SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 18, 2016

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Sweeny, Andrias, Manzanet-Daniels, Webber, JJ.

1125 In re Home Run KTV Inc., Index 101744/15
Petitioner,

-against-

New York State Liquor Authority,
Respondent.

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Mehler & Buscemi, New York (Francis R. Buscemi of counsel), for petitioner.

New York State Liquor Authority, Albany (Mark D. Frering of counsel), for respondent.

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Determination of respondent New York State Liquor Authority, dated August 18, 2015, sustaining three charges that petitioner permitted its premises to become disorderly in violation of Alcohol Beverage Control Law § 106(6) and failed to exercise adequate supervision over the premises in violation of Rule 54.2 of the Rules of the State Liquor Authority (9 NYCRR 48.2), and imposing an $8,500 civil penalty and a $1,000 bond forfeiture on petitioner, modified, on the law, the petition granted to the extent of vacating so much of the determination that sustained

charges 12 and 14, dismissing those charges, vacating the penalty, and remanding the matter to respondent for imposition of an appropriate penalty, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shlomo Hagler, J.], entered on or about December 21, 2015), otherwise disposed of by confirming the remainder of the determination, without costs.

Respondent's determination that petitioner suffered or permitted altercations and/or assaults to occur, leading to a person being shot and assaulted on the licensed premises, is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]). An armed gunman and four others entered the premises, and proceeded to one of the karaoke rooms. The gunman pointed a firearm at the individuals in the room. A fight ensued and one of the male patrons was shot in the leg. Another male patron was punched in the head and face. This occurred, despite petitioner's general practice of patting down patrons upon entry. The petitioner's head of security's concessions that he did not know who (if anyone) was manning the front door at the time the perpetrators entered and that the security guard, if present, may have been patrolling the premises at the time of such entry, allow for an

inference to be drawn that lax security measures allowed the incident to occur.[1]

We conclude however that there was an insufficient showing by respondent to support the charges relating to the recovery of alleged drugs at the premises. As a threshold matter, there was no competent evidence that the substance recovered was ketamine. The redacted laboratory report, introduced without proper foundation does not identify the case to which it is attached. Neither the name of the vouchering police officer or his/her precinct is stated on the report. The report states that two items, identified as "ziploc bag(s) cont. solid material," were analyzed. One of the containers was found to contain ketamine. The analysis of the second sample had not been determined.

Assuming there was a sufficient showing that the substance recovered was ketamine, the record is devoid of any evidence that petitioner licensee or petitioner's manager knew or should have known of the presence of these drugs (*see Matter of Richjen Rest. v State Liq. Auth.*, 51 NY2d 847, 849-850 [1980]; *Matter of Albany Manor Inc. v New York State Liq. Auth.*, 57 AD3d 142, 145-146 [1st Dept 2008]).

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[1]In response to the incident, metal detectors were installed at the premises.

Contrary to the dissent's characterizations, there was no evidence that there had been numerous drug purchases on the premises. Respondent submitted a memorandum from the precinct commanding officer, who was not called to testify, memorializing the execution of the April 23, 2015 search warrant. The memorandum states that the search warrant for the premises was issued by a Criminal Court Judge based upon the "documented purchase of illegal controlled substances in connection with official Departmental enforcement operations." There is no mention of the number of purchases, where they were made, when they were made, or by whom they were made. From this, the dissent apparently gleans that prior drug purchases were made.

Petitioner's head of security testified that as a former detective assigned to that area, he was aware of the use of ketamine in the neighborhood and once employed by petitioner, directed his staff to ensure that the patrons were not engaged in the use or sale of any controlled substances. He testified that he was unaware of any documented or undocumented drug sales on the premises.

None of the police officers who testified, including those who executed the search warrant, testified as to any knowledge of any prior purchases of ketamine or other any other controlled

substance on the premises or of any drug activity at the premises. One of the executing officers testified about a high use of the drug ketamine in the precinct but testified that he had no knowledge of ketamine use or other drug use at petitioner's bar and was unaware of any complaints of the same made to the police.

The dissent's assertion that since a search warrant was issued based upon probable cause, what provided that probable cause most likely was the purchase and use of drugs at the premises, is not supported by the record. The search warrant and search warrant affidavit were not submitted by respondent. There was no testimony as to its contents. Petitioner licensee testified that he was never shown the search warrant and the executing officers testified that they never saw the search warrant, but rather were told of its existence by the precinct commanding officer. The officers testified that they were not familiar with the contents of the search warrant or what led to its being attained.

Respondent also failed to establish that inadequate security measures resulted in the presence of the drugs on the premises. The alleged drugs found were contained in two vials, less than ½ an inch in length, and a small baggie. The recovery of two small

vials and a baggie of a powdery substance is not substantial evidence of trafficking, and is insufficient to establish that petitioner failed to exercise reasonable diligence in supervising the premises (see *Matter of 150 RFT Varick Corp. v New York State Liq. Auth.*, 107 AD3d 524 [1st Dept 2013]).

The dissent points to the testimony of petitioner's head of security that when security guards were on patrol they would sometimes have a staff member, who was not trained to pat people down, watch the door, as allowing an inference to be drawn that lax security measures led to the presence of drugs at the scene. This however, is purely speculative and not based on the record. The quantity of drugs recovered was very small. The uncontroverted police testimony was that the drugs could easily been have secreted on an individual. There was no evidence that the patrons entering the premises were not subjected to a patdown or that given the packaging, a patdown would have detected drugs. Substantial evidence, which has been characterized as a "minimal standard" or as comprising a "low threshold," must consist of such relevant proof, within the whole record, "as a reasonable mind may accept as adequate to support a conclusion or ultimate fact" (*Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 280-281 [1st Dept 2007], it does not, however, "rise

from bare surmise, conjecture, speculation or rumor" (*300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d at 180).

In light of the foregoing, we remand for the imposition of an appropriate penalty.

All concur except Tom, J.P. and Andrias, J. who dissent in part in a memorandum by Tom, J.P. as follows:

TOM, J.P. (dissenting in part)

I agree with the majority that respondent's determination that petitioner suffered or permitted altercations and/or assaults to occur, leading to a person being shot and punched on the licensed premises, is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176, 180 [1978]).

However, because there is substantial evidence to support respondent's findings that petitioner suffered or permitted the premises to become disorderly by engaging in and/or suffering the storage, possession, use and trafficking of a controlled substance in violation of Alcohol Beverage Control Law § 106(6), and failed to exercise adequate supervision over the conduct of the licensed premises in violation of Rules of the State Liquor Authority rule 54.2 (9 NYCRR 48.2), I respectfully dissent from the majority's contrary holding and would confirm the agency's determination in its entirety.

