

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 6, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, DeGrasse, Freedman, JJ.

9120 Joseph LaMorte, et al., Index 120319/02
Plaintiffs,

-against-

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

- - - - -

[And a Third-Party Action]

- - - - -

Consolidated Edison Company of New York, Inc.,
Second Third-Party Plaintiff-Respondent,

-against-

Felix Equities Inc.,
Second Third-Party Defendant,

Roadway Contracting, Inc.,
Second Third-Party Defendant-Appellant.

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

Office of Richard W. Babinecz, New York (Steven T. Brewi of
counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered April 12, 2012, which, after a jury trial, granted
defendant/second third-party plaintiff Consolidated Edison
Company of New York Inc.'s motion for full contractual
indemnification from second third-party defendant Roadway
Contracting, Inc., unanimously reversed, on the law, without

costs, and the motion denied.

On May 26, 2002, plaintiff Joseph LaMorte was injured while riding a bicycle on Seventh Avenue between 21st and 22nd Streets in Manhattan. In January 2001, second third-party defendant Roadway Contracting, Inc. had performed road work in that spot under a contract with second third-party plaintiff Consolidated Edison Company of New York, Inc. (Con Edison).

A little more than one year before the injured plaintiff's accident, Con Edison and Roadway entered into the contract, dated January 31, 2001, which consisted of a term purchase order agreement (the purchase order) and a document entitled "Standard Terms and Conditions of Construction Contracts" (the standard terms). Under the contract's terms, Roadway agreed to install underground conduits and telecommunications equipment boxes as needed during the period from December 18, 2000 to December 17, 2002. Neither party signed either the standard terms or the purchase order.¹

The standard terms contained both a contractual indemnification provision and an insurance procurement provision. The indemnification provision required Roadway to defend and indemnify Con Edison for any liability arising out of Roadway's work, and to pay for Con Edison's legal expenses associated with

¹ At trial, the contract was admitted into evidence without objection. The face of the purchase order stated that the "Current Date" was December 1, 2005. This date appears to represent the date that the purchase order was printed.

that work. The insurance provision, in turn, required Roadway to buy insurance, including a \$5 million comprehensive general liability (CGL) policy naming Con Edison as an additional insured and insuring Con Edison against its own negligence. Further, the insurance provision stated that Roadway was obliged to carry products/completed operations liability insurance "for at least one year after completion of performance hereunder." The purchase order referred to the insurance clause, stating that "[Roadway] shall comply with Con Edison insurance requirements." However, the purchase order did not refer to the indemnification provision. Roadway procured a \$1 million CGL policy from United National Insurance Company.

In 2002, plaintiffs commenced an action against Con Edison to recover damages for personal injuries. At the trial in that action, Con Edison took the position that Roadway's work had caused the accident. The jury rendered a verdict for \$660,000 in plaintiffs' favor, finding the injured plaintiff 40% at fault, Con Edison 35% at fault (for a total of \$231,000), and Roadway 25% at fault (for a total of \$165,000).

After the jury rendered its verdict, Con Edison moved for full indemnification from Roadway for the entire verdict amount and for Con Edison's counsel fees, arguing that under the indemnification provision in the parties' contract, it was entitled to such an award. Con Edison asserted that full indemnification did not violate General Obligations Law § 5-

322.1, which limits indemnification clauses in construction contracts. Rather, Con Edison asserted, although an indemnification clause is unenforceable as applied to liability arising from the indemnitee's own negligence, a contract can require another to obtain insurance covering such liability. Thus, Con Edison concluded, Roadway was liable for full indemnification because it had breached the portion of the contract requiring it to obtain insurance naming Con Edison as an additional insured.

Roadway offered several arguments in opposition, only one of which is relevant on this appeal - namely, that, assuming there was a valid contract, Roadway had not, in fact, breached the contract provision requiring it to make Con Edison an additional insured. Rather, Roadway argued, it had no obligation to maintain insurance past January 26, 2002, one year after it completed the injury-causing road work. Indeed, Roadway noted, Con Edison had ordered it off the work site on January 26, 2001 because its work had caused a water leak, and Roadway performed no further work for Con Edison after that date.

