SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 15, 2015

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, Moskowitz, Manzanet-Daniels, JJ.

10070 In re New York City Asbestos Litigation — Index 190377/10

- - - - -

Mary Andrucki as Administratrix for the Estate of George P. Andrucki, et al.,
Plaintiffs-Respondents,

-against-

Aluminum Company of America, et al.,
Defendants,

Port Authority Of New York and New Jersey,
Defendant-Appellant.

_____

Segal McCambridge Singer & Mahoney, Ltd., New York (Christian H. Gannon of counsel), for appellant.

Weitz & Luxenberg, P.C., New York (Daniel T. Horner of counsel), for respondents.

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Upon remittitur from the Court of Appeals for consideration of issues raised by not determined on appeal to this Court (__NY3d__ [2014], 2014 NY Slip Op 08053) judgment, Supreme Court, New York County (Martin Shulman, J.), entered January 30, 2012, awarding plaintiffs damages, unanimously affirmed, without costs.

This matter was joined for trial with several other mesothelioma actions and scheduled for trial on July 11, 2011. By order to show cause and emergency application dated July 11, 2011, defendant Port Authority of New York and New Jersey sought summary judgment dismissing all the claims and cross claims against it, arguing that plaintiffs had failed to fulfill the conditions precedent to bringing the action because they did not serve a new notice of claim upon the Port Authority when plaintiff's decedent died. As a result, the Port Authority asserted, the court lacked subject matter jurisdiction.

Jury selection proceeded as scheduled and the trial began on July 26, 2011. However, the Port Authority did not appear because its summary judgment motion was still pending and it believed that the court lacked subject matter jurisdiction.

On September 7, 2011, Supreme Court denied the Port Authority's motion for summary judgment, finding that plaintiffs had complied with all the necessary conditions precedent to suit and that the court thus had proper subject matter jurisdiction over the Port Authority. Further, the court found that the Port Authority had not interposed an answer to the amended complaint and was therefore in default.

In August 2011, plaintiffs moved for a default judgment and assessment of damages against the Port Authority. In so doing,

plaintiffs asked the court to rely on the testimony already in the record. The trial court granted the motion, finding, among other things, that the Port Authority's failure to appear at trial was a sufficient ground for a default judgment. The Clerk entered judgment in plaintiffs' favor and against the Port Authority in the amount of $2,500,000 plus interest.

On a prior appeal, we reversed, vacated the judgment, denied plaintiff's motion for a default judgment against the Port Authority, and dismissed the complaint, finding that, in fact, the trial court lacked subject matter jurisdiction because the death of plaintiff's decedent required service of a new notice of claim upon the Port Authority (106 AD3d 617 [2013]). The Court of Appeals reversed our order and remitted the case to this Court "for consideration of issues raised but not determined" (__ NY3d __, 2014 NY Slip Op 08053).

The trial court properly awarded damages to plaintiffs without the benefit of an inquest. Under CPLR 3215(b), the trial court is permitted to make an assessment of damages without a jury, and although a defaulting defendant is ordinarily entitled to participate in an inquest on damages, a court may, under CPLR

3215(g)(1), "dispense with the requirement of notice and a hearing where the defendant has failed to proceed to the trial of an action reached and called for trial."

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

ENTERED: JANUARY 15, 2015

CLERK

Renwick, J.P., Moskowitz, DeGrasse, Manzanet-Daniels, Feinman, JJ.

12262 The People of the State of New York, Respondent, Ind. 6183/08

-against-

Derrick Hill, Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Patricia M. Nunez, J.), rendered February 17, 2010, convicting defendant, after a jury trial, of attempted robbery in the third degree, and sentencing him, as a persistent felony offender, to a term of 15 years to life, unanimously affirmed.

The court properly denied defendant's suppression motion. The record establishes that defendant was arrested by a police sergeant who undisputedly had probable cause to make that arrest (regardless of which officer was credited with the arrest for police administrative purposes), and that a wrench was recovered from defendant's person immediately after the arrest. Accordingly, the search was incident to a preexisting lawful arrest, even though it was conducted by another officer, who was not necessarily privy to all the information possessed by the

sergeant (*see People v Bacon*, 19 AD3d 287 [1st Dept 2005], *lv denied* 5 NY3d 803 [2005]). Furthermore, the searching officer overheard the radio run describing the sergeant's pursuit of defendant, saw the sergeant chasing defendant, and was present during the arrest and assisted in subduing defendant. In any event, we find that under the circumstances of the case probable cause may be imputed to the searching officer by way of the fellow officer rule (*see e.g. People v Washington*, 87 NY2d 945 [1996]).

Defendant's contention that the trial evidence rendered duplicitous the attempted robbery count is a claim requiring preservation (*see People v Allen*, __ NY3d__, 2014 NY Slip Op 08222 [2014]), and we reject defendant's arguments to the contrary. We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we reject it on the merits. The evidence at trial was consistent with the single count in that it showed that defendant engaged in an uninterrupted course of conduct with the single intent of stealing money (*see People v Alonzo*, 16 NY3d 267, 269-270 [2011).

The court properly exercised its discretion in adjudicating defendant a persistent felony offender (*see People v Jennings*, 33 AD3d 378, 379 [1st Dept 2006], *lv denied* 7 NY3d 926 [2006]).

The extent and seriousness of defendant's criminal record outweighed the mitigating factors he cites.

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

ENTERED: JANUARY 15, 2015

CLERK

Friedman, J.P., Acosta, Moskowitz, Richter, Clark, JJ.

13678 Donald P. Fewer, Index 601099/08
Plaintiff-Respondent,

-against-

GFI Group Inc., et al.,
Defendants-Appellants.

_____

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), for appellants.

Greenberg Traurig, LLP, New York (Carmen B. Ciparick of counsel), for respondent.

_____

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 21, 2014, which, insofar as appealed from as limited by the briefs, granted plaintiff's motion for summary judgment on the first, third, fourth, fifth, sixth and seventh causes of action, and summary judgment dismissing the first, second, fifth, and seventh counterclaims, and denied defendants' motion for summary judgment dismissing the first, third, sixth, and seventh causes of action, unanimously modified, on the law, to deny plaintiff's motion as to the first, sixth and seventh causes of action, the fifth counterclaim, and so much of the third, fourth and fifth causes of action and first and second counterclaims as are based on the nonsolicitation provisions, to grant defendants' motion for summary judgment dismissing the sixth and seventh causes of action as nonjusticiable, and it is

declared, upon the third, fourth and fifth causes of action, that the noncompete covenants in the employment and option agreements are unenforceable, and otherwise affirmed, without costs.

In 1996, plaintiff began working for defendant Jersey Partners Inc. (JPI), defendant GFI Group Inc.'s predecessor and largest shareholder, as the head of its North American credit derivatives desk. In 2000, he was promoted to the position of "Senior Managing Director and President," became responsible for GFI's entire North American brokerage business, and reported directly to the CEO and president. In 2007, GFI effected a "realignment of responsibilities in North America," replacing plaintiff as the person in charge of the day-to-day operations of its North American brokerage business, limiting his responsibilities to the North American credit business, and requiring him to report to his replacement, thereby diminishing his rank and role in the company.

The significant change in plaintiff's duties constituted a material breach of his employment agreement (*see Rudman v Cowles Communications*, 30 NY2d 1, 10 [1972]; *Hondares v TSS-Seedman's Stores*, 151 AD2d 411, 413 [1st Dept 1989]). However, a triable issue of fact exists whether plaintiff's 15-month delay in asserting the breach, during which time he continued to perform his duties, was reasonable or, by so delaying, he elected his

remedy and may not now assert the breach (*see El-Ad 250 W. LLC v 30 Hubert St. LLC*, 67 AD3d 520, 521 [1st Dept 2009]*; Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 [1st Dept 2007], *affd* 14 NY3d 791 [2010]). Thus, plaintiff is not entitled to summary judgment on his first cause of action.

The record demonstrates that defendants did not have a legitimate interest in restricting plaintiff from working for a competitor once he was in his demoted position at GFI (*see BDO Seidman v Hirshberg*, 93 NY2d 382, 388-389 [1999]; *Reed, Roberts Assoc. v Strauman*, 40 NY2d 303, 307-308 [1976]). Although the employment agreement acknowledged the uniqueness of plaintiff's services, that acknowledgment was made in connection with plaintiff's acceptance of a position he no longer held at the time of his resignation. Further, the record is devoid of evidence that plaintiff possessed any trade secrets or confidential customer lists (*see BDO Seidman*, 93 NY2d at 389*; Reed, Roberts*, 40 NY2d at 308). Thus, insofar as the restrictive covenants contained in the employment and option agreements prohibited plaintiff from competing with GFI and JPI, respectively, they are unenforceable.

