda*, rejecting the claim that he had a conflict of interest.

Batra, the lawyer who represented Riskin in *Riskin v Karp*, met with Louis in January 2007 to talk about the lawsuit, and provided Louis with a copy of the complaint. Louis then published two separate columns on the "Opinion" page of the Daily News print edition and online version, the first on January 28, 2007, the second on February 8, 2007.

#### The Columns

The topic heading of Louis's January 28, 2007 column reads, "Corruption," and its opening lines assert, "The complicated world of judicial corruption in Brooklyn - a snake pit filled with bribery and back-room political deals - is about to be blown wide open by a longtime insider who has decided to start talking publicly about what he knows. ¶ And Ravi Batra knows plenty." The column refers to the "sprawling \$20 million dispute between two Brooklyn real estate families - the Riskins and the Singers," and reports that, according to the lawsuit brought on behalf of the Riskins against Karp,

"Karp secretly took payments from ... Ted Singer, and provided legal advice and strategy to him -- all without disclosing the fact that Karp once represented Supreme Court Justice Larry Martin, the judge hearing the multimillion-dollar case. ¶ In plain English, Batra claims that Karp tried to rig the case by simultaneously representing Singer and the judge hearing his case."

Louis's article concludes that "Batra says the suit will expose the inner workings of the Brooklyn judge-making apparatus," that "[l]ocal and federal prosecutors have been alerted," and that "prosecutors should follow up with Batra immediately and get to the bottom of a case that could make [Clarence] Norman's alleged crimes look like a church picnic."

In sum, in relation to Justice Martin, Louis's column inaccurately reported that according to the complaint and information Batra provided to him, Justice Martin was presiding over a matter in which Karp "simultaneously" represented the judge and one of the parties in the matter, which constituted judicial corruption.

The February 8, 2007 column was entitled "Weed out bad judges," and sub-headed "More resources will help nail corrupt jurists." It began by discussing the need to combat corruption and scandal in the court system, referred to two former judges who had been removed or were serving time in prison, and then proceeded to "the case of Justice Larry Martin," who, it

explained, had been admonished by the Commission on Judicial Conduct for letters asking other judges to impose lenient sentences on his family friends. The column then asserted,

"Now the judge is in the hot seat again. According to a lawsuit filed in November, Martin is hearing a real estate case, *Singer vs. Riskin*, in which *the judge's personal lawyer* -- Jerome Karp, who defended Martin before the commission in the letter-writing cases -- is representing one of the parties in the case, Ted Singer. ¶ That's an obvious conflict of interest. Martin should have disclosed the Karp connection and recused himself from the case -- but he didn't. So Tembeckjian's staff will need to spend time and money to sort through the charges."

So, in the second column as well, Louis inaccurately reported the facts and the allegations, in that (1) Justice Martin was not hearing the *Singer v Riskin* "global" real estate litigation, but only the *Riskin v Belinda* foreclosure proceeding; (2) Karp, who had represented Justice Martin before the Commission on Judicial Conduct, was not representing either of the parties in the foreclosure case before Justice Martin; and (3) even when Singer attempted to intervene in, and made motions in, the foreclosure matter being heard by Justice Martin, he was not represented by Karp. Indeed, Batra's claim in the *Riskin v Karp* complaint that Karp was serving as Singer's "illegal shadow counsel" -- a term Batra coined to accuse Karp of secretly acting on Singer's behalf -- recognized that the role allegedly played by Karp was not acknowledged in the context of the court

proceedings.

Years later, after the Daily News's website switched to a new content-management system, it was discovered that some content had been lost from the website. Specifically, in March 2010, defendants discovered that Louis's two columns were no longer posted on the website, and they restored the columns to the website. Defendants' explanation is that in-house counsel were concerned that the omission of the columns from the website might be interpreted as an admission of liability or destruction of evidence.

#### The Defamation Actions

Justice Martin's first defamation action was commenced against the Daily News, Louis and Batra in 2008, based upon the foregoing Daily News columns, as well as a number of subsequent blog postings. He commenced a second action against the Daily News and Louis on March 14, 2011, based on the alleged republication in March 2010, when the Daily News restored the unintentionally deleted columns to its digital archives.