The record contains evidence that lax security measures at petitioner's karaoke bar allowed violence and drug dealing to occur on the premises. As the majority recognizes with regard to the charge that petitioner permitted the shooting to occur, the evidence showed that there was only one security guard at

petitioner's bar on the night of the shooting, who likely was not guarding the entrance so as to allow the perpetrators to enter the premises with a gun. Specifically, on the night of October 29, 2014, four men entered the establishment, and made their way to a karaoke room. One of the men pointed a firearm at a group of 10 to 15 people, and, in Mandarin Chinese, told them to sit down or they would be shot. The man with the gun was identified as "Pi Fa," a/k/a "Wholesale," a man who allegedly runs a gambling operation in Manhattan. A fight broke out, and Pi Fa shot a male patron, Xinke Hang, in the leg. Then, the other three men in Pi Fa's party punched Hang and another male patron, Pan Youdi, in the head and face before leaving.

Wade Williams, petitioner's head of security, testified that he was aware that there was an issue with ketamine (a veterinary anesthetic also used as a recreational drug) use in the neighborhood and directed his security guards to patrol the premises, which has 13 private karaoke rooms, to ensure that the patrons were not engaged in the sale or use of controlled substances. However, he also explained that, when security guards are on patrol, they will sometimes have a staff member watch the front door and that the staff are not trained to pat people down, like the security guards. Williams thus conceded

that the perpetrators of the shooting may have entered during a time when non-security staff members were watching the entrance. In other words, due to these insufficient security measures, patrons could bring firearms or controlled substances into the bar without being patted down. As the ALJ concluded:

> "[B]ased . . . [on] the record in general, a fair inference may be raised that there was an apparent laxity in supervision or an inadequacy of supervision that created a greater risk that surreptitious and illegal activity, such as possession and use of a controlled substance (ketamine), might occur on the Licensed Premises, especially given its private-room structure. Licensee's failure to take more affirmative actions to contain this risk constitutes a form of suffering and permitting, as charged."

Regarding the controlled substance charges, Police Officer Robert Cox testified that there was a high use of ketamine, a white powdery substance, in the precinct. The police records in evidence establish that a search warrant for petitioner's bar was issued by Judge Michelle A. Armstrong, Queens County Criminal Court, "based on the documented purchase of illegal controlled substances in connection with official Department enforcement operations." Notably, this warrant could only have been procured based on allegations that provided the court with "reasonable cause" to believe that controlled substances were being sold at petitioner's bar (*see* CPL §§ 690.35, 690.40). The record does

not show that the licensee made any attempts to controvert the validity of the search warrant.

Officer Cox, who executed the search warrant, described the premises as well-lit, with multiple rooms with closed doors. The doors had windows on them that let one see into the room. The police recovered two clear vials, each filled with about 1,000 milligrams of ketamine, in one of the rooms. One of the vials was found underneath a couch and the other was found under the "roof" of the room. Police Officer Dominic Cappiello, who executed the warrant with Officer Cox, determined that the two vials recovered from the room contained ketamine based upon how it looked - it was a white powdery substance - and how it was packaged.

In addition, Police Officer Raymond Nappi, who was also involved in executing the search warrant, testified that he found a clear, "little baggy of white powder in a white envelope," which he believed to be ketamine, on the floor in one of the rooms. A Police Department lab test report entered into evidence indicated that one of the samples recovered from the premises was in fact ketamine; testing of another sample was pending.

It is settled that an administrative determination must be sustained if it is supported by substantial evidence upon the

record as a whole (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d at 181), which requires less than a preponderance of the evidence and may include hearsay testimony and circumstantial evidence (*see generally Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d 280, 280-281 [1st Dept 2007]; *see also Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988] ["Hearsay evidence can be the basis of an administrative determination"]; *Matter of S & R Lake Lounge v New York State Liq. Auth.*, 87 NY2d 206, 209 [1995] [Substantial evidence . . . may be supplied by circumstantial proof"]). An administrative law judge is required to assess the credibility of witnesses and draw reasonable inferences, "and the courts may not weigh the evidence or reject the conclusion of the administrative agency where the evidence is conflicting and room for choice exists" (*Café La China* at 281).

The majority loses sight of the fact that this is an administrative hearing before an ALJ of the New York State Liquor Authority and not a criminal trial or proceeding. Significantly, the majority is applying inapplicable evidentiary standards to this matter. The Court of Appeals has noted that substantial evidence requires "less than proof by 'a preponderance of the evidence, overwhelming evidence or evidence beyond a reasonable

doubt'" (*Matter of FMC Corp. [Peroxygen Chems. Div.] v Unmack*, 92 NY2d 179, 188 [1998], quoting *300 Gramatan Ave. Assoc.*, 45 NY2d at 180). Indeed, as a burden of proof, "it demands only that 'a given inference is *reasonable and plausible, not necessarily the most probable*'" (*Matter of Miller v DeBuono*, 90 NY2d 783, 793 [1997], quoting Borchers and Markell, New York State Administrative Procedure and Practice § 3.12, at 51 [1995] [emphasis added]; *see also Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

Respondent's determination is supported by substantial evidence in the record as a whole, which demonstrated that petitioner had insufficient security at the entrance to the establishment and throughout the establishment, especially given the private-room structure and petitioner's awareness of a ketamine problem in the area. These circumstances allow for an inference to be drawn that lax security measures allowed the shooting incident to occur and permitted trafficking, storage and possession of controlled substances to occur at the premises.

Contrary to the majority's position, the evidence presented at the hearing established that the basis of the search warrant was that prior drug purchases were made at the premises. The memorandum from the precinct commanding officer was sufficient to

establish that a search warrant was issued for the premises based on probable cause that included the documented purchase of illegal controlled substances at the location. Respondent was not required to call the commanding officer to testify, or to submit the search warrant or search warrant affidavit. Nor was respondent required to call other officers to testify about the prior purchases of controlled substances at the premises.

While the details of the Police Department's prior enforcement operations at the premises are not contained in the record, it can be inferred procedurally that there were complaints to the police department of illegal drug activities being conducted at the premises. The police investigated and made purchases of controlled substance at the bar and a search warrant was then obtained based on probable cause. The undisputed evidence before the ALJ clearly showed that a search warrant was issued for the premises based on illegal drug activities conducted at the karaoke bar and upon execution of the warrant illegal controlled substances were found on the premises. Thus, respondent's finding that petitioner suffered or permitted the storage, possession or trafficking in controlled substances as a result of petitioner's failure to exercise adequate supervision over the licensed premises is "a conclusion or

ultimate fact" that may be reasonably extracted from the record (*300 Gramatan Ave. Assoc.*, 45 NY2d at 181).