However, the record does not demonstrate as a matter of law whether GFI had a legitimate business interest in preventing plaintiff from soliciting former coworkers. Thus, plaintiff is

not entitled to summary judgment on the third, fourth and fifth causes of action and summary judgment dismissing the first and second counterclaims to the extent those causes of action and counterclaims are based on the nonsolicitation covenants (*see Natsource LLC v Paribello*, 151 F Supp 2d 465, 469 [SD NY 2001]; *Renaissance Nutrition, Inc. v Jarrett*, 2012 WL 42171, *5, 2012 US Dist LEXIS 2490, *15 [WD NY, Jan. 9, 2012, No. 08-CV-800S]). JPI's cancellation of plaintiff's shares of company stock without compensation renders the "employee choice" doctrine inapplicable to the nonsolicitation covenants in the option agreements (*see Morris v Schroder Capital Mgt. Intl.*, 7 NY3d 616, 620-621 [2006]).

In the undisputed absence of any justiciable controversy as to the enforceability of the call rights provisions contained in the option agreements, plaintiff is not entitled to summary judgment on the sixth and seventh causes of action, and those causes of action are dismissed (CPLR 3001; *see Matter of Ideal Mut. Ins. Co.*, 174 AD2d 420 [1st Dept 1991]).

Plaintiff is not entitled to summary judgment dismissing the fifth counterclaim, which alleges breach of loyalty. Issues of fact exist as to whether plaintiff, while still employed by GFI, solicited his fellow employees, who later joined plaintiff at a competing firm (*see Scott v Beth Israel Med. Ctr., Inc.*, 47 AD3d

541 [1st Dept 2008]; *Don Buchwald & Assoc., Inc. v Marber-Rich*, 11 AD3d 277, 278 [1st Dept 2004]).

The motion court properly dismissed the seventh counterclaim alleging unfair competition. Defendants failed to demonstrate that plaintiff misappropriated or exploited confidential information (*see 1 Model Mgt., LLC v Kavoussi*, 82 AD3d 502, 504 [1st Dept 2011]). Despite extensive discovery, GFI points to no evidence that plaintiff improperly exploited the confidential information that he obtained while working for it, or that the competitor actually used the information to unfairly compete with defendants.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Renwick, Andrias, Saxe, Kapnick, JJ.

13726 Barklee 94 LLC, Index 100346/13
Plaintiff-Respondent,

-against-

Augustus Oliver, et al.,
Defendants-Appellants.

_____

Frydman LLC, New York (David S. Frydman of counsel), for appellants.

Barbara Kraebel, New York, for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered May 16, 2014, which denied defendants' motion to dismiss the complaint, unanimously modified, on the law, to grant the motion as to the first, second, fourth, and fifth causes of action, so much of the third cause of action as sounds in nuisance and trespass, other than the portion of the trespass claim that is based on the installation of wires across plaintiff's rooftop, and so much of the sixth cause of action as seeks replacement of certain decorative panels along the building's rear facade, and otherwise affirmed, without costs.

The parties are owners of adjoining townhouses with a common structural wall (the Party Wall). Plaintiff commenced this action on February 15, 2013, alleging in support of its first, second, fourth and fifth causes of action that, in 2009,

defendants, among other things, made changes to the rooftop part of the Party Wall (the Parapet Wall), rebuilt a chimney and flue in the northern section of the Party Wall, installed new flues at the southern end of the Parapet Wall, made changes to the wall separating the parties' back yards and planted a row of closely spaced trees along the lot line, and buried untreated timber that had been used to shore up the back yard during excavation.

These causes of action, which sound variously in trespass, private nuisance, violation of property rights and Building Code provisions, and breach of a prior settlement agreement in which the parties agreed not to build any wall taller than six feet along their common lot line, are barred by the three-year statute of limitations (CPLR 214[2], [4]; *see Mindel v Phoenix Owners Corp.*, 17 AD3d 227 [1st Dept 2005]; *Jemison v Crichlow*, 139 AD2d 332, 336 [2d Dept 1988], *affd* 74 NY2d 726 [1989]). The three-year statute governs the breach of contract cause of action because the settlement agreement resolved plaintiff's claim, brought in a prior action, that defendants' proposed construction of a yard wall taller than six feet would violate the Building Code, and thus added nothing new to defendants' duties under the Building Code (*Mindel*, 17 AD3d at 228).

In support of the third cause of action, plaintiff alleges that its building is "also burdened by wiring serving [the Oliver

House] which crosses the center of [plaintiff's] roof, the rear facade of [the Barklee House], and [plaintiff's] side of the Yard Wall," and that defendants had "assume[d] no responsibility for this wiring." Defendant argues that since there is no allegation that defendants instructed their contractors to place any wiring on plaintiff's roof, gave the contractors negligent instructions relating to the placement of rooftop wiring, or otherwise intentionally caused the wires to be placed on plaintiff's property, no cause of action for trespass is stated. However, we must afford the pleading a liberal construction, accept the facts as alleged as true, and accord plaintiff the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). While the third cause of action offers scant detail concerning the placement of the wiring, the complaint states elsewhere that "[d]efendants routinely trespassed on [p]laintiff's property, made changes to [p]laintiff's property without permission, violated [p]laintiff's property and easement rights in the Party Wall, and are encroaching on [p]laintiff's property." Reading the complaint as a whole, the allegations in the third cause of action, coupled with that allegation,

sufficiently state a cause of action for trespass with respect to the wiring (*see e.g. Fitzgerald v Fahnestock & Co.*, 286 AD2d 573, 575 [1st Dept 2001]). None of the documentary evidence put forward by defendants establishes conclusively whether or not they are subject to any of the exceptions to the rule that a party who retains an independent contractor is not liable for the independent contractor's negligent acts (*see Brothers v New York State Elec. and Gas Corp.*, 11 NY3d 251, 258 [2008]; *Kleeman v Rheingold*, 81 NY2d 270, 274 [1993]; *Seltzer v Bayer*, 272 AD2d 263, 264 [1st Dept 2000]).

Plaintiff's allegations that defendants installed various eight-foot-high screens and other structures on the roof along the Parapet Wall fail to state a cause of action for trespass or nuisance (*see Golub v Simon*, 28 AD3d 359 [1st Dept 2006]). However, they state a cause of action for violations of applicable New York City Zoning Resolutions.

So much of the sixth cause of action as seeks replacement of certain decorative panels installed by defendants along their building's rear facade fails to state a cause of action for private nuisance (*see Ruscito v Swaine, Inc.*, 17 AD3d 560 [2d Dept 2005], *lv denied* 5 NY3d 704 [2005], *cert denied* 546 US 978 [2005]). The remainder of the sixth cause of action, which alleges that defendants made changes to the Party Wall and to

their building's foundation, undermining the structural integrity of plaintiff's building, states a cause of action for violations of plaintiff's easement and property rights (*see Sakele Bros. v Safdie*, 302 AD2d 20, 25-26 [1st Dept 2002]; *5 E. 73rd, Inc. v 11 E. 73rd St. Corp.*, 16 Misc 2d 49, 52 [Sup Ct, NY County 1959], *affd* 13 AD2d 764 [1st Dept 1961]; *see also* Administrative Code of City of NY § 28-306.1). Contrary to defendants' contention, the architect's application for payment does not conclusively establish that the renovation project was completed as of January 13, 2010, rendering this cause of action time-barred (*see* CPLR 3211[a][1]; *Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [1st Dept 2006]).

The seventh cause of action, which alleges that defendants excavated the front yard without providing adequate lateral support for plaintiff's property, states a cause of action for violations of the New York City Building and Landmarks Codes (*see* Administrative Code §§ 25-305[a][1]; 28-3304.4.1). Contrary to defendants' contentions, the Department of Buildings inspection report dated June 10, 2013, does not conclusively establish that

the excavation did not violate any Building or Landmarks Code provisions.

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

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

ENTERED: JANUARY 15, 2015

CLERK

Tom, J.P., Friedman, Renwick, Manzanet-Daniels, Kapnick, JJ.

13830N Julie Karen Nacos, Index 306730/10
Plaintiff,

-against-

John Christopher Nacos,
Defendant-Respondent,

- - - - -

Michael Leichtling, et al.,
Nonparty Appellants.

_____

McNamee, Lochner, Titus & Williams, P.C., Albany (Bruce J. Wagner of counsel), for appellants.

Warshaw Burstein, LLP, New York (Eric Wrubel of counsel), for respondent.

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Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered June 4, 2014, which denied nonparty appellants' motion to reject a special referee's report and recommendation, dated March 10, 2004, and granted defendant's cross motion to confirm the report and recommendation, unanimously affirmed, without costs.

The motion court properly concluded that there was no basis for a protective order or an order quashing a document request in subpoenas served on appellants. Appellants, the father and brother of plaintiff, failed to establish that an attorney-client relationship existed between them and plaintiff in this divorce action. Accordingly, they failed to establish that the requested

correspondence is privileged based on such a relationship (*see Matter of Priest v Hennessy*, 51 NY2d 62, 68-69 [1980]; *see also Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d 371, 377-378 [1991]). The motion court correctly noted that appellants, both of whom are attorneys, but not matrimonial lawyers, and neither of whom appeared in the divorce proceedings, failed to state specific legal tasks they performed, or legal advice they provided, on plaintiff's behalf (*Pellegrino v Oppenheimer & Co., Inc.*, 49 AD3d 94, 99 [1st Dept 2008]; *Coastal Oil N.Y. v Peck*, 184 AD2d 241, 241 [1st Dept 1992]), and their conclusory statements are insufficient (*Coastal*, 184 AD2d at 241). To the extent that appellants helped plaintiff select counsel, this alone does not establish an attorney-client relationship. In addition, to the extent that plaintiff's brother helped her understand certain financial documents, this, without more, does not demonstrate that he advised her on legal, rather than business, matters (*see Rossi v Blue Cross & Blue Shield of Greater N.Y.*, 73 NY2d 588, 594 [1989]).