The complaint in the first action stated that the assertions against Justice Martin of corruption or conflict of interest in the columns were false. Justice Martin asserted that he never presided over the "sprawling \$20 million dispute" between Singer and Riskin, but rather, he only presided over a separate mortgage

foreclosure proceeding that Riskin brought against a single mortgagor, *Riskin v Belinda*, in which Singer's only involvement was (1) a motion to intervene brought on July 25, 2000 and withdrawn on October 10, 2000, in which Singer was represented not by Jerome Karp, but by Sol Mermelstein; (2) a motion brought on June 27, 2001 by Batra on behalf of Riskin, seeking sanctions against Singer and Mermelstein for Singer's motion to intervene; and (3) a cross motion for sanctions then brought by Singer against Rivkin and Batra. Justice Martin's complaint pointed out that Karp played no apparent role in Singer's motions in *Riskin v Belinda* and that Justice Martin had no means of knowing about any secret involvement on Karp's part at that time.

#### Defendants' Motions

Defendants moved to dismiss the first complaint, arguing that the columns were not defamatory, that they were non-actionable opinion, that they were privileged under Civil Rights Law § 74, and that Justice Martin could not adequately plead, or show, that defendants acted with the requisite actual malice, that is, reckless disregard of whether the statements were false or not.

In an order entered July 20, 2009, the motion court granted dismissal of all claims against Batra and those related to the first column and the blog postings.<sup>2</sup> However, it declined to dismiss the defamation claim based on the second column.

Following discovery, the remaining defendants moved for summary judgment. In an order entered December 5, 2012, the court granted summary judgment dismissing all remaining claims. It concluded that Justice Martin had failed to come forward with sufficient evidence to establish actual malice.

The second action, alleging that the restoration of the columns to the website in March 2010 despite knowledge of the errors in the columns constituted republication of the defamation, was dismissed by order entered February 10, 2012, on the ground that the restoration did not constitute a separate publication.

### Discussion

#### Defamatory Content

Initially, we reject defendants' contention that the contents of the columns were not reasonably susceptible of a defamatory interpretation.

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<sup>2</sup> Justice Martin does not appeal from the dismissal of the complaint as against Batra, or from the aspect of the order concerning the blog postings.

"Making a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion or disgrace constitutes defamation" (*Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]). "In analyzing the [published] words in order to make that threshold decision, the court must ... consider them in context, ... give the language a natural reading (*Weiner v Doubleday & Co., Inc.*, 74 NY2d 586, 596 [1989], *cert denied* 495 US 930 [1990]), and "test[] [them] against the understanding of the average reader" (*Aronson v Wiersma*, 65 NY2d 592, 594 [1985]).

The motion court found that the first column contained only a passing reference to Justice Martin, and accused only Karp -- not Justice Martin -- of trying to "rig" the case. However, as in *Cole Fisher Rogow, Inc. v Carl Ally, Inc.* (29 AD2d 423, 426 [1st Dept 1968], *affd* 25 NY2d 943 [1969]), the court must consider the news item together with the headline or heading that introduces it. Here, the first column must be read in light of the topic heading, situated above the column's headline, namely, the word "Corruption." We must also pay attention to the opening words of the column, referring to "[t]he complicated world of judicial corruption in Brooklyn." With those references in mind, we find that the erroneous statement in the first column, that Justice Martin was "hearing the multimillion-dollar case" which Karp "tried to rig ... by simultaneously representing Singer and

the judge hearing his case," and that "prosecutors should ... get to the bottom of [the] case," constitutes more than just an accusation against Karp. It implicitly asserts that Justice Martin is part of that case-rigging. When viewed in this light, the first column supports a claim that the content of this publication was defamatory by implication.

The second column discusses two jurists who were either removed or sent to prison, then proceeds to "[t]ake the case of Larry Martin," as if Justice Martin were another example of a judge who should be removed or sent to prison. Reading this column as a whole, the average reader could view it as an indictment of the Brooklyn judiciary as corrupt, in which Justice Martin is offered up as an example. A claim that the column's content was defamatory, either expressly or by implication, is therefore made out (see *Armstrong v Simon & Schuster*, 85 NY2d 373, 380-381 [1995]).

### Opinion

Of course, "only statements of fact can be defamatory because statements of pure opinion cannot be proven untrue" (*Thomas H. v Paul B.*, 18 NY3d at 584). Expressions of opinion, "even in the form of pejorative rhetoric, relating to fitness for judicial office or to performance while in judicial office," are

not actionable (*Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 380 [1977], cert denied 434 US 969 [1977] [*Rinaldi I*]; see *Mann v Abel*, 10 NY3d 271 [2008], cert denied 555 US 1170 [2009])).

We observe initially that the column's position on the "Opinion" page of the newspaper is not dispositive of the issue whether the challenged statements are protected opinion (see *Mann v Abel*, 10 NY3d at 277).