Further, although the officers testified that the drugs were contained in small vials and a baggie, which could have been secreted on a person, the completely insufficient security at the bar along with petitioner's knowledge of rising ketamine sales in the area - which was conceded by petitioner's head of security - the police department's documented purchase of illegal controlled substances at the premises causing issuance of a search warrant, and the fact that ketamine was found secreted on the premises indicate that the premises was not properly supervised and that petitioner had the "opportunity through reasonable diligence to acquire knowledge of the alleged acts" (*see Matter of Leake v Sarafan*, 35 NY2d 83, 86 [1974]). There is nothing speculative about inferring from the unambiguous testimony of petitioner's head of security that there were often times when the entrance to the premises was left unguarded by a trained security guard to be watched by other staff members who were not trained to pat people down, and to therefore conclude that the complete lack of adequate security allowed drugs to be freely brought onto the premises. In any event, actual knowledge is not required. It is enough that petitioner "should have known of the asserted

disorderly condition on the premises and tolerated its existence" (*Matter of Playboy Club of N.Y. v State Liq. Auth. of State of N.Y.*, 23 NY2d 544, 550 [1969] [citations omitted]).

Unlike the *Matter of 150 RFT Varick Corp. v New York State Liq. Auth.* (107 AD3d 524 [1st Dept 2013]), cited by the majority, which does not involve a search warrant, the matter before us does not merely concern a one-time observation of an individual "snorting cocaine" at the premises. Rather, this matter concerns an ongoing problem with drug dealing at the premises that is evidenced by the procurement of a search warrant, and, given the inadequate security, the ALJ reasonably concluded that petitioner failed to exercise reasonable diligence in supervising the premises.

Thus, there was substantial evidence to sustain charges 12 and 14 that inadequate supervision by the licensee of the licensed business permitted the possession, use and sale of a controlled substance on the premises.

That additional evidence might have been helpful in determining this matter is of no moment. Further, "the more rigorous foundation requirements applied in criminal cases were inapplicable in this proceeding" (*Matter of Sander v New York City Dept. of Transp.*, 23 AD3d 156, 157 [1st Dept 2005]), and

thus any concern expressed by the majority about the lack of foundation for the laboratory report is inappropriate. Indeed, contrary to the majority's conclusion, the redacted laboratory report was properly introduced without foundation in this proceeding. Moreover, the ALJ could reasonably conclude from the officers' testimony alone that the substance recovered was ketamine. Accordingly, any purported deficiencies in the laboratory report are inconsequential.

Nor is it consequential that some of the evidence in the record is hearsay evidence, as such evidence is admissible in administrative proceedings and "if sufficiently probative, it alone may constitute substantial evidence" (*Matter of Café La China Corp. v New York State Liq. Auth.*, 43 AD3d at 281).

Accordingly, respondent's determination should be confirmed and the petition dismissed.

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

ENTERED: AUGUST 18, 2016

DEPUTY CLERK

Friedman, J.P., Renwick, Andrias, Gische, Webber, JJ.

1399-
1400 Index 308176/12

Mamadou Lamine Dabo,
Plaintiff-Appellant,

-against-

Beatrice Sibblies,
Defendant-Respondent.

_____

Dentons US LLP, New York (Renee Eubanks of counsel), for appellant.

Hennessey & Bienstock LLP, New York (Peter Bienstock of counsel), for respondent.

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Judgment of divorce, Supreme Court, New York County (Ellen F. Gesmer, J.), entered September 30, 2015, pursuant to an order, same court and Justice, entered on or about July 2, 2015, which, among other things, upon the parties' motions, confirmed in part and rejected in part a special referee's report, unanimously affirmed, without costs. Appeal from the aforesaid order, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Supreme Court properly found that defendant wife's business interests were separate property, of which plaintiff husband was not entitled to equitable distribution, and that the value of such interests had not been established at trial. The court

noted that the record did not support a finding that the wife's interests in Cold Spring I LLC (Cold Spring) and BOS Development LLC (BOS) were marital, since it was clear from the testimony of both parties that the wife had established Cold Spring and BOS prior to the parties' marriage, and that she was already heavily involved in the development of a real estate project known as the Morningside Project in 2007, the year prior to the parties' marriage. It noted that the husband's direct contribution to the Morningside Project was limited to his participation in a single conference call regarding a stop work order that the Department of Buildings had issued just after the work had begun on the building's foundation. The husband acknowledged that the business was formalized prior to the marriage and that he was not a principal of 86 Morningside LLC (a company formed to develop the Morningside Project) or Cold Spring. Accordingly, the court found that the record supported a finding that the wife's interests in Cold Spring (including Cold Spring's interest in 86 Morningside LLC) and BOS were her separate, premarital property.

The husband's argument that the Morningside Project was marital property subject to equitable distribution since the leasehold interest was "acquired after the parties' marriage" is without merit (*see Zaretsky v Zaretsky*, 66 AD3d 885, 887-888 [2d

Dept 2009]). The evidence reveals that the wife was unilaterally involved in the development of the Morningside Project in 2007, the year prior to the parties' marriage in 2008. In *Zaretsky*, the Appellate Division, Second Department held that the wife was not entitled to any share of the husband's interest in property he acquired very shortly after their wedding, as the husband demonstrated that the property was purchased with funds from his father and brother (*id.*).

Moreover, the motion court correctly held that the husband was not entitled to equitable distribution of the value of the wife's business interests. The wife's business was separate property established before the marriage. Notwithstanding the claim that he had contributed to it, the husband made no showing to satisfy his burden of demonstrating the baseline value of the business and the extent of its appreciation (*see Kurtz v Kurtz*, 1 AD3d 214, 215 [1st Dept 2003]; *Capasso v Capasso*, 129 AD2d 267, 282 [1st Dept 1987], *lv denied and dismissed* 70 NY2d 988 [1988]). Valuation based solely upon a capital account distribution reported on a K-1 form is insufficient (*see Heine v Heine*, 176 AD2d 77, 88-89 [1st Dept 1992], *lv denied* 80 NY2d 753 [1992]).