Even if the requested correspondence is privileged based on the attorney-client relationship between plaintiff and her prior matrimonial counsel, that privilege was waived because the communications were "copied to, sent to, or authored by" appellants (*Gama Aviation Inc. v Sandton Capital Partners, L.P.*,

99 AD3d 423, 424 [1st Dept 2012]). Appellants failed to prove that the privilege was not waived, as their statements regarding nonwaiver are conclusory (*Nab-Tern-Betts v City of New York*, 209 AD2d 223, 224 [1st Dept 1994]). Further, appellants failed to show that they were acting as plaintiff's agent when communicating with her prior counsel (*see Gama*, 99 AD3d at 424). In particular, appellants failed to indicate how they facilitated communications with her prior counsel (*see Stroh v General Motors Corp.*, 213 AD2d 267, 268 [1st Dept 1995]). As noted, appellants are not matrimonial lawyers, and plaintiff is undisputedly educated and capable of communicating directly with her attorneys (*cf. Stroh*, 213 AD2d at 268). Accordingly, under the circumstances, any expectation that the requested communications would remain confidential was unreasonable (*see id.*).

Appellants had sufficient notice of the circumstances or reasons underlying the subpoena request (*see* CPLR 3101[a][4]), and they failed to establish that the correspondence sought is "utterly irrelevant" to the divorce action (*Matter of Kapon v Koch*, 23 NY3d 32, 34 [2014] [internal quotation marks omitted]). The request seeks correspondence only with prior matrimonial counsel, and appellants did not state or demonstrate that such communications are irrelevant to the financial issues to be tried. In any event, the motion court has already made clear

that any documents to be produced shall be limited in scope to the financial issues being tried. Further, the mere fact that the request seeks documents spanning a five-year period beginning in January 2009 does not render it overbroad (*see Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 37, 40 [1st Dept 1998] [document requests "limited to a relatively brief time frame (of 26 months)" were upheld]). Indeed, the request seeks documents during the relevant time period — namely, shortly before the commencement of the first divorce proceeding to the date of trial in New York.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13947 The People of the State of New York, Ind. 2992/08
Respondent,

-against-

Jonathan Gilmore,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of The Appellate Defender, New York (C. Scott McAbee of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Andrew E. Seewald 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 (Carol Berkman, J.), rendered on or about September 12, 2012,

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: JANUARY 15, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13948 Trevor Duncan, M.D., Index 105115/11
Petitioner-Appellant,

-against-

The New York City Department
of Education,
Respondent-Respondent.

_____

Felton & Associates, Brooklyn (Regina Felton of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Michael J. Pastor of counsel), for respondent.

_____

Amended judgment, Supreme Court, New York County (Peter H. Moulton, J.), entered August 29, 2013, denying the petition to vacate an arbitration award terminating petitioner's employment with respondent the New York City Department of Education (DOE), and dismissing the proceeding brought pursuant to CPLR article 75 and Education Law § 3020-a(5), unanimously affirmed, without costs.

The Hearing Officer's determination was in accord with due process, rational, and supported by adequate evidence (*see Lackow v Department of Educ. [or "Board"] of City of N.Y.*, 51 AD3d 563, 567-568 [1st Dept 2008]). The specifications sufficiently apprised petitioner of the charges against him (*see Matter of D'Ambrosio v Department of Health of State of N.Y.*, 4 NY3d 133,

140 [2005]). Indeed, the specifications detailed the bases for the charges and listed specific dates that corresponded to numerous observation reports and letters to petitioner's file (*cf. Wolfe v Kelly*, 79 AD3d 406, 410-411 [1st Dept 2010], *appeal dismissed* 17 NY3d 844 [2011]). Further, petitioner was able to mount a defense; indeed, he called 13 out of the 18 witnesses, and his counsel had the opportunity to examine or cross-examine every witness (*see Matter of Ajeleye v New York City Dept. of Educ.*, 112 AD3d 425, 425 [1st Dept 2013]). There is no basis to disturb the Hearing Officer's credibility findings in favor of the DOE's witnesses (*see id.*).

The selection of the Hearing Officer comported with the law (*see* Education Law § 3020-a[3][b][ii]). Further, the record shows that petitioner had an adequate opportunity to prepare for the hearing, as the notice of charges and specifications were mailed to his home approximately a month before the hearing, and he retained counsel over a week before the hearing.

Petitioner's argument regarding the DOE's answer was not presented to the Supreme Court, and it may not be raised for the

first time on appeal (*see Ta-Chotani v Doubleclick, Inc.*, 276 AD2d 313, 313 [1st Dept 2000]).

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

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13949 The People of the State of New York, Ind. 454/12
Respondent,

-against-

Marcus Rivera,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Malancha Chanda 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 (Lewis Bart Stone, J.), rendered on or about December 20, 2012,

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: JANUARY 15, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13950 The People of the State of New York, Respondent, SCI 13527C/11

-against-

Mohammad Islam, Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Paul B. Hershan of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Diane Kiesel, J.), rendered October 5, 2012, convicting defendant, after a nonjury trial, of attempted assault in the third degree (two counts), attempted endangering the welfare of a child, menacing in the third degree and harassment in the second degree, and sentencing him to an aggregate term of one year of probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). There is no basis for

disturbing the court's credibility determinations, including its finding that the victim's testimony was credible in some respects but not others.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13951-
13951A Index 652240/10

Cotag S.A.R.L.,
Plaintiff-Respondent,

-against-

Karim Ben Khalifa,
Defendant-Appellant.

_____

Karim Ben Khalifa, appellant pro se.

Lewis S. Fischbein, P.C., New York (Lewis S. Fischbein of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered April 18, 2013, awarding plaintiff the total amount of $476,119.57, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered March 15, 2013, which denied defendant Karim Ben Khalifa's (defendant) motion to vacate his default, adopted the report of the special referee, and directed the Clerk of the Court to enter judgment in plaintiff's favor against defendants, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Defendant contends that his default should have been vacated because he was not properly served with the summons and complaint. However, he completely fails to address the August 6, 2012 order which – as a result of his failure to comply with a June 12, 2012 discovery order – deemed his address as of the date

of service to be a specific address in Manhattan. Under those circumstances, service on the concierge at that address was proper (*see generally Cowan, Liebowitz & Latman v New York Turkey Corp.*, 111 AD2d 93 [1st Dept 1985]).

The special referee's findings were supported by the record; hence, the IAS court properly confirmed the special referee's report (*see generally Freedman v Freedman*, 211 AD2d 580 [1st Dept 1995]).

Defendant's remaining arguments (e.g., that the complaint should be dismissed pursuant to CPLR 3211[a][1] and [7], when defendants never made such a motion below) are not properly before us on this appeal, or improperly rely on "documents dehors the record" (*Sunrise Capital Partners Mgt. LLC v Glattstein*, 115 AD3d 602, 602 [1st Dept 2014]).

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13952 The People of the State of New York, Ind. 2628/08
Respondent,

-against-

Curtis Williams,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Nancy E. Little of counsel), for appellant.

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Ana Lisa Torres, J.), rendered on or about November 30, 2009,

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: JANUARY 15, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13953 The People of the State of New York, Respondent, Ind. 89/11

-against-

Jahlyl Layne, Defendant-Appellant.

_____

David K. Bertan, Bronx, for appellant.

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

_____

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered November 29, 2011, as amended December 12, 2011, convicting defendant, after a jury trial, of conspiracy in the second and fourth degrees, and sentencing him to an aggregate term of 7½ to 23½ years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's participation in a conspiracy to sell drugs and possess weapons was established by recorded telephone conversations, as well as police observations of defendant at the drug-selling location. The only reasonable interpretation of the recorded calls was that defendant was exercising a supervisory role over the operation, rather than merely chatting about other persons' criminal activity. In

addition to establishing the conspiracy, defendant's instructions to others satisfied the requirement of overt acts (*see People v Lugo*, 309 AD2d 512, 513 [1st Dept 2003], *lv denied* 1 NY3d 598 [2004]).

The court properly admitted declarations by coconspirators during the course and in furtherance of the conspiracy. The People established a prima facie case of conspiracy against defendant based upon his own statements and other evidence, without resort to the declarations sought to be introduced (*see generally People v Salko*, 47 NY2d 230, 237-238 [1979]).

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13955 Anyolina Mata, Index 300939/10
Plaintiff-Respondent,

-against-

City of New York,
Defendant,

New York City Transit Authority,
Defendant-Appellant.

_____

Lawrence Heisler, Brooklyn (Anna J. Ervolina of counsel), for appellant.