To begin, under the circumstances presented here, Roadway did not breach its duty, under either the purchase agreement or the standard terms, to procure insurance naming Con Edison as an additional insured with respect to plaintiffs' injuries. The standard terms specify that Roadway was obliged to maintain a products/completed operations insurance policy for "at least one

year after completion of performance hereunder.” While the purchase order states that the contract term ran for a two-year period from December 2000 until December 2002, the work that caused plaintiffs’ injuries took place on January 26, 2001. Therefore, Roadway’s duty to maintain insurance with Con Edison as an additional insured ended on January 26, 2002, one year after Roadway finished its work under the contract and approximately four months before the injured plaintiff’s May 2002 accident (*see Regno v City of New York*, 88 AD3d 610 [1st Dept 2011]). Indeed, as Roadway notes, the record shows that Roadway performed no work for Con Edison at all after Con Edison ordered it off the Seventh Avenue work site on January 26, 2001.

Con Edison asserts that the contract imposed a duty on Roadway to maintain insurance in favor of Con Edison until one year after the full contract term ended – that is, until December 17, 2003. We reject this argument, as it has no basis in the contract’s language. On the contrary, although the contract does not define “performance,” its language strongly suggests that the terms “perform” or “performance” refer to the actual physical labor that Roadway was hired to do, not just to Roadway’s theoretical availability to perform work for Con Edison. For example, paragraph 9 of the standard terms, entitled “Contractor’s Performance,” provides that Roadway “shall perform in good workmanlike manner and in accordance with best accepted practices in the industry all the Work specified or reasonably

implied in the Contract" and directs that Roadway "shall provide a full time on-site representative." Similarly, in specifying the manner of performance, the standard terms provide that "all equipment, tools, other construction aids and materials utilized by [Roadway] shall be of high quality and in good working order."

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10277 Manouchehr Malek,
Plaintiff-Appellant,

Index 158489/12

-against-

Kevin N. Malek,
Defendant-Respondent.

Bernard D'Orazio & Associates, P.C., New York (Bernard D'Orazio of counsel), for appellant.

Kevin N. Malek, New York, respondent pro se.

Order, Supreme Court, New York County (Joan M. Kenney, J.), entered March 1, 2013, which denied plaintiff's motion for summary judgment in lieu of a complaint, and directed plaintiff to serve a formal complaint, unanimously affirmed, without costs.

Although plaintiff made a prima facie showing of his entitlement to judgment as a matter of law, defendant's affidavit successfully raised issues of fact concerning the validity of the promissory note based on the defenses of coercion and economic duress.

We have considered plaintiff's remaining arguments,

including his contention that defendant ratified the note by making payments under it, and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10278 In re Brandon M.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -
Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (John A. Newbery of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Diana Lawless of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about December 2, 2011, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crimes of criminally negligent homicide and assault in the third degree, and placed him on probation for a period of 24 months, unanimously affirmed, without costs.

The 24-month term of probation was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). Appellant committed a serious offense by

starting a building fire that resulted in, among other things,
the death of a person.

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10279 Howard Gorman, etc., et al.,
Plaintiffs-Respondents,

Index 16583/06

-against-

Montefiore Medical Center,
Defendant-Appellant.

Wenick & Finger, P.C., New York (Frank J. Wenick of counsel), for appellant.

Richard J. Katz, LLP, New York (Jonathan A. Rapport of counsel), for respondents.

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered January 8, 2013, which, to the extent appealed from, denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

We affirm the order denying summary judgment on the alternate ground that the motion for summary judgment, made more than fifteen months after the filing of the note of issue, was untimely (*see* CPLR 3212[a]; *Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]). Defendant's purported excuse for the late motion – that a CD of an MRI, which had been lost, was found shortly before defendant made the motion – is inadequate. The parties agreed on the MRI's findings of a hip fracture, which were documented in other medical records, including an operative report. While the MRI was relied on by the parties' experts, it was not necessary for defendant's motion and the case could have proceeded to trial without that evidence.