Supreme Court correctly determined that the marital residence became marital property upon the wife's transfer,

during the marriage, of the property from her sole name to the parties' joint names (*see Fields v Fields*, 15 NY3d 158 [2010]; *Imhof v Imhof*, 259 AD2d 666, 667 [2d Dept 1999], *lv dismissed* 93 NY2d 999 [1999], *lv denied* 94 NY2d 915 [2000]). Supreme Court also properly found that the husband was entitled to 50% (or $37,500) of the appreciation of the marital residence (*see Maldonado v Maldonado*, 100 AD3d 448 [1st Dept 2012]), based on the parties' stipulation that the value of the residence at the time of its transfer was $1.6 million and was $1.675 million at a date closer to trial (*see Patelunas v Patelunas*, 139 AD2d 883, 884-885 [3d Dept 1988]). Supreme Court providently exercised its discretion in selecting a valuation date close to the date of trial, especially since it was the last date the marital residence had been appraised (*see id.; see also Wegman v Wegman*, 123 AD2d 220, 234, 235 [2d Dept 1986], *amended on other grounds* 512 NYS2d 410 [2d Dept 1987]). The court was not required to order an updated valuation, as "there are no strict rules mandating the use of particular valuation dates" (*Mauthner v Mauthner*, 128 AD3d 502, 502 [1st Dept 2015]; *see Grunfeld v Grunfeld*, 94 NY2d 696, 707 [2000]). The delay between the date of the last valuation and the commencement of trial was due, in large part, to the husband's own conduct in, among other things,

postponing the start of trial on two occasions.

Supreme Court properly granted the wife a $1.6 million separate property origination credit for the marital residence, since the husband stipulated that was the value of the property on the date his name was added to the deed (*see Myers v Myers*, 119 AD3d 1114, 1116 [3d Dept 2014]; *see also Heine*, 176 AD2d at 84; *Fields*, 15 NY3d at 166, 167). The husband failed to preserve his argument that he was fraudulently induced into entering into the stipulation, and, in any event, the evidence in the record does not support his contention.

Supreme Court providently exercised its discretion in directing the husband to pay $37,500 in counsel fees. The court considered the appropriate factors, including the financial circumstances of the parties, the relative merits of the positions taken at trial, and any dilatory tactics undertaken by the parties during the litigation (*see DeCabrera v Cabrera-Rosete*, 70 NY2d 879, 881 [1987]; *Warner v Houghton*, 43 AD3d 376, 380 [1st Dept 2007], *affd* 10 NY3d 913 [2008]). The record supports the court's imposition of $7,500 in sanctions for the husband's filing of a frivolous motion (*see* 22 NYCRR 130-1.1).

The husband never challenged the Special Referee's recommendation that he pay 50% of the private school tuition for

the parties' child. Accordingly, we decline to consider his argument that Supreme Court erred in adopting that recommendation.

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

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

ENTERED: AUGUST 18, 2016

DEPUTY CLERK

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

1435 Margarita Caban, Index 22375/12
Plaintiff-Appellant,

-against-

Bronx Park South II Associates, et al.,
Defendants-Respondents.

_____

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

Rafter & Associates PLLC, New York (Howard K. Fishman of counsel), for respondents.

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Order, Supreme Court, Bronx County (Lizbeth Gonzalez, J.), entered November 16, 2015, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff alleges that she was injured when she tripped over the loose edge of a rubber mat that was affixed to the interior stairs in the lobby of defendants' building. Defendants made a prima facie showing that they neither created the allegedly defective condition of the rubber mat, nor had actual or constructive notice of its existence (*see Kasner v Pathmark Stores, Inc.*, 18 AD3d 440 [2d Dept 2005]). Defendants submitted evidence showing that their porter cleaned the building daily and regularly inspected the mat (*see Denker v Century 21 Dept.*

Stores, LLC, 55 AD3d 527 [2d Dept 2008]). Defendants further pointed to plaintiff's own testimony that she looked down at the mat immediately before falling and did not observe any defect (*see Budd v Gotham House Owners Corp.*, 17 AD3d 122 [1st Dept 2005]).

In opposition, plaintiff failed to raise a triable issue of fact. While plaintiff testified that she noticed a bump in the mat after her accident, she admitted that she had not noticed any bump, either immediately before her accident or when she walked over the mat without incident on her way into her brother's apartment the morning before the accident, even though she had been looking directly at it immediately before the accident (*see Vazquez v Genovese Drug Stores, Inc.*, 88 AD3d 467 [1st Dept 2011]). Specifically, plaintiff testified as follows at her deposition:

> "Q. When you went over that rubber mat in the morning on your way to your brother's apartment what were your observations with respect to that rubber mat?
>
> "A. I didn't notice anything. I just went straight to the elevator.
>
> "Q. Did you walk over the rubber mat?
>
> "A. Yes.
>
> "Q. Did you have any difficulties walking over the rubber mat that morning?

"A. No.

"Q. At the time of the accident were you talking to your brother?

"A. No.

"Q. Where were you looking immediately before your accident?

"A. Looking down.

. . .

"Q. Did you see the rubber mat immediately before your accident?

"A. Yes.

"Q. Okay?

"A. I had to step over it.

"Q. When you saw the rubber mat immediately before your accident what did you observe?

"A. Nothing.

"Q. When you say nothing is it nothing out of the ordinary?

"A. I thought it was just a mat. I stepped on it on my way up and I stepped on it on my way out.

. . .

"Q. When you went immediately before you stepped over the mat before your accident did you observe that it was not flush with the ground?

"A. No.

"Q. That it was up?

"A. No.

"Q. That morning when you walked inside the building and walked over the mat did you observe that it was up?

"A. No."

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

ENTERED: AUGUST 18, 2016

DEPUTY CLERK

Sweeny, J.P., Acosta, Feinman, Kapnick, Webber, JJ.

1595N In re Carlos Rivera, Index 155455/13
Petitioner-Respondent,

-against-

New York City Department of Sanitation, et al.,
Respondents-Appellants.

_____

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

Glass Krakower LLP, New York (John Hogrogian of counsel), for respondent.

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Judgment, Supreme Court, New York County (Joan B. Lobis, J.), entered June 10, 2014, upon respondents' purported default, granting the petition brought pursuant to CPLR article 78 to annul respondents' determination, dated February 14, 2013, which terminated petitioner's probationary employment as a sanitation worker, and order, same court, Justice and date of entry, which denied respondents' motion to vacate the default judgment, unanimously reversed, on the law, without costs, the motion to vacate the default judgment granted, the petition denied, and the proceeding dismissed.