Pollack, Pollack, Isaac & De Cicco, LLP, New York (Brian J. Isaac of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered August 28, 2013, upon a jury verdict, awarding plaintiff the amounts of $2,000,000 for past pain and suffering and $3,500,000 for future pain and suffering over 50 years, unanimously modified, on the law and the facts, to vacate the awards for past and future pain and suffering and order a new trial as to such damages, unless plaintiff stipulates, within 30 days of service of a copy of this order with notice of entry, to a reduction of the awards for past and future pain and suffering to $1,000,000 and $2,000,000, respectively, and to entry of an amended judgment in accordance therewith, and to correct the rate of interest on the judgment from 9% to 3% pursuant to Public

Authorities Law § 1212(6), and otherwise affirmed, without costs.

Plaintiff, who was 27 years old when she tripped over a subway grate embedded in a concrete median, suffered injuries to her wrist and spine that required surgery. Although plaintiff testified that she still experiences pain after arthroscopic surgery to her wrist and a laminectomy with fusion surgery to her lower back, she sustained no fractures. In addition, although she had to hire additional staff to help her after she was injured, she is able to perform her full time job of owning and operating a daycare center in her home. Accordingly, we find that plaintiff was not so debilitated as to warrant the jury's awards for past and future pain and suffering, which deviate materially from what constitutes reasonable compensation under the circumstances (*see* CPLR 5501[c]; *Williams v City of New York*, 105 AD3d 667 [1st Dept 2013], *Ramos v New York City Tr. Auth.*, 90 AD3d 492 [1st Dept. 2011]).

As appellant recognizes, the judgment incorrectly applies an interest rate of 9% per annum to plaintiff's award against the Transit Authority. The rate of interest against the Transit

Authority may be no more than 3%, as this rate is mandated by statute (*see* Public Authorities Law § 1212[6]; *Kiker v Nassau County*, 85 NY2d 879 [1995]; *Williams v City of New York*, 111 AD3d 420 [1st Dept 2013]).

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13956 The People of the State of New York, SCI 2222/12
Respondent,

-against-

Steve Boria,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Rebecca L. Johannesen of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered October 2, 2012, convicting defendant, upon his plea of guilty, of attempted criminal possession of a weapon in the second degree, and sentencing him to a term of one year, unanimously modified, on the law, to the extent of vacating the sentence, and remanding for resentencing, and otherwise affirmed.

The record establishes that the court did not consider youthful offender treatment in connection with defendant's conviction for attempted criminal possession of a weapon in the second degree, which does not qualify as an armed felony because it is capable of being committed without the actual possession of a deadly weapon (*see* CPL 1.20[41]). Accordingly, defendant was eligible for YO treatment without any finding of mitigation (*see* CPL 720.10[2]), and the subsequent determination by the Court of

Appeals in *People v Rudolph* (21 NY3d 497, 501 [2013]) requires a YO determination. In any event, regardless of whether defendant was convicted of an armed felony, he was potentially eligible for YO treatment under the mitigation provisions of CPL 720.20(3), and was therefore entitled to a determination (*see People v Flores*, 116 AD3d 644 [1st Dept 2014]).

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13962 The People of the State of New York, Ind. 3376/09
Respondent,

-against-

Mikaila Sayeed,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Harold V. Ferguson, Jr. of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Katherine A. Gregory of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Margaret L. Clancy, J.), rendered on or about September 25, 2012,

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: JANUARY 15, 2015

CLERK

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

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13963 The People of the State of New York, Ind. 3544/08
Respondent,

-against-

Jose Velez,
Defendant-Appellant.

_____

Law Office of Lauriano Guzman, Jr., P.C., Bronx (Lauriano Guzman, Jr. of counsel), for appellant.

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

_____

Judgment, Supreme Court, Bronx County (Steven Lloyd Barrett, J.), rendered December 12, 2012, convicting defendant, upon his plea of guilty, of enterprise corruption and promoting gambling in the first degree, and sentencing him to an aggregate term of 1½ to 4½ years, unanimously affirmed. The matter is remitted to Supreme Court for further proceedings pursuant to CPL 460.50(5).

The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The record establishes that defendant's plea was knowingly, intelligently and voluntarily entered. Defendant's claims that the attorney who represented him at the time of the plea rendered ineffective assistance, and that defendant was under the influence of medication, were conclusory, unsubstantiated and contradicted by the record. The court properly relied on its

familiarity with the plea allocution and other proceedings. The prior attorney negotiated a favorable disposition (*see People v Ford*, 86 NY2d 397, 404 [1995]), and neither defendant nor his new attorney cast any doubt on the prior attorney's effectiveness.

There was nothing improper about the court's participation in the plea bargaining process, which, in any event, led to terms more favorable to defendant than the People had offered.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13964 In re Clarence Davion M., and Another,

Children Under the Age
of Eighteen Years, etc.,

Clarence M., Sr.,
Respondent-Appellant,

Catholic Guardian Society and
Home Bureau,
Petitioner-Respondent.

_____

Geoffrey P. Berman, Larchmont, for appellant.

Magovern & Sclafani, Mineola (Joanna M. Roberson of counsel), for respondent.

Douglas H. Reiniger, New York, attorney for the children.

_____

Order of fact-finding and disposition, Family Court, Bronx County (Sarah P. Cooper, J.), entered on or about September 25, 2013, which, to the extent appealed from as limited by the briefs, found, after hearings, that respondent father's consent to the children's adoption is not required, and transferred custody and guardianship of the subject children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs.

The court properly determined that the father's consent is not required for the children's adoption because, among other

things, he did not provide financial support for the children's care (*see* Domestic Relations Law § 111[1][d]). Indeed, the father failed to demonstrate that he provided any support for the children's care, in excess of a few small toys and minimal clothing, even though he was employed, at least intermittently, and had relatively few living expenses (*see Matter of Marc Jaleel G. [Marc E.G.]*, 74 AD3d 689, 690 [1st Dept 2010]; *see also Matter of Maxamillian*, 6 AD3d 349, 351 [1st Dept 2004]).

The determination that it would be in the children's best interests to be freed for adoption is supported by a preponderance of the evidence (*see Matter of Star Leslie W.*, 63 NY2d 136, 147-148 [1984]). There is no indication that the father is capable of caring for the children, especially given their special needs. Further, the children have thrived in their long-term, preadoptive kinship foster home, where they have been well cared for and have developed strong bonds with their foster mother (*see Matter of Isiah Steven A. [Anne Elizabeth Pierre L.]*, 100 AD3d 559, 560 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). The father failed to preserve his claim that a suspended judgment is warranted and, in any event, that disposition is not appropriate in this case (*see Matter of Julianna Victoria S. [Benny William W.]*, 89 AD3d 490, 491 [1st Dept 2011], *lv denied* 18 NY3d 805 [2012]).

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

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13965 Eric T. Schneiderman, etc., et al., Index 250795/13
Plaintiffs-Appellants-Respondents,

-against-

Mujahid Pervez, etc., et al.,
Defendants,

Nadia Pervez, et al.,
Defendants-Respondents-Appellants,

_____

Eric T. Schneiderman, Attorney General, New York (Daniel J. Jawor of counsel), for appellants-respondents.

Jaspan Schlesiger LLP, Garden City (Linda S. Agnew of counsel), for respondents-appellants.

_____

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered January 22, 2014, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion pursuant to CPLR 1317 to confirm an ex parte order of attachment with respect to a specified parcel of real property and the residence located thereon, and granted non-criminal defendants' cross motion pursuant to CPLR 1312(4) for an order vacating or modifying the court's prior order granting provisional remedies against them to the extent that it permitted the release of restrained funds in the aggregate amount of $32,500 for the payment of attorneys' fees, unanimously reversed, on the law, without costs, the motion to confirm the ex parte order of attachment with respect to the

specified property granted, and the cross motion denied.

Plaintiffs established, through their detailed affidavits and supporting documentation, that there is a substantial probability that they will prevail on the issue of forfeiture against the non-criminal defendants, that the failure to enter the order may result in the property being unavailable for forfeiture at the end of the case and that the need to preserve the property outweighs the hardship on any affected party (*see* CPLR 1312[3]; 1318[1]). We need not determine whether criminal defendant Mujahid Pervez a/k/a Peter Pervez (Pervez) was the actual owner of the real property located at 208 Bagatelle Road notwithstanding the fact that the deed for the property indicates that it was purchased in 1997 by Pervez's then 19-year-old daughter, non-criminal defendant Nadia Pervez (Nadia), since plaintiffs have sufficiently demonstrated that there is a substantial probability that the subject property may be subject to forfeiture as the "substituted proceeds of a crime" (*see* CPLR 1310[3]; CPLR 1311).