In any event, were we to reach the merits, we would find that the court properly denied defendant's motion. Defendant's motion papers failed to respond to a number of specific allegations of negligence asserted in the bill of particulars, including the central claim concerning the failure of its nurse to reposition the guardrails on the decedent's bed so as to prevent a fall (see *Brosnan v Shafron*, 278 AD2d 442 [2d Dept 2000]). Further, even if defendant's motion papers were sufficient, plaintiff's evidence raised triable issues of fact as to whether defendant departed from the prevailing standards of medical care and whether such departures proximately caused the decedent's injuries (see *Frye v Montefiore Med. Ctr.*, 70 AD3d 15, 25 [1st Dept 2009]).

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CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10280 Coogi Partners LLC,
Plaintiff-Appellant,

Index 650788/12

-against-

Soho Fashion, Ltd.,
Defendant-Respondent.

Davidoff Hutcher & Citron LLP, New York (Charles Klein of counsel), for appellant.

Lazarus & Lazarus, P.C., New York (Michael E. Murav of counsel), for respondent.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered August 14, 2012, which denied plaintiff's motion for summary judgment, unanimously affirmed, without costs.

Plaintiff established the existence of an implied-in-fact contract by submitting the 2011 sales reports generated by defendant, which indicated that royalties and advertising fees were payable at the same rates as set forth in the parties' expired licensing agreement. In opposition, defendant submitted an affidavit by its president, who stated that defendant's nonpayment of royalties at the quarterly intervals set forth in the initial agreement was consistent with its rejection of the royalty terms of the agreement, and that its nonpayment was acquiesced in by plaintiff while the parties negotiated the terms of a new license agreement at a new royalty rate. Thus, an issue of fact exists whether the parties agreed to the same terms and conditions as set forth in the initial agreement (*see Sivin-Tobin*

Assoc., LLC v Akin Gump Strauss Hauer & Feld LLP, 68 AD3d 616 [1st Dept 2009]; *I.G. Second Generation Partners, L.P. v Duane Reade*, 17 AD3d 206, 208 [1st Dept 2005]; *Bessette v Niles*, 23 AD3d 996 [4th Dept 2005]; *Berlinger v Lisi*, 288 AD2d 523, 524 [3d Dept 2001]).

Defendant's contention that the parties were actively negotiating a new reduced royalty rate and that payments made in the interim period were to be credited against amounts due under a prospective new license agreement at a new royalty rate raises an issue of fact as to the reasonable value of the services defendant provided, precluding summary judgment on plaintiff's claim of unjust enrichment (see *Georgia Malone & Co., Inc. v Rieder*, 86 AD3d 406, 410 [1st Dept 2011], *affd* 19 NY3d 511 [2012]).

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10281 Northern Stamping, Inc., Index 652445/11
Plaintiff-Appellant-Respondent,

-against-

Monomoy Capital Partners, L.P., et al.,
Defendants-Respondents-Appellants.

Trachtenberg Rodes & Friedberg, LLP, New York (Barry Friedberg of counsel), for appellant-respondent.

Crowell & Moring LLP, New York (John N. Thomas of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered June 6, 2012, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the causes of action for breach of fiduciary duty, tortious interference with economic advantage, and negligent misrepresentation, and denied the motion as to the cause of action for fraud/fraudulent inducement, unanimously modified, on the law, to grant the motion as to the cause of action for fraud/fraudulent inducement, and otherwise affirmed, without costs.

Contrary to plaintiff's contention, the breach of fiduciary duty cause of action is unsupported by any facts from which the formation of a joint venture or partnership could be inferred (see *Matter of Steinbeck v Gerosa*, 4 NY2d 302, 317 [1958]). Moreover, it is duplicative of the breach of contract cause of action (see *Nineteen Eighty-Nine, LLC v Icahn*, 96 AD3d 603, 604

[1st Dept 2012]).

Apart from the allegations of breach of fiduciary duty, which fail to state a cause of action, the tortious interference cause of action is unsupported by any facts that would establish an independent tort (see *Amaranth LLC v J.P. Morgan Chase & Co.*, 71 AD3d 40, 47 [1st Dept 2009], *lv dismissed in part, denied in part* 14 NY3d 736 [2010]). The negligent misrepresentation cause of action also relied on an alleged fiduciary or confidential relationship (see *MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 296 [1st Dept 2011]).