CPLR 5015(a)(1) requires a movant seeking to vacate a default to move within one year of entry of the default and to

show a reasonable excuse for the default as well as a meritorious defense (*see Youni Gems Corp. v Bassco Creations Inc.*, 70 AD3d 454, 455 [1st Dept 2010], *lv dismissed* 15 NY3d 863 [2010]). Respondents timely moved to vacate the default. It should be noted that petitioner did not oppose the application.

On the merits, respondents cite "law office failure" as a reason for the default. Under certain circumstances, law office failure may provide a reasonable excuse for a default (*see e.g. Goodwin v New York City Hous. Auth.*, 78 AD3d 550, 551 [1st Dept 2010]). At oral argument, respondents essentially conceded that, in this e-filed case, their office failed to regularly check its email and, as a result, was unaware of the motion court's order that gave rise to the default. Respondents' excuse was sufficiently particularized and there is no evidence of wilful or contumacious conduct on their part (*see Reyes v New York City Hous. Auth.*, 236 AD2d 277, 279 [1st Dept 1997]).

Additionally, respondents have demonstrated the existence of a meritorious defense. Petitioner was a probationary employee who was arrested and charged with DWI while still on probationary status. His commercial driver's license, a requirement for a sanitation worker, was suspended and then revoked as a result. Several disciplinary complaints were filed as a result of this

incident and he was subsequently terminated.

"A probationary employee may be discharged without a hearing or a statement of reasons, in the absence of a demonstration that [his] termination was made in bad faith, for a constitutionally impermissible purpose, or in violation of statutory or decisional law" (*Matter of Turner v Horn*, 69 AD3d 522, 523 [1st Dept 2010]). The record before us clearly establishes that there were legitimate reasons for terminating petitioner's employment, specifically, his arrest and the revocation of his license[2] (*see Matter of Cipolla v Kelly*, 26 AD3d 171 [1st Dept 2006]). This is a valid reason for termination even if the charges for which he was arrested were later withdrawn or dismissed (*see e.g. Matter of Holder v Sielaff*, 184 AD2d 228 [1st Dept 1992]).

Since respondents' failure to timely file an answer was neither wilful, nor part of a pattern of dilatory behavior, and petitioner points to no evidence that the short (three-month) period of default caused him to change his position, and he has demonstrated no other prejudice, and in view of the strong public

[2]Although petitioner claims that his license has since been restored, this claim is dehors the record and cannot be considered by us (*Vick v Albert*, 47 AD3d 482, 484 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]).

policy of disposing of cases on their merits, the motion court improvidently exercised its discretion in denying respondents' motion to vacate the default (*DaimlerChrysler Ins. Co. v Seck*, 82 AD3d 581 [1st Dept 2011]).

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

ENTERED: AUGUST 18, 2016

DEPUTY CLERK

Friedman, J.P., Andrias, Saxe, Richter, Kahn, JJ.

1611 The People of the State of New York, Ind. 5388/12
Respondent,

-against-

Terrell Taylor,
Defendant-Appellant.

_____

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

Terrell Taylor, appellant pro se.

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

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Judgment, Supreme Court, New York County (Patricia Nunez, J.), rendered October 10, 2013, as amended November 12, 2013, convicting defendant, after a jury trial, of four counts of criminal contempt in the first degree, and sentencing him, as a second felony offender, to an aggregate term of four to eight years, unanimously affirmed.

The indictment sufficiently charged first-degree contempt under Penal Law § 215.51(c), which involves violation of a certain kind of order of protection, committed by a person with a prior conviction of a similar crime. Defendant argues that his indictment was jurisdictionally defective because the special information that was filed to elevate each count of second-degree

contempt to first-degree contempt did not explicitly allege either that the prior second-degree contempt conviction involved the violation of a stay-away order, or that the person on whose behalf the prior order of protection was issued was his ex-girlfriend, the same person listed in the current indictment. Assuming, without deciding, that both of these claims raise actual jurisdictional issues that do not require preservation, we reject both arguments on the merits.

First, while it is undisputed that Penal Law § 215.51(c) requires proof that the prior conviction, like the instant offenses charged in the indictment, involved a violation of a stay-away order, this element was satisfactorily alleged by citation, in the indictment and the special information, to that particular statute (*see People v D'Angelo*, 98 NY2d 733 [2002]; *see also People v Ray*, 71 NY2d 849, 850 [1988]). In light of that specific reference, the special information, by accusing defendant of first-degree contempt "in that" he was convicted of second-degree contempt on March 24, 2011, fairly apprised him of all the elements of the charges against him, including that the prior order was a stay-away order.

Second, we find that the statutory language clearly does not require, as an element of first-degree contempt, proof that a

defendant's prior conviction involved an order protecting the same person named in the order or orders at issue in the currently charged offenses. Accordingly, the indictment could not be jurisdictionally defective based on the failure to allege that the same person was the beneficiary of both the order on which the prior conviction was predicated and the new order or orders; this was simply a nonexistent element, and the legislature had no reason to specify or highlight the absence of an element. The statutory phrase "as described herein" plainly refers to the type of order, i.e., a stay-away order, not the identity of the protected person. For essentially the same reasons, defendant's argument that the evidence was legally insufficient to prove such an identity between the protected persons fails as well, regardless of any alleged procedural bars.

Although the prosecutor's summation contained essentially the same infirmity that we identified in *People v Jones* (125 AD3d 403 [1st Dept 2015]), the issue was unpreserved. In any event, we find that the error was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]). We note that in *Jones*, we did not address the issue of harmless error, because we were already reversing on a jury selection error not subject to harmless error analysis.

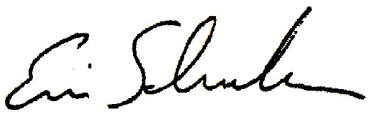
Defendant did not preserve his claim that a 911 call made by

the victim failed, for lack of corroboration, to qualify under the present sense impression exception to the hearsay rule, and we decline to review it in the interest of justice. As an alternative holding, we find that there was no "corroboration problem, since the declarant[] testified in court" (*People v Robinson*, 282 AD2d 75, 82 [1st Dept 2001]).

We have considered and rejected defendant's remaining claims, including those contained in his pro se supplemental briefs and those advanced in defense counsel's supplemental submission.

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

ENTERED: AUGUST 18, 2016



DEPUTY CLERK

Friedman, J.P., Acosta, Renwick, Saxe, Kapnick, JJ.

16307 Rebecca Broadway Limited Partnership, et al., Plaintiffs-Respondents, Index 653659/12

-against-

Mark Christopher Hotton, et al., Defendants,

Marc Thibodeau, Defendant-Appellant.