While a statement that a judge is incompetent or unfit for office merely expresses an opinion about the judge's performance in office (*Rinaldi I*, 42 NY2d at 381), a published statement that a judge is corrupt is not equivalent to an opinion about the judge's fitness for office. The *Rinaldi I* Court considered a journalist's assertion that the plaintiff judge was "probably corrupt," and observed that a reader would understand those words, in the context of the article, "as meaning that plaintiff had committed illegal and unethical actions" (*id.* at 382). It concluded that this type of accusation is not protected opinion.

The explicit and implicit accusations of judicial corruption in these columns fall within this category and therefore cannot be treated as protected opinion.

#### The Civil Rights Law § 74 Privilege

Even news articles containing false factual statements capable of defamatory interpretation will be protected by the

absolute privilege afforded by Civil Rights Law § 74 if the gist of the articles constitutes a "fair and true report" (see *McRedmond v Sutton Place Rest. & Bar, Inc.*, 48 AD3d 258, 259 [1st Dept 2008]). Civil Rights Law § 74 states that "[a] civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding," and the privilege applies to reports about legal pleadings (see *McRedmond*, 48 AD3d at 259). "When determining whether an article constitutes a 'fair and true' report, the language used therein should not be dissected and analyzed with a lexicographer's precision" (*Alf v Buffalo News, Inc.*, 21 NY3d 988, 990 [2013], quoting *Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 68 [1979]). Rather, the question is whether the article "provided substantially accurate reporting" (see *Alf*, 21 NY3d at 990).

While the first column is largely comprised of assertions about what "Batra's complaint ... alleges," Louis also provides his own interpretation of the complaint, inaccurately stating, "In plain English, Batra claims that Karp tried to rig the case by simultaneously representing Singer and the judge hearing his case." The inaccuracies in this statement -- namely, that Justice Martin was hearing the multimillion dollar *Riskin-Singer* case, rather than the foreclosure case against Belinda, and that

the *Riskin v Karp* complaint alleged that Karp was representing Singer in the action before Justice Martin while he was also representing Justice Martin -- are more than technical inaccuracies. They lie at the heart of the defamation by which Louis conveyed to the reader the accusation that Justice Martin, whom Louis characterized as a corrupt judge, presided over the global litigation between Riskin and Singer, and that he knowingly did so despite a disabling conflict of interest.

The readers were not informed that Singer's involvement in the *Belinda* foreclosure matter assigned to Justice Martin was limited to a quickly withdrawn motion by Singer to intervene, followed by cross motions for sanctions; nor were they made aware that Karp did not represent Singer on any of those motions. The readers were also not made aware that the *Riskin v Karp* complaint alleged that Karp's involvement in Singer's litigation was as something Batra had dubbed a "shadow counsel," playing a secret role that was not acknowledged until 2005. As a result of this missing information and Louis's careless reporting, the columns created a false impression that Justice Martin was mixed up in corruption.

#### The New York Times Co. v Sullivan Standard

Although we agree with Justice Martin that the published columns were susceptible of a defamatory interpretation, were not

protected opinion, and were not privileged under Civil Rights Law § 74, that is not the end of the inquiry; Justice Martin had to also clear the demanding hurdle presented by the standard set in *New York Times Co. v Sullivan* (376 US 254, 279-280 [1964]). Since he is a public figure, he had the burden of showing, with convincing clarity, actual malice -- that is, that the author and publisher of the columns acted with reckless disregard for the truth (*Freeman v Johnston*, 84 NY2d 52, 56 [1994], cert denied 513 US 1016 [1994]). "The standard is a subjective one, focusing on the speaker's state of mind" (*Hoesten v Best*, 34 AD3d 143, 155 [1st Dept 2006]). This standard of "convincing clarity" applies even on a motion for summary judgment (*Freeman v Johnston*, 84 NY2d at 56-57).

"[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication" (*St. Amant v Thompson*, 390 US 727, 731 [1968]). "[I]t is essential that the First Amendment protect some erroneous publications as well as true ones" (*id.* at 732). Therefore, to prevail, Justice Martin was required to offer a showing tending to establish that Louis "in fact entertained serious doubts as to the truth of his

publication,' or acted with a 'high degree of awareness of [its] probable falsity'" (*Masson v New Yorker Mag., Inc.*, 501 US 496, 510 [1991], quoting *St. Amant*, 390 US at 731, and *Garrison v Louisiana*, 379 US 64, 74 [1964])).

In support of his argument that he satisfied the standard, Justice Martin cites portions of Louis's deposition testimony. At one point, Louis stated that in his view, "the entire essence of the problem related to recusal and possible conflict of interest was that it was not clear what role Jerome Karp played, in following or not following whatever he did, following his authorization to resolve all of the cases." Louis explained that in his view, the claim of "conflict of interest" turned on whether or not Karp was involved in the case in any manner; he thought that the letter from February of 2005 authorizing Karp to resolve all of Singer's conflicts with Riskin was key.