The complaint fails to allege factual details that would establish specific damages resulting from defendants' alleged misrepresentations and thus, the fraud cause of action should be dismissed (see *id.*).

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

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10282-

10283 In re Solangee Z.,
 Petitioner-Respondent,

-against-

 Kahir E.,
 Respondent-Appellant.

Law Offices of Randall S. Carmel, Syosset (Randall S. Carmel of counsel), for appellant.

Daniel R. Katz, New York, for respondent.

Ballon Stoll Bader & Nadler, P.C., New York (Frederic P. Schneider of counsel), attorney for the child Akiyl E.

Order, Family Court, New York County (Helen C. Sturm, J.), entered on or about December 20, 2007, which, to the extent appealed from as limited by the briefs, denied respondent father's motion to dismiss petitioner mother's petition for custody of the parties' youngest child, and order, same court (Gloria Sosa-Lintner, J.), entered on or about December 1, 2010, which, to the extent appealed from as limited by the briefs, granted the mother's petition for sole custody of, and sole medical decision-making for, the child, and awarded the father alternative week visitation, unanimously affirmed, without costs.

Petitioner met her burden of demonstrating by a fair preponderance of the evidence that respondent had been properly served with the petition (*see Tirado v City of New York*, 200 AD2d 383 [1st Dept 1994]). Petitioner's coworker, who had seen

respondent in the past and knew him to be the child's father, testified that he served the petition on the father at the child's school. The court found the coworker's testimony to be credible, and there is no basis to disturb that credibility determination (*id.*; *Matter of Tiffany E.*, 214 AD2d 469 [1st Dept 1995]).

The court properly elected to proceed with the custody hearing even though respondent had not received responses to his interrogatories, because he ignored the court's prior instruction to obtain leave of court before seeking such discovery (see CPLR 408).

The record supports the court's determination that the child's best interests would be served by awarding petitioner sole custody and sole authority for medical decision-making (see *Matter of Frank M. v Donna W.*, 44 AD3d 495, 495-496 [1st Dept 2007]). The record shows that respondent refused to permit his daughter, the parties' oldest child, to undergo required surgery and refused to comply with the court's directives concerning a psychiatric evaluation for the younger child. Further, the

court-appointed psychiatric expert stated that the younger child would benefit from a transfer of custody to petitioner.

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10284 In re Carmen Velez,
Petitioner,

Index 401368/12

-against-

Mathew M. Wambua, etc.,
Respondent.

Milbank, Tweed, Hadley & McCloy, LLP, New York (James G. Foster for counsel), for petitioner.

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

Determination of respondent New York City Department of Housing Preservation and Development (HPD), dated February 29, 2012, which, after a hearing, terminated petitioner's Section 8 rent subsidy, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alexander W. Hunter, Jr., J.], entered October 9, 2012), dismissed, without costs.

The challenged determination is supported by substantial evidence (*see generally Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). Petitioner made numerous false representations to HPD about her income and employment status, despite multiple warnings that doing so could result in termination of the subsidy. Petitioner's argument that she mailed pay stubs to HPD and relied upon the erroneous advice of an HPD employee is unavailing. The Hearing Officer discredited petitioner's

testimony to that effect, and there is no basis upon which to disturb this credibility determination (see *Matter of Beckles v Cestero*, 102 AD3d 559 [1st Dept 2013]).

The penalty imposed does not shock one's sense of fairness under the circumstances (see e.g. *Matter of Perrette v New York City Dept. of Hous. Preserv. & Dev.*, __ AD3d __, 962 NYS2d 123 [1st Dept 2013]; *Matter of Gerena v Donovan*, 51 AD3d 502 [1st Dept 2008]).

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10285 Lion Copolymer, LLC,
 Plaintiff-Respondent,

Index 651993/12

-against-

Kolmar Americas, Inc.,
 Defendant-Appellant,

SGS Nederland B.V., et al.,
 Defendants.