Plaintiffs' submissions demonstrate that significant amounts of money, which were unlawfully and fraudulently obtained from New York State's Medicaid program by Pervez and the three criminal defendant pharmacies, were transferred to bank accounts owned by Nadia, and then used to pay the mortgage on 208

Bagatelle Road. While non-criminal defendants claim that at least a portion of these transfers constituted legitimate rent payments from Pervez, the evidence does not establish that the criminal defendant pharmacies, located in the Bronx, had any legitimate business purpose for renting a residential property on Long Island. Moreover, the record shows that the amounts directed to non-criminal defendants by the criminal defendant pharmacies frequently exceeded the purported monthly rent obligation, without any fair consideration being given by the non-criminal defendants in exchange, thus creating the presumption that non-criminal defendants knew that such payments were the proceeds of a crime (*see* CPLR 1311[3][c][i]). In addition, Nadia's knowledge may be presumed under CPLR 1311(3)(c)(iv), since the record strongly supports the conclusion that she participated in or was aware of the criminal defendants' scheme to conceal or disguise the manner in which she obtained her interest in the funds.

Plaintiffs demonstrate that the failure to enter the order of attachment "may" result in the subject property being unavailable for forfeiture, given the extensive commingling of the non-criminal defendants and the criminal defendants' assets, criminal defendant Pervez's use of the non-criminal defendants' bank accounts to conceal his assets, and Pervez's ultimate flight

to Pakistan.

Contrary to the motion court's conclusion, CPLR article 13-A's five-year statute of limitations does not restrict plaintiffs' ability to attach the real property located at 208 Bagatelle Road solely because the property was initially purchased in Nadia's name in 1997. There is ample evidence demonstrating that Nadia and her husband, non-criminal defendant Mohammad Bilal, took out a new mortgage on the property in 2010, and thereafter used funds directed to their bank accounts by the criminal defendants to make payments on the mortgage.

The motion court erred in granting non-criminal defendants' cross motion pursuant to CPLR 1312(4) to the extent that it authorized the release of restrained funds in specified amounts for the payment of attorneys' fees, since the court expressly found that the non-criminal defendants failed to establish the unavailability of other unrestrained assets to pay those expenses, a prerequisite to obtaining relief pursuant to CPLR 1312(4) (*see Morgenthau v Western Express Intl., Inc.*, 83 AD3d 521 [1st Dept 2011]). Moreover, CPLR 1312(4) does not authorize the court to excuse defendants from providing an affidavit establishing the unavailability of other assets in subsequent motions for the release of restrained funds for attorneys' fees, since a showing of necessity is the linchpin of a motion pursuant

to CPLR 1312(4).

We have considered the non-criminal defendants' remaining contentions and find them unavailing.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13966 The People of the State of New York, Respondent, Ind. 5097/09

-against-

Kenneth Ramsey, Defendant-Appellant.

_____

Scott Rosenberg, The Legal Aid Society, New York (Lorraine Maddalo of counsel), for appellant.

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

_____

Order, Supreme Court, New York County (Bonnie G. Wittner, J.), entered on or about October 1, 2012, which adjudicated defendant a level two sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factor for relationship with the victim. Defendant and the victim were strangers at the time of the sex crime, because their very limited interactions did not rise to the level of an acquaintanceship under the guidelines (*see People v Tejada*, 51 AD3d 472 [2008]). In any event, even if a minimal relationship was established, this was for the primary purpose of victimization, which was an alternative basis for the assessment (*see id.*). Regardless of the victim's actions on the Internet,

it was defendant and not the victim who initiated actual personal contact, and defendant did so for the purpose of victimization.

The court properly exercised its discretion when it declined to grant a downward departure (*see People v Gillotti*, 23 NY3d 841 [2014]). There were no mitigating factors that were not adequately taken into account by the guidelines, and the record does not establish any basis for a downward departure.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13967N Andrell Robinson, Index 300783/12
Plaintiff-Appellant,

-against-

Highbridge House Ogden, LLC, et al.,
Defendants-Respondents.

_____

Edelman, Krasin & Jaye, PLLC, Carle Place (Kara M. Rosen of counsel), for appellant.

Babchik & Young, LLP, White Plains (Matthew C. Mann of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 5, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion to compel defendants to produce their maintenance records and maintenance complaint log book for a period of two years prior to and including the date of the accident, unanimously modified, on the law and the facts, to the extent of granting so much of the motion as sought production of maintenance records and the maintenance complaint log book entries relating to a wet or slippery condition on the subject stairwell for a one-year period prior to and including the date of the accident, and otherwise affirmed, without costs.

In this action, plaintiff seeks to recover for injuries allegedly sustained on a stairwell in defendants' apartment

complex as a result of a wet, transitory condition consisting of urine. To the extent that plaintiff seeks records for any other location or type of condition or for a period exceeding one year, the request is not "material and necessary in the prosecution ... of an action" (CPLR 3101[a]; *see Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406-407 [1968]). Inasmuch as defendants have not alleged that the records sought are unavailable, an affidavit with respect to their search for records cannot serve as a substitute for production (*cf. Jackson v City of New York*, 185 AD2d 768 [1st Dept 1992]).

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13968N Sonia Ivory, Index 402896/11
Plaintiff-Appellant,

-against-

Al-An Elevator Maintenance,
Defendant-Respondent.

_____

Diamond & Diamond LLC, New York (Stuart Diamond of counsel), for appellant.

Gallo Vitucci & Klar LLP, New York (Kimberly A. Ricciardi of counsel), for respondent.

_____

Appeal from order, Supreme Court, New York County (Joan M. Kenney, J.), entered September 13, 2013, which, to the extent appealed from as limited by the briefs, sua sponte precluded plaintiff from offering at trial the testimony of three nonparty witnesses, unanimously dismissed, without costs.

The part of the court's order that was entered sua sponte is not appealable as of right (*see Ning-Yen Yao v Yao*, 88 AD3d 462,

462-463 [1st Dept 2011]; *see also Sholes v Meagher*, 100 NY2d 333, 335 [2003]; CPLR 5701[a][2],[3]). We decline to grant leave to appeal (*cf. Ning-Yen*, 88 AD3d at 462-463; *see* CPLR 5701[c]).

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13969N In re Port Authority of New York and New Jersey, Petitioner-Appellant, -against- Port Authority Police Lieutenants Benevolent Association, Respondent-Respondent. Index 451813/12

James M. Begley, New York (Toby J. Russell of counsel), for appellant.

Witham & Kozan, P.A., New York (Craig Kozan of counsel), for respondent.

Judgment, Supreme Court, New York County (Anil C. Singh, J.), entered June 14, 2013, confirming an arbitration award, dated September 10, 2012, rendered upon a finding that petitioner violated the parties' governing collective bargaining agreement ("Memorandum of Agreement" [MOA]) by eliminating free "E-Z Pass" privileges for retired police lieutenants, unanimously affirmed, without costs.

The MOA expressly incorporates the terms of a 1973 Port Authority Administrative Instruction, PAI 40-1.01, that provides that retired employees "receive the same allowance to which they would be entitled if their Port Authority service was not interrupted." The ruling that this language vests retired members of respondent with a lifetime interest in the EZ-Pass

privileges they enjoyed while employed did not exceed the arbitrator's authority since it is not "completely irrational" (*Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]; *Matter of Port Auth. of N.Y. & N.J. v Local Union No. 3, Intl. Bhd. of Elec. Workers*, 117 AD3d 424 [1st Dept 2014]). Supreme Court stated in the judgment that the arbitrator "noted" that "it will take a new Collective Bargaining Agreement and MOA to end free passes for [respondent's] members, past and present." We note that the court's remark is dictum and that the statement of the arbitrator that the court paraphrased, also dictum, expressed no such determination.

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13970N In re Port Authority of New York and New Jersey, Petitioner-Appellant, -against- Port Authority Police Sergeants Benevolent Association, Respondent-Respondent. Index 451612/12

James M. Begley, New York (Toby J. Russell of counsel), for appellant.

Detzky, Hunter & DeFillippo, LLC, New York (Michael Detzky of counsel), for respondent.

Judgment, Supreme Court, New York County (Michael D. Stallman, J.), entered October 7, 2013, confirming an arbitration award, dated July 12, 2012, rendered upon a finding that petitioner violated the parties' collective bargaining agreement ("Memorandum of Agreement" [MOA]) by eliminating free "E-Z Pass" privileges for retired police sergeants, unanimously affirmed, without costs.

The MOA expressly incorporates the terms of a 1973 Port Authority Administrative Instruction, PAI 40-1.01, that provides that retired employees "receive the same allowance to which they would be entitled if their Port Authority service was not interrupted." The ruling that this language vests retired members of respondent with a lifetime interest in the EZ-Pass

privileges they enjoyed while employed did not exceed the arbitrator's authority since it is not "completely irrational" (*Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]; *Matter of Port Auth. of N.Y. & N.J. v Local Union No. 3, Intl. Bhd. of Elec. Workers*, 117 AD3d 424 [1st Dept 2014]). Petitioner's contention that the arbitrator exceeded his contractual power by failing to apply applicable precedent arises from its misreading of the MOA. The contractual phrase, "in accordance with applicable law," refers to the extent to which the arbitral award will be binding upon the parties; it does not indicate an intent of the parties to deviate from the basic principle that an arbitral award may not be vacated on the ground that the arbitrator made a mistake of law (*see Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 [1995]).