Louis also explained that his reference to "Singer v Riskin" was used as a way to indicate the entire group of cases involving Riskin and Singer, not merely the case with that caption. He acknowledged that it was inaccurate to say that Justice Martin was the judge hearing the multimillion dollar case, but explained that he did not think "the nature of the case or the size of the case [was] really very relevant or germane to the issue of not resolving a conflict of interest."

Justice Martin emphasizes Louis's admission that although he did not know what role Karp had played, he nevertheless accused Justice Martin of a conflict of interest based on Karp's involvement. However, none of Louis's testimony satisfies the actual malice standard. The only issue here is whether Justice Martin presented evidence sufficient to create an issue of fact as to whether he could prove, by clear and convincing evidence, that Louis knew that Justice Martin's conduct did not involve a conflict of interest. This he failed to do.

The letter in which Singer authorized Karp to act as his agent to negotiate a settlement neither definitively established nor definitively disproved that Karp was acting as Singer's attorney before or at that time. Louis's reliance on the authorization letter to justify his reasoning that Karp was actually representing Singer was not entirely unreasonable; his testimony fails to rise to the level of establishing that he "entertained serious doubts as to the truth of his publication," or acted with a 'high degree of awareness of [its] probable falsity'" (*Masson v New Yorker Mag.*, 501 US at 510 [internal citation omitted]). Rather, Louis's sometimes inaccurate reporting about the *Riskin v Karp* lawsuit and Justice Martin's conduct was simply sloppy and careless.

### The Re-Posting of the Deleted Columns

Justice Martin posits that the re-posting of Louis's columns in 2010 constituted an actionable republication of the defamatory statements.

Under the "single publication rule," the publication of a defamatory statement in a single issue of a newspaper or magazine, although widely circulated and distributed, constitutes one publication, which gives rise to one cause of action, and the statute of limitations runs from the date of that publication (*Gregoire v Putnam's Sons*, 298 NY 119, 123 [1948]). This rule applies to publications on the Internet (*Firth v State of New York*, 98 NY2d 365, 369 [2002]), so continuous access to an article posted via hyperlinks to a website is not a republication (see *Haefner v New York Media, LLC*, 82 AD3d 481 [1st Dept 2011]). However, this case does not involve continuous access on a website; the columns were missing from the Daily News website for three years.

An exception to the single publication rule has been applied when the following factors are present: "the subsequent publication is intended to and actually reaches a new audience," "the second publication is made on an occasion distinct from the initial one," "the republished statement has been modified in form or in content," and "the defendant has control over the

decision to republish" (see *Hoesten v Best*, 34 AD3d at 150-151). Thus, for example, repetition of a defamatory statement in a later edition of a book, magazine or newspaper may give rise to a new cause of action (*Rinaldi v Viking Penguin*, 52 NY2d 422, 433-435 [1991] [*Rinaldi II*]).

Justice Martin points out that the new posting actually reached a new audience, observing that the restored columns included new hyperlinks to social media and networking sites. Moreover, even if defendants initially harbored no serious doubts as to the truth of Louis's assertions, by the time the columns were re-posted they had to know the substance of Justice Martin's lawsuit, and could no longer legitimately claim that they were unaware of the inaccuracies.

However, we agree with the conclusion of the motion court that the re-posting did not constitute republication under *Rinaldi II*.

Had the columns remained on the Daily News website as was intended, their presence there three years later would not have justified any additional action. Their inadvertent deletion during a changeover to a new computer content-management system, and their restoration once that inadvertent deletion was discovered, was not geared toward reaching a new audience. The columns were not modified in any substantial way, and their

restoration was, as characterized by the motion court, akin to a delayed circulation of the original. Therefore, Justice Martin's second action, based on the claim of republication, is time-barred.

We have considered Justice Martin's argument as to defendants' use of an expert opinion on legal ethics and find it unavailing.

Accordingly, the judgment of the Supreme Court, New York County (Martin Shulman, J.), entered June 11, 2013, dismissing the complaint in the first action (Index No. 100053/08) as against defendants Daily News L.P. and Errol Louis, should be affirmed, without costs. The appeal from the order, same court and Justice, entered December 5, 2012, should be dismissed, without costs, as subsumed in the appeal from the judgment. The order, same court and Justice, entered February 10, 2012, which granted defendants' motion to dismiss the complaint in the second action (Index No. 103129/11), should be affirmed, without costs.

All concur.

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

ENTERED: JULY 17, 2014

  
CLERK