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Nesenoff & Miltenberg, LLP, New York (Phillip A. Byler of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Erik S. Groothuis and Jonathan Mazer of counsel), for respondents.

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Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about May 28, 2015, affirmed, with costs.

Opinion by Friedman, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
Rolando T. Acosta
Dianne T. Renwick
David B. Saxe
Barbara R. Kapnick, JJ.

16307
Index 65369/12

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Rebecca Broadway Limited Partnership, et al.,
Plaintiffs-Respondents,

-against-

Mark Christopher Hotton, et al.,
Defendants,

Marc Thibodeau,
Defendant-Appellant.

_____x

Defendant Marc Thibodeau appeals from an order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about May 28, 2015, which granted plaintiffs' motion for summary judgment as to liability on their cause of action for breach of contract against him, and denied his cross motion for summary judgment dismissing plaintiffs' causes of action for tortious interference with prospective business relations and defamation as against him.

Nesenoff & Miltenberg, LLP, New York (Phillip A. Byler and Andrew T. Miltenberg of counsel), for appellant.

Schlam Stone & Dolan LLP, New York (Erik S. Groothuis, Jonathan Mazer and Richard H. Dolan of counsel), for respondents.

FRIEDMAN, J.P.

This case arises from an unsuccessful effort to produce a Broadway musical about a ghost. After it was reported that a major foreign investor in the production had died, it emerged that the supposedly deceased backer had never been more than a ghost himself – the man had never existed, except as a deceptive construct conjured up by a dishonest fundraiser, who has since been incarcerated for this wrongdoing. The publicity agent for the show, when he began to suspect the truth about the supposedly deceased foreign investor, expressed his concerns to the producer's principal, who essentially told him to keep quiet about it. Apparently stung by this dismissive treatment, the publicity agent sent four anonymous emails to another potential investor (this one an actual, living person), who had wished to remain anonymous. The last of these emails, sent under a fictitious name, made various highly negative allegations about the producer and the show's prospects, and urged the potential investor not to back the play. After receiving this email, the potential investor promptly withdrew from involvement in the production, preventing it from going forward.

At issue on this appeal are the producer's claims against the publicity agent for defamation, tortious interference with prospective business relations and breach of contract, based on

the agent's emails to the potential "angel investor" (as the producer refers to him). Although neither the producer nor the publicity agent can be credited with angelic virtue, we hold that Supreme Court correctly determined that the producer's claims for defamation and tortious interference should go to trial. Supreme Court also correctly determined that the record establishes that the producer is entitled to summary judgment as to liability on its claim for breach of contract against the publicity agent. The surreptitious and anonymous emails that the agent sent to the prospective investor — whose identity had been the producer's confidential information — apparently were intended to sink the project, and accomplished that goal. The publicity agent thus "destroy[ed] or injur[ed] the right of [the producer] to receive the fruits of [its] contract [with the agent]" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.* 98 NY2d 144, 153 [2002] [internal quotation marks omitted]). That contract had been intended to facilitate the very theatrical production that the agent sabotaged by means of his emails, which he had only been able to send by misusing the producer's confidential information. This is the very definition of a breach of the covenant of good faith and fair dealing that the law of New York implies in every contract (*see* Restatement [Second] of Contracts § 205, Comment *a* ["Good faith performance . . . of a contract emphasizes

faithfulness to an agreed common purpose and consistency with the justified expectations of the other party"]). Accordingly, on this record, the publicity agent's liability to the producer for breach of contract is established as a matter of law.

Plaintiff Rebecca Broadway Limited Partnership (RBLP) was formed in 2011 to stage a Broadway production of "Rebecca — The Musical," a musical play based on Rebecca, the famous 1938 gothic novel by Daphne du Maurier.[1] By a written agreement dated May 10, 2012, RBLP hired defendant Marc Thibodeau "as the Press Representative for the Play to provide public relations services as may customarily be required by [RBLP] to be rendered by the press representative of a first-class musical stage play production."

Earlier in 2012, RBLP had hired defendant Mark Hotton — who is not a party to this appeal — to assist in raising capital for the production. Hotton, after traveling abroad at RBLP's expense, returned with purported funding commitments from a group of four foreign investors who collectively subscribed to provide $4.5 million of capital, more than a third of the $12 million that was needed. The alleged leader of this investor group was a

[1]The general partner of RBLP is plaintiff Sprecher/Forlenza Productions Inc. This writing hereinafter refers to both plaintiffs collectively as RBLP.

man identified as Paul Abrams, who was said to have committed to provide personally $2 million of the $4.5 million to be forthcoming from the group.

In September 2012, RBLP was informed that Paul Abrams had suddenly died in London after contracting malaria while on a trip to Africa. RBLP shared this information with Thibodeau, who issued a press release on RBLP's behalf, dated September 8, 2012, announcing that the start of rehearsals for the show was being "delayed . . . by two weeks [from September 10 to September 24] due to the death of a key investor responsible for a $4.5 million investment pool in the production." RBLP also subsequently informed Thibodeau that it was engaged in discussions with Laurence Runsdorf, a new prospective investor who might replace a significant portion of the funds that Abrams had been expected to provide. RBLP also informed Thibodeau that Runsdorf wished to keep his involvement in the production confidential.

After the announcement of the demise of the foreign investor, Thibodeau spoke with Patrick Healy, a New York Times reporter who was investigating the matter. From his discussions with Healy and research he conducted on his own, Thibodeau began to suspect that Abrams, a figure previously unknown on the Broadway scene, was a fictitious character. Thibodeau was unable to locate any obituary for a person named Paul Abrams

corresponding to the description provided by Hotton, nor any other information verifying the existence of such a person. Thibodeau further discovered through an Internet search that several lawsuits for fraud were pending against Hotton. On September 21 and 24, 2012, Thibodeau discussed with Ben Sprecher, one of RBLP's two principals, his suspicions concerning the foreign investors supposedly located by Hotton. Sprecher responded by instructing Thibodeau not to discuss the matter with anyone (as recalled by Thibodeau, Sprecher said "don't go there about this stuff") and further telling Thibodeau that "we are not going to talk about this anymore."