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

ENTERED: JANUARY 15, 2015

CLERK

Mazzarelli, J.P., Sweeny, Andrias, Moskowitz, Richter, JJ.

13971N In re Port Authority of New York and New Jersey, Petitioner-Appellant, -against- Port Authority Police Sergeants Benevolent Association, Respondent-Respondent. Index 450825/13

_____

James M. Begley, New York (Toby J. Russell of counsel), for appellant.

Detzky, Hunter & DeFillippo, LLC, New York (Michael Detzky of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Cynthia S. Kern, J.), entered September 12, 2013, confirming an arbitration award, dated February 11, 2013, rendered upon a finding that petitioner violated the parties' collective bargaining agreement ("Memorandum of Agreement" [MOA]) by eliminating free "E-Z Pass" privileges for retired police sergeants, unanimously affirmed, without costs.

The MOA expressly incorporates the terms of a 1973 Port Authority Administrative Instruction, PAI 40-1.01, that provides that retired employees "receive the same allowance to which they would be entitled if their Port Authority service was not interrupted." The ruling that this language vests retired members of respondent with a lifetime interest in the EZ-Pass

privileges they enjoyed while employed did not exceed the arbitrator's authority since it is not "completely irrational" (*Matter of National Cash Register Co. [Wilson]*, 8 NY2d 377, 383 [1960]; *Matter of Port Auth. of N.Y. & N.J. v Local Union No. 3, Intl. Bhd. of Elec. Workers*, 117 AD3d 424 [1st Dept 2014]). Nor is the arbitrator's refusal to limit his ruling to employees who retired during the term of the current MOA irrational, in light of his finding that PAI 40-1.01 has been incorporated into every MOA executed since it was first issued in 1973 (*see Kolbe v Tibbetts*, 22 NY3d 344, 353 [2013]).

Petitioner's contention that the arbitrator exceeded his contractual power by failing to apply applicable precedent arises from its misreading of the MOA. The contractual phrase, "in accordance with applicable law," refers to the extent to which the arbitral award will be binding upon the parties; it does not indicate an intent of the parties to deviate from the basic

principle that an arbitral award may not be vacated on the ground that the arbitrator made a mistake of law (*see Hackett v Milbank, Tweed, Hadley & McCloy*, 86 NY2d 146, 154-155 [1995]).

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

ENTERED:

CLERK

Mazzarelli, J.P., Acosta, Saxe, Richter, Clark, JJ.

13358 J.P. Morgan Securities Inc., et al., Index 600979/09
Plaintiffs-Respondents,

-against-

Vigilant Insurance Company, et al.,
Defendants-Appellants.

_____

DLA Piper LLP, New York (Joseph G. Finnerty III of counsel), for appellants.

Proskauer Rose LLP, New York (John H. Gross of counsel), for respondents.

_____

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 28, 2014, modified, on the law, to deny plaintiffs' motion as to the affirmative defense based on public policy, and otherwise affirmed, without costs.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Rosalyn H. Richter
Darcel D. Clark, JJ.

13358
Index 600979/09

_____x

J.P. Morgan Securities Inc., et al.,
Plaintiffs-Respondents,

-against-

Vigilant Insurance Company, et al.,
Defendants-Appellants.

_____x

Defendants appeal from an order of the Supreme Court, New York County (Charles E. Ramos, J.), entered February 28, 2014, which denied their motion for partial summary judgment, and granted plaintiffs' motion for partial summary judgment dismissing the affirmative defenses based on (1) the exclusion for deliberate, dishonest, fraudulent or criminal acts or omissions (the "Dishonest Acts Exclusion") and (2) the doctrine precluding, on public policy grounds, insurance coverage for monies paid by the insured as a result of intentional harm to others.

DLA Piper LLP, New York (Joseph G. Finnerty III, Megan Shea Harwick and Eric S. Connuck of counsel), for Vigilant Insurance Company and Federal Insurance Company, appellants.

Drinker Biddle & Reath LLP, New York (Marsha J. Indych of counsel), for Travelers Indemnity Company, appellant.

D'Amato & Lynch LLP, New York (Luke D. Lynch, Jr., Kevin Windels and Liza Chafiian of counsel), for National Union Fire Insurance Company of Pittsburg, Pa., appellant.

Kaufman Borgeest & Ryan LLP, New York (Scott A. Schechter and Sergio Alves of counsel), for Liberty Mutual Insurance Company, appellant.

Clyde & CO. US LLP, New York (Edward J. Kirk, allison M. Calkins and James Mirro of counsel), for Certain Underwriters at Lloyd's London, appellant.

Landman Corsi Ballaine & Ford P.C., New York (Michael L. Gioia of counsel), for American Alternative Insurance Corporation, appellant.

Proskauer Rose LLP, New York (John H. Gross, Steven E. Obus, Seth B. Schafler, Francis D. Landrey and Matthew J. Morris of counsel), for respondents.

MAZZARELLI, J.P.

In 2000, defendant Vigilant Insurance Company issued a professional liability insurance policy to plaintiff Bear Stearns, and the other defendants issued "follow-the-form" excess policies, which required them to indemnify Bear Stearns for all losses it became "legally obligated to pay as a result of any Claim ... for any Wrongful Act" on its part.[1] The policy broadly defined "loss" to include "compensatory damages," "judgments," and "settlements," while "claim" was expressly defined to include investigations by the Securities & Exchange Commission (SEC) and the New York Stock Exchange (NYSE) into "possible violations of law or regulation." The "Dishonest Acts Exclusion" in the policies provided:

> "This policy shall not apply to any Claim(s) made against the Insured(s) ... based upon or arising out of any deliberate, dishonest, fraudulent or criminal act or omission by such Insured(s), provided, however, such Insured(s) shall be protected under the terms of this policy with respect to any Claim(s) made against them in which it is alleged that such Insured(s) committed any deliberate, dishonest, fraudulent or criminal act or omission, *unless judgment or other final adjudication thereof adverse to such Insured(s) shall establish that such Insured(s) were guilty of any deliberate,*

[1] A fuller discussion of the facts underlying this case may be found in the decisions in prior appeals in this case (*see* 91 AD3d 226 [1st Dept 2011], *revd* 21 NY3d 324 [2013]).

> *dishonest, fraudulent or criminal act or omission*" (emphasis added).

In 2003, the SEC and the NYSE began to investigate Bear Stearns for allegedly facilitating late trading and deceptive market timing by certain of its customers in connection with the buying and selling of shares in mutual funds. Late trading has been defined as

> "the practice of placing orders to buy, redeem or exchange mutual fund shares after the 4:00 p.m. close of trading, but receiving the price based on the net asset value set at the close of trading. The practice allows traders to obtain improper profits by using information obtained after the close of trading. Market timing involves the frequent buying and selling of shares of the same mutual fund or the buying or selling of mutual fund shares to exploit inefficiencies in mutual fund pricing. Although market timing is not per se improper, it can be deceptive if it induces a mutual fund to accept trades it otherwise would not accept under its own market timing policies" (*J.P. Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3d 324, 330, n 1 [2013]).

The SEC informed Bear Stearns that it intended to commence civil enforcement proceedings charging Bear Stearns with violations of federal securities laws and seeking injunctive relief and sanctions. After SEC staff reviewed with Bear Stearns the evidence upon which it would rely to support these charges, Bear Stearns decided not to contest the matter but to settle it. Bear Stearns submitted an offer of settlement, which the SEC

accepted and incorporated into an "Order Instituting Administrative and Cease-and-Desist Proceedings, Making Findings, and Imposing Remedial Sanctions and a Cease-and-Desist Order" (the SEC Order). Significantly, the SEC Order stated:

> "Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, [Bear Stearns] consent[s] to the entry of [the SEC Order]."

The SEC Order included approximately 170 factual "findings" setting forth the malfeasance that the SEC had alleged against Bear Stearns. The "findings" explained, inter alia, how Bear Stearns operated its late trading and market timing scheme in direct disregard of thousands of demands by mutual funds that it stop allowing market timing in their funds; how it took "affirmative steps" to help its clients "evade the blocks and restrictions imposed by the mutual funds"; and how it endeavored to "ensure that [the clients'] rapid mutual fund trades would not be detected by the mutual funds." The "findings" further outlined Bear Stearns's assignment of "multiple account numbers to customers so that the mutual funds could not identify them as customers whose trades they had previously blocked." However, the SEC Order expressly stated, "The findings herein are made

pursuant to [Bear Stearns's] Offer of Settlement and are not binding on any other person in this or any other proceeding." The SEC Order directed Bear Stearns to disgorge $160,000,000 and pay civil penalties of $90,000,000, as well as to cease and desist from future violations.

Bear Stearns entered into a similar arrangement with the NYSE. Pursuant to the NYSE's rules, the parties agreed on a "Stipulation of Facts and Consent to Penalty" (the NYSE Stipulation), which was to be put before a hearing panel. As was the case with the SEC Order, the NYSE Stipulation contained a litany of detailed "findings" to which Bear Stearns consented, but with the caveat that it was "[f]or the sole purpose of settling this disciplinary proceeding, prior to hearing, without adjudication of any issue of law or fact, and without admitting or denying allegations, facts, conclusions or findings referred to" therein. Bear Stearns agreed in the NYSE Stipulation to pay the same sanction it agreed to pay in the SEC Order, but the NYSE Stipulation deemed the payment satisfied by Bear Stearns's payment of the sanction to the SEC.

Bear Stearns was also named in several shareholder class actions in which investors alleged damages arising out of the illegal trading scheme. In one decision denying Bear Stearns's motions to dismiss these actions the court found that the

plaintiffs had sufficiently alleged that Bear Stearns engaged in late trading and market timing (*see In re Mutual Funds Inv. Litig.*, 384 F Supp 2d 845, 862 (D Md 2005), and that they had adequately pleaded claims that Bear Stearns was a "co-designer" or "committed a manipulative or deceptive act in furtherance of" the illegal mutual fund trading scheme (*id.* at 858) [internal quotation marks omitted] and "did not merely assist in facilitating late trades and market timed transactions" (*id.* at 862). However, no finding of liability was ever made because Bear Stearns ultimately agreed to pay $14 million to settle the class actions.

Bear Stearns sought indemnification from defendants for the amounts they paid to settle the two administrative proceedings and the civil actions. Defendants refused to pay, citing, inter alia, the doctrine that disgorgement payments are not insurable as a matter of settled New York law and public policy, as well as several exclusions in the policies, including the Dishonest Acts Exclusion. Plaintiffs J.P. Morgan Securities Inc., J.P. Morgan Clearing Corp. and The Bear Stearns Companies LLC (collectively Bear Stearns) commenced this action for a declaratory judgment compelling defendants to provide coverage, and defendants moved to dismiss. Defendants' motion was based on the public policy doctrine and two policy exclusions, but not on the Dishonest Acts

Exclusion. Supreme Court denied the motion, finding, as is relevant here, that there was a question whether the payments Bear Stearns had agreed to make were for improperly acquired funds and thus truly were in the nature of disgorgement. This Court reversed, and granted the motion, stating that

> "read as a whole, the offer of settlement, the SEC Order, the NYSE [Stipulation] and related documents are not reasonably susceptible to any interpretation other than that Bear Stearns knowingly and intentionally facilitated illegal late trading for preferred customers, and that the relief provisions of the SEC Order required disgorgement of funds gained through that illegal activity" (91 AD3d at 231).

The Court of Appeals reversed, and denied the motion, holding that the language in those documents did not "decisively repudiate Bear Stearns' allegation that the SEC disgorgement payment amount was calculated in large measure on the profits of others," as opposed to a calculation of ill-gotten gains by Bear Stearns (21 NY3d at 336).

While that appeal was pending in this Court, Bear Stearns moved for summary judgment dismissing defendants' defenses based on the Dishonest Acts Exclusion and the public policy doctrine. Defendants cross-moved for summary judgment on the Dishonest Acts Exclusion. After the Court of Appeals had decided the appeal, Supreme Court denied defendants' motion and granted Bear Stearns's motion to dismiss the affirmative defense that the

"findings" made in the regulatory administrative orders established that Bear Stearns acted with the intent to injure investors. The court found that the administrative orders did not trigger the Dishonest Acts Exclusion because they were not final judgments or adjudications.

The court relied on the facts that the regulatory factual "findings" were neither admitted nor denied by Bear Stearns and that the administrative orders were the results of settlements in which Bear Stearns reserved the right to take contrary legal and factual positions in proceedings to which the SEC was not a party. Accordingly, the court dismissed defendants' affirmative defenses based on the Dishonest Acts Exclusion and public policy, to the extent they were premised on the "findings" in the administrative orders. However, citing the Court of Appeals' decision on the prior appeal (21 NY3d at 335, 336), the court ordered that the action would continue "with respect to assessing whether there is evidence demonstrating Bear Stearns 'had the requisite intent to cause harm,' and if the disgorgement payment to the SEC is linked to 'improperly acquired funds,' which would bar insurance coverage on the public policy grounds."

Defendants contend that the Dishonest Acts Exclusion applies because, by consenting to the entry of administrative orders that contained detailed "findings" and required Bear Stearns to make

compensatory payments and pay penalties, Bear Stearns had been adjudicated a wrongdoer. Defendants stress the incorporation of "findings" in the SEC Order and the NYSE Stipulation, and contend that the inclusion of these "findings" effectively transformed them from mere allegations to proven fact. Defendants further point to cases that they characterize as equating consent judgments and orders with adjudications (*see e.g. Schwartzreich v E.P.C. Carting Co.*, 246 AD2d 439 [1st Dept 1998]; *Prudential Lines v Firemen's Ins. Co. of Newark, N.J.*, 91 AD2d 1 [1st Dept 1982]). They note provisions in the Administrative Procedure Act, which governs proceedings instituted by the SEC, that refer to enforcement proceedings as "adjudications" (*see e.g.* 5 USC § 551[7]).

Defendants also place heavy reliance on two cases, *Vigilant Ins. Co. v Credit Suisse First Boston Corp.* (6 Misc 3d 1020[A] [Sup Ct, NY County 2003], *mod on other grounds* 10 AD3d 528 [1st Dept 2004]) and *Millennium Partners, L.P. v Select Ins. Co.* (24 Misc 3d 212 [Sup Ct, NY County 2009], *affd* 68 AD3d 420 [1st Dept 2009], *appeal dismissed* 14 NY3d 856 [2010]). In each of those cases, the insurer successfully relied on consent decrees entered into by the insured to avoid having to indemnify the insured for monies it agreed to disgorge as a result of wrongdoing.

Bear Stearns argues that the SEC Order, the NYSE Stipulation

and the resolution of the class action were settlements, and that a settlement can never constitute an adjudication for purposes of the type of exclusion at issue here. It principally relies on *National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.* (25 AD3d 309 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]), in which this Court declined to hold that a consent decree between the SEC and the defendants constituted an "adjudication" for purposes of an insurance policy exclusion similar to the one at issue here, where the insureds reserved the right to contest the allegations against other litigants.

"To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 [2000], quoting *Continental Cas. Co. v Rapid-American Corp.*, 80 NY2d 640, 652 [1993]). Further, the court is required to interpret the policy "in light of 'common speech' and the reasonable expectations of a businessperson" (*Belt Painting Corp. v TIG Ins. Co.*, 100 NY2d 377, 383 [2003]). Here, the issue is the applicability of the Dishonest Acts Exclusion, so defendants bear the specific burden of demonstrating that a settlement constitutes an "adjudication" for purposes of the exclusion.

In arguing that the term "adjudication" means any resolution of a dispute that has specific consequences for a party, defendants virtually ignore the part of the Dishonest Acts Exclusion that requires that any adjudication "*establish* that such Insured(s) were guilty of any deliberate, dishonest, fraudulent or criminal act or omission" (emphasis added). Defendants quote the dictionary definition of "adjudication," but fail to note that "establish" is defined, in this context, as "to put beyond doubt" (Merriam-Webster's Collegiate Dictionary [11th ed 2003]). It can hardly be said that the SEC Order and the NYSE Stipulation put Bear Stearns's guilt "beyond doubt," when those very same documents expressly provided that Bear Stearns did not admit guilt, and reserved the right to profess its innocence in unrelated proceedings. Again, in interpreting the policy we are guided by reason, and defendants' position that the settlement documents "establish" guilt is not reasonable.

Moreover, defendants' interpretation is inconsistent with our own recent precedent concerning consent decrees with prosecuting agencies. In *Borst v Bovis Lend Lease LMB, Inc.* (102 AD3d 519 [1st Dept 2013]), the plaintiffs were firefighters who were injured while battling a fire that had ignited during the deconstruction of the Deutsche Bank building adjacent to the

World Trade Center.[2] Two other firefighters had perished in the conflagration. Bovis was the general contractor on the project. A post-fire investigation revealed safety lapses on the deconstruction site that were so serious that the New York County District Attorney's Office determined that there was sufficient evidence to bring charges against Bovis for manslaughter in the second degree, criminally negligent homicide, and reckless endangerment in the second degree.

Instead of prosecuting, however, the District Attorney's Office offered to enter into a non-prosecution agreement with Bovis whereby Bovis would acknowledge responsibility for its actions, agree to comply with various safety initiatives, and establish a memorial fund. Bovis accepted the offer, and in the agreement it provided that it did not challenge certain detailed facts, which were incorporated into the agreement. These facts stated, inter alia, that on the day of the fire Bovis informed responding firefighters that a standpipe was operational even though it knew that it was not, that it had purposefully neglected to take any measures to fix the standpipe in the months prior to the fire, even though it was aware of the critical role

[2] The facts underlying the *Borst* decision were obtained from the briefs filed in this Court in connection with that appeal.

it would play in fighting a fire, and that its project manager reported the standpipe as being in working condition on daily project checklists, even though it was not. The agreement also provided that Bovis neither admitted nor denied criminal and civil liability for the fire, and in it Bovis reserved the right to contradict the recitation of facts in any civil litigation or proceeding related to the fire to which the District Attorney's Office was not a party.