On September 25 and 26, 2012, while RBLP's negotiations with Runsdorf were ongoing, articles appeared in the New York Times and the New York Post, respectively, suggesting that Abrams had never existed. It is undisputed that, on September 25, 26, and 28, Thibodeau sent four anonymous emails to Runsdorf or his representatives. The first three emails merely drew attention to the Times and Post articles, but the fourth email, dated September 28, 2010, which Thibodeau sent under the false name "Sarah Finkelstein" to Runsdorf himself, made a number of damaging and (according to RBLP) false allegations, including: (1) that the "walls are about to cave in on Mr[.] Sprecher [RBLP's principal] and the Rebecca Broadway production"; (2) that

the "cloud hanging over this production is very very dark"; (3) that "[e]ven before any of this happened, Rebecca's prospects were not very promising and every major regular Broadway investor has passed on [it]"; and (4) that "with this prospect of fraud, an ongoing money shortage, a bad public perception, anemic ticket sales, and a rabid press corps, the only good reason to invest in [R]ebecca would be for a tax write-off and a desire to be dragged into a fraud trial."

Promptly after receiving the September 28 email, Runsdorf — who, as previously noted, had not wanted his involvement with the play to become publicly known — told RBLP that he was no longer interested in backing "Rebecca — The Musical." RBLP was forced to cancel the first rehearsal for the show, which had been scheduled for the next week. and "Rebecca — The Musical" has not opened on Broadway to date.

After Runsdorf's withdrawal, it emerged that Hotton, the fundraiser, had indeed created the fictitious investor Paul Abrams and his three associates and perpetrated other frauds upon RBLP in connection with the "Rebecca — The Musical" project. Hotton ultimately pleaded guilty to federal charges of wire fraud based on this scheme, and was sentenced to nearly three years in prison. So far as the record discloses, RBLP and its principals have not been accused of any wrongdoing in this matter.

In this action, as relevant to this appeal, RBLP asserts causes of action for breach of contract, tortious interference with business relations and defamation against Thibodeau. Thibodeau brings the instant appeal from Supreme Court's order granting RBLP's motion for summary judgment as to liability on its cause of action for breach of contract and denying Thibodeau's cross motion for summary judgment dismissing RBLP's causes of actions for tortious interference with business relations and defamation. We affirm.

Initially, we hold that Supreme Court correctly denied Thibodeau's cross motion for summary judgment dismissing the defamation and tortious interference claims. With respect to the defamation cause of action, even if RBLP constituted a limited-purpose public figure in connection with matters relating to the attempted production of "Rebecca — The Musical" (*see Perez v Violence Intervention Program*, 116 AD3d 601, 601-602 [1st Dept 2014], *lv denied* 25 NY3d 915 [2015]), and would therefore be required to prove "actual malice" within the meaning of *New York Times Co. v Sullivan* (376 US 254 [1964]) — the highest potentially applicable standard of proof on a defamation claim — to prevail at trial, a jury could find that there is clear and convincing evidence that Thibodeau wrote the September 28 email either with knowledge of the falsity of statements made in that

email or with reckless disregard for the truth or falsity of such statements (*see New York Times Co. v Sullivan*, 376 US at 279-280; *Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 357 [2009]).[2]

Similarly, the court properly found that issues of fact precluded summary judgment dismissing the claim for tortious interference with prospective business relations, inasmuch as the record contains evidence to support a finding that Thibodeau caused the loss of the play's financing, either through the use of wrongful means (specifically, the use of Runsdorf's identity, which was RBLP's confidential information, to send the email) or with the sole purpose of inflicting harm on RBLP (*see e.g. CBS Corp. v Dumsday*, 268 AD2d 350, 352-353 [1st Dept 2000]). The truth of Thibodeau's claim that he was acting in the interest of investors, rather than with the sole purpose of harming RBLP, is a contested issue to be determined by the factfinder at trial.

As to the breach of contract cause of action, Supreme Court properly granted RBLP summary judgment as to liability on that claim. The record establishes that Thibodeau, without RBLP's

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[2]In denying Thibodeau's motion for summary judgment dismissing the defamation cause of action, Supreme Court found it unnecessary to determine which standard of proof applied because there was sufficient evidence in the record to sustain the claim under any potential standard. Thibodeau, the only party appealing, has not requested that we determine the applicable standard of proof in the event we affirm the denial of summary judgment dismissing the defamation claim.

authorization, and using confidential information he had obtained as a result of his employment as RBLP's press representative, sent an email directly to Runsdorf, a key potential investor who had desired to remain anonymous, causing Runsdorf to withdraw his financial commitment, all of which resulted in the cancellation of rehearsals and the play's failure to open. Even assuming that his conduct did not violate the express terms of his agreement to act as the play's press representative, Thibodeau breached the implied duty of good faith and fair dealing by essentially defeating the purpose of the agreement by his actions (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 153). Thibodeau was hired by RBLP to use his public relations skills to facilitate the production of a play; his actions, in which he made use of confidential information that RBLP had entrusted to him in the course of his employment, made it impossible for RBLP to produce the play as planned. It is difficult to imagine a plainer case of a party to a contract utterly defeating the purpose for which the other party had entered into that contract, or a more blatant example of an agent's disloyalty to his principal.[3]

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[3]Thibodeau also argues that RBLP was not harmed by his actions because, even if Runsdorf had decided to invest, RBLP likely would not have located sufficient funding to proceed with the production. On a cause of action for breach of contract,

Thibodeau argues that RBLP should not have been granted summary judgment as to liability on the breach of contract claim because an issue of fact exists as to whether his sending of the emails, even if that would otherwise constitute a breach, might have been excused by a prior breach of the implied duty of good faith and fair dealing by RBLP itself. On this record, Thibodeau's contention is, as Supreme Court aptly put it, "a nonstarter," and without merit as a matter of law. There is nothing in the record to support Thibodeau's contention that RBLP undermined his ability to perform his duties under the contract honestly or his contention that RBLP required him to engage in conduct that would implicate him in Hotton's fraud when it ultimately came to light. On the contrary, as Supreme Court observed in its decision, RBLP never instructed Thibodeau to issue a press release containing a statement that he believed to be false (or even any statement as to which he had doubts), nor

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this argument goes to the question of damages, not liability (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993]; *Ross v Sherman*, 95 AD3d 1100 [2d Dept 2012]; Restatement [Second] of Contracts § 346; 24 Richard A. Lord, Williston on Contracts § 64:6 at 62 [4th ed 2002] ["An action will . . . lie for the breach (of a contract) although it causes no injury"]). In any event, the record contains evidence supporting RBLP's contention that, if Runsdorf had gone through with his contemplated investment of $2.25 million, RBLP's principals would have provided out of their personal assets the remaining capital required to launch the play.

is there any evidence that RBLP ever instructed Thibodeau to respond falsely to inquiries from the press. By Thibodeau's own account, Sprecher, the RBLP principal, simply instructed him to keep silent about the Abrams issue, not to lie about it. Neither does Thibodeau claim that RBLP ever lied to him. In short, there is nothing in the record to support Thibodeau's claim that RBLP was causing him to implicate himself, wittingly or unwittingly, in any fraud or scandal.[4]

Thibodeau does claim that, on September 21 and 24, 2012, Sprecher responded dismissively to Thibodeau's expressions of concern that Abrams might be fictitious. In those exchanges, as previously described, Sprecher essentially instructed Thibodeau to keep quiet about the Abrams matter, both in dealing with the public and internally. However, RBLP, as Thibodeau's principal, had no obligation to be more forthcoming in discussing the

[4]As previously noted, on September 8, 2012, Thibodeau did issue, at RBLP's direction, a press release announcing that rehearsals were being delayed "due to the death of a key investor," but there is no evidence in the record to support a finding that either RBLP or Thibodeau had reason to believe that Abrams was fictitious as of that date. Thibodeau's doubts about Abrams arose from discussions he had with the New York Times reporter, and research he conducted, after September 8. While Sprecher told the Times that he had flown to London in a failed attempt to meet with a representative of the Abrams estate, and later admitted that he never made such a trip, that misrepresentation was neither made to Thibodeau nor embodied in any press release that Thibodeau issued.

financing issue with him, or to treat his concerns more respectfully than it did. In this regard, it should be borne in mind that, as Supreme Court emphasized in its decision, Thibodeau had no responsibility whatsoever for the financing of the project or for dealing with the project's investors. His role was simply to prepare and issue press releases and to deal with reporters. If RBLP did not wish Thibodeau to address financing issues in these communications, that was its prerogative as the principal in this principal-agent relationship. Nothing that RBLP did, or is alleged to have done, interfered with Thibodeau's ability to perform honestly the limited task charged to him.

In support of his position that RBLP breached the covenant of good faith and fair dealing, Thibodeau points to deposition testimony by RBLP's general manager that, during the same period in which Sprecher had instructed him not to "go there about this stuff [i.e., the issue of the foreign investors]," Thibodeau was required to "field[]" questions about that very matter. Although Thibodeau might well have felt uncomfortable in meeting the press while under orders not to give them the information they sought, RBLP did not breach the covenant of good faith and fair dealing by giving him those instructions.[5] Again, while the record

[5]Needless to say, dealing with pressure from the press and the public is what publicists are paid to do.

establishes that RBLP — as was its right — directed Thibodeau not to respond substantively to questions concerning the Abrams issue, Thibodeau does not allege that RBLP ever directed him to respond falsely to press inquiries.[6] He could have responded to questions about Abrams, both truthfully and consistent with RBLP's directives, by stating that RBLP was investigating the matter. RBLP, as Thibodeau's principal, was entitled to limit the subjects that Thibodeau, as RBLP's agent, was authorized to discuss substantively with the press and public; if Thibodeau was uncomfortable with that limitation on his authority, he was free to resign.

Even if RBLP could be deemed to have somehow breached its implied duty to Thibodeau of good faith and fair dealing before he committed his own breach of that covenant by sending the anonymous emails, we would not reach a different result. Any such material breach by RBLP, before the breach by Thibodeau, would have given Thibodeau grounds to suspend his own performance and, absent a timely cure by RBLP of its breach, to terminate his contract with RBLP (and then, perhaps, to seek damages for breach) (*see Chemical Bank v Stahl*, 272 AD2d 1, 15 [1st Dept

[6]As RBLP's general manager testified, Thibodeau was expected, "not [to] be dishonest," but to put the production "in the best light possible, all things considered."

2000]; Restatement [Second] of Contracts § 237 and Comments *a* and *b* thereto; 2 Farnsworth, Contracts § 8:15 [3d ed]). But a first material breach of the parties' agreement by RBLP, if there was one, would not have justified Thibodeau's remaining in RBLP's employ while using confidential information entrusted to him to sabotage the production. A party to a bilateral contract, when faced with a breach by the other party, must make an election between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract. Such a party has no right to represent himself as continuing to perform under the contract — and continuing to receive the other party's performance in exchange — while at the same time surreptitiously breaching his own duty by flouting his own implied duty of good faith and fair dealing (*see Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 80 [1st Dept 2002], *lv denied* 100 NY2d 504 [2003] [if a party to a contract, in response to the other party's repudiation of the contract, chooses to "affirm the contract, . . . the nonrepudiating party is deemed to remain obligated to perform under the contract"]; *Inter-Power of N.Y. Inc. v Niagra Mohawk Power Corp.*, 259 AD2d 932, 934 [3d Dept 1999], *lv denied* 93 NY2d 812 [1999] [when an executory contract is breached, the injured party "must . . . make an election (between terminating and

affirming the contract) and cannot at the same time treat the contract as broken and as subsisting," for "(o)ne course of action excludes the other"] [internal quotation marks omitted]; Restatement [Second] of Contracts § 246[1] and Comment *b* thereto; 23 Richard A. Lord, Williston on Contracts § 63:33, at 561-562 ["the victim of the breach may either treat the contract as totally breached and stop its own performance or continue to perform and seek damages for the breach; but it may not stop performance and yet continue to take advantage of the benefits of the contract"]).

In this case, Thibodeau, a sophisticated professional with many years of experience as a publicity agent for major Broadway productions, should have suspended his performance or terminated his agreement with RBLP if he sincerely believed that RBLP's conduct would implicate him in a scandal. Alternatively, if RBLP had instructed Thibodeau to issue a materially false press release or to respond falsely to press inquiries (and there is no evidence that it ever did so), Thibodeau would have had a right to refuse such a directive. He did not, however, have the right to continue as RBLP's publicist while sending a prospective provider of needed capital an anonymous communication deprecating the entire production and suggesting that the producers were guilty parties in a fraudulent scheme. Accordingly, as Supreme

Court correctly held, RBLP is entitled to judgment as to liability on its cause of action against Thibodeau for breach of contract.

Accordingly, the order of the Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about May 28, 2015, which granted plaintiffs' motion for summary judgment as to liability on their cause of action for breach of contract against defendant Thibodeau, and denied Thibodeau's cross motion for summary judgment dismissing plaintiffs' causes of action for tortious interference with prospective business relations and defamation as against him, should be affirmed, with costs.

All concur.

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

ENTERED: AUGUST 18, 2016

DEPUTY CLERK