The plaintiffs moved for summary judgment on liability, arguing that the non-prosecution agreement was irrefutable evidence that Bovis had admitted its negligence. This Court affirmed Supreme Court's rejection of that position, stating that "[t]he agreement explicitly provided that Bovis had not admitted liability, that the factual statements contained in the agreement were relevant only for the purposes of the compromise between the NYDA [the District Attorney's Office] and Bovis, and that Bovis could contradict and/or contest any factual statement in the agreement in a subsequent action or proceeding to which the NYDA was not a party" (102 AD3d at 520).

The situation here does not warrant a different result. As Bovis did in *Borst*, Bear Stearns entered into a settlement agreement that was expressly crafted to preserve its ability to contest its liability against any person or entity other than the

counter-signatory. Further, while we certainly do not condone the financial machinations outlined in the SEC Order and NYSE Stipulation, they do not begin to compare to the reckless behavior outlined in the agreement at issue in *Borst*, which led to the deaths of two firefighters and serious injury to several others. To hold that the non-prosecution agreement in that case preserved Bovis's ability to contest its liability but that Bear Stearns is precluded from doing so in this case would be a perverse result, to say the least.

The cases relied upon by defendants are unavailing. To the extent the cases hold that, in general, a settlement can have the same preclusive effect as a judgment on the merits, this is an uncontroversial proposition. However, the issue here is not the preclusive effect of a settlement agreement, which has to do with preservation of judicial resources and basic fairness to litigants. It is the interpretation of a contract.

Defendants rely mainly, as they did before Supreme Court, on *Vigilant Ins. Co. v Credit Suisse First Boston Corp.* (6 Misc 3d 1020[A] [Sup Ct, NY County 2003], *mod on other grounds* 10 AD3d 528 (1st Dept 2004]) and *Millennium Partners, L.P. v Select Ins. Co.* (24 Misc 3d 212 [Sup Ct, NY County 2009] *affd* 68 AD3d 420 [1st Dept 2009], *appeal dismissed* 14 NY3d 856 [2010]). However, these cases are inapposite. In *Vigilant Ins. Co.*, the plaintiff

insured an investment bank, which had settled allegations of financial improprieties leveled by the SEC. The bank agreed to the entry of a "final judgment" that explained that it was disgorging significant monies "obtained improperly by [it] as a result of the conduct alleged in" a complaint filed by the SEC in federal court (6 Misc 3d 1020[A] at *3). The plaintiff argued that the bank was not entitled to indemnification because public policy prohibits insurance against disgorgement. The bank contended that, because the final judgment stated that it had admitted no wrongdoing, the judgment was inconclusive as to whether payment by plaintiff would contravene public policy. The court rejected this argument, because the final judgment "specifically link[ed] the disgorgement payment to the improper activity that the SEC complaint alleged" (*id.* at *4). This Court affirmed that part of Supreme Court's decision (10 AD3d at 529).

The facts of *Millennium Partners are* similar. Plaintiff was a hedge fund that entered into a settlement with the SEC to resolve allegations of financial malfeasance. It consented to the entry of an order, similar to the one at issue in this case, that incorporated factual "findings" echoing the allegations leveled by the SEC, but contained language explaining that the plaintiff was neither admitting nor denying those allegations. The court followed *Vigilant Ins. Co.* in holding that the

plaintiff was not entitled to indemnification, because the SEC order established that the defendant insurers would be reimbursing the plaintiff for monies it was required to disgorge as a result of wrongdoing, in contravention of public policy. This court affirmed.

Although the applicability of a consent decree was at issue in those two cases, their similary to this case ends there. In those cases the focus was on whether the disgorgement made by the insureds was for wrongdoing that they had committed, so that public policy would bar the insurers from covering the disgorgement. In this case we are strictly concerned with the unrelated issue of whether an exclusion for "adjudicated" wrongdoing applies where the purported "adjudication" is a consent decree or other settlement agreement entered into by the insured, with the caveat that it is not admitting guilt other than for purposes of the settlement.

The case principally relied on by Bear Stearns, *National Union Fire Ins. Co. of Pittsburgh, Pa. v Xerox Corp.* (6 Misc 3d 763 [Sup Ct, NY County 2004], *affd* 25 AD3d 309 [1st Dept 2006], *lv dismissed* 7 NY3d 886 [2006]), directly involves the issue before us now. In that case, the defendants were the subject of investigations and enforcement actions by the SEC. They settled the administrative actions by entering into "final judgments"

with the SEC that required them to disgorge monies. The judgments each stated that the defendants were neither admitting nor denying the allegations in the complaint, but that the monies being disgorged were gained as a result of the malfeasance detailed in the complaint. The defendants sought indemnification under insurance policies issued by the plaintiff, and the plaintiff sought to avoid coverage by invoking, inter alia, an exclusion for fraudulent conduct where "there is a judgment or final adjudication" alleging same (6 Misc 3d at 770). The court dismissed as premature the plaintiff's cause of action seeking a declaration that the exclusion applied. This was apparently because there were still private litigations pending against the defendants arising out of their actions, so it was still possible that a future "adjudication" would find that the defendants had engaged in fraudulent behavior. The implication, however, was that the "final judgments" entered into by the defendants were insufficient to trigger the exclusion.

This Court, in affirming, did not directly address the exclusion. However, in affirming the dismissal of the insurer's claims for a declaration that Xerox fraudulently induced the insurer into issuing the policy, this Court rejected the insurer's attempt to use the consent judgment against Xerox as a sword, stating, in relevant part:

> "In their respective settlements with the [SEC], defendants did not admit guilt, and the consent agreements specifically precluded any collateral estoppel effect and did not preclude defendants from taking positions contrary to the settlements in any litigation in which the SEC was not a party. Thus, defendants did not admit the falsity of their financial statements for purposes of this litigation or any claim which might be brought regarding those financial statements" (25 AD3d at 309-310).

We reject defendants' attempts to distinguish *Xerox*. That the "final judgment" in that case contained no recitation of facts is of no moment, since, as discussed above, Xerox's reservation of its right to later contest the charges in the SEC's complaint would preclude the characterization of any such recitation as conclusive "findings." Further, although this Court's affirmance in *Xerox* did not directly address the exclusion in that case, the holding, that a consent decree that expressly leaves open the question of guilt cannot be used to establish guilt, applies to the Dishonest Acts Exclusion at issue here.

To be clear, *Xerox*, on the one hand, and *Vigilant Ins. Co.* and *Millennium Partners,* on the other, can be reconciled. We do not find it contradictory to rely on a settlement agreement for the limited purpose of establishing whether a payment constituted disgorgement, even if the insured did not admit guilt, but not

for the purpose of determining whether the agreement was an adjudication that established guilt for the purpose of satisfying an exclusion. This is because, as the Court of Appeals noted in the prior appeal in this case (21 NY3d at 334), we have a stronger interest in enforcing public policy than we have in regulating private dealings between insurance companies and their customers that do not have an impact on public policy. It is not the business of the courts to prevent financial firms and their regulators from agreeing to submit language in consent orders that preserves claims of innocence for the purpose of avoiding exclusions like the one at issue here. At the same time, however, courts should not countenance the use of such language for the purpose of preserving coverage for wrongful acts intended to harm others.

Because the Dishonest Acts Exclusion does not apply, the motion court properly dismissed defendants' affirmative defense based on that exclusion. However, the court should not have dismissed the affirmative defense invoking the public policy against permitting insurance coverage for disgorgement, to the extent it is based on the settlements with the SEC and the NYSE. Bear Stearns argues that the absence of an adjudication of wrongdoing within the meaning of the Dishonest Acts Exclusion bars defendants from relying on the "findings" in the settlement

orders for purposes of the public policy doctrine. Again, however, as the Court of Appeals stated in the prior appeal, one of the two situations in which the contractual language of a policy may be overwritten is where an insured engages in conduct "with the intent to cause injury" (21 NY3d at 334-335 [internal quotation marks omitted]). This is the very reason we can reconcile finding for the insurer in *Vigilant Ins. Co.* and *Millennium Partners,* where the insureds admitted to the recitation of "findings" while not conceding their guilt, with *Xerox*, where the public policy doctrine was not at issue so the use of the term "adjudication" in the insurance contract was determinative. Indeed, for us to accept Bear Stearns's argument on this point would be to contradict the holdings in *Vigilant Ins. Co.* and *Millennium Partners*.

Accordingly, the order of the Supreme Court, New York County (Charles E. Ramos, J.), entered February 28, 2014, which denied defendants' motion for partial summary judgment, and granted plaintiffs' motion for partial summary judgment dismissing the affirmative defenses based on (1) the exclusion for deliberate, dishonest, fraudulent or criminal acts or omissions (the "Dishonest Acts Exclusion") and (2) the doctrine precluding, on public policy grounds, insurance coverage for monies paid by the

insured as a result of intentional harm to others, should be modified, on the law, to deny plaintiffs' motion as to the affirmative defense based on public policy, and otherwise affirmed, without costs.

All concur.

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

ENTERED: JANUARY 15, 2015

CLERK