Lennon, Murphy, Caulfield & Phillips, LLC, New York (Patrick F. Lennon of counsel), for appellant.

Duane Morris LLP, New York (James W. Carbin of counsel), for respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered on or about January 10, 2013, which, to the extent appealed from, denied defendant Kolmar Americas, Inc.'s motion to dismiss as against it the causes of action for breach of contract, breach of implied warranty of merchantability, breach of implied warranty of fitness for a particular purpose, and negligence, unanimously affirmed, with costs.

The complaint alleges that defendant allowed the quality of the contracted-for petroleum product to degrade, and failed to deliver a product conforming to the parties' contract specifications. Even if plaintiff assumed the risk of loss during transportation, that would not be fatal to its claims, since plaintiff alleges that the loss occurred before loading; it contests the findings of inspection reports that a conforming

product was loaded for delivery.

We have considered defendant's remaining arguments, including that plaintiff failed to give it proper notice of its claim regarding the quality of the product, and find them unavailing.

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OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10286 Irene David Realty, Inc., et al., Index 110014/09
Plaintiffs-Appellants,

-against-

David Moyal, et al.,
Defendants-Respondents,

121 Varick Street Corp.,
Nominal Defendant.

Lawlor & Rella LLP, New York (Anthony J. Rella of counsel), for appellants.

White Fleischner & Fino LLP, New York (Benjamin A. Fleischner of counsel), for respondents.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 26, 2012, which denied plaintiffs' motion for partial summary judgment on their first, third and fifth causes of action to the extent based on allegations that defendants engaged in self-dealing in connection with the subleasing of the ground floor premises at 121 Varick Street, unanimously affirmed, with costs.

Plaintiffs, minority shareholders in 121 Varick Street Corp. (Varick), a commercial cooperative corporation, allege that defendant Moyal, as president of the board of directors, engaged in self-dealing and breached his fiduciary duties. Moyal owns two corporations that lease space on the ground floor of the building. Plaintiffs do not contend that Moyal was improperly involved in the approval of the primary leases between the two

Moyal corporations and Varick, or that those leases were otherwise improper. Under the terms of the leases, the Moyal corporations have a right to enter into subleases, subject to board approval, and Varick has no interest in any profits made on such subleases. However, they complain that Moyal improperly participated in the board's vote to approve a sublease between the two corporations and a third party, and that they will reap substantial profits from the sublease, while Varick will not benefit from the sublease at all.

Plaintiffs cite no authority in support of their claim that a commercial cooperative that freely and fairly negotiates the terms of a lease is later entitled to additional rent profits if the lessee enters into a sublease permitted by the lease terms, merely because the sublease must be approved by the cooperative's board. At best, plaintiffs presented evidence that Moyal voted to approve the sublease, even though he had an interest in it. In opposition, defendants submitted evidence showing that the sublease was subsequently ratified by a disinterested director, following full disclosure of Moyal's financial interests, and that the board had a liberal policy of approving subleases and historically had not been involved in the setting of rents on subleases. Plaintiffs thus failed to eliminate any triable issues of fact regarding whether defendants exceeded the protection of the business judgment rule by taking action that "[had] no legitimate relationship to the welfare of the

cooperative, deliberately single[d] out individuals for harmful treatment, [was] taken without notice or consideration of the relevant facts, or [was] beyond the scope of the board's authority" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 540 [1990]; see also *40 W. 67th St. v Pullman*, 100 NY2d 147, 153 [2003]). To the extent a conflict of interest was involved due to Moyal's interest in the sublease, defendants raised an issue of fact as to whether the sublease was properly ratified and whether the alleged self-dealing resulted in any unfairness to Varick (see generally *Alpert v 28 Williams St. Corp.*, 63 NY2d 557, 570 [1984]; *Simpson v Berkley Owner's Corp.*, 213 AD2d 207 [1st Dept 1995]).

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judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10288 Marion Franchini,
Plaintiff-Appellant,

Index 309358/09

-against-

American Legion Post,
Defendant-Respondent.

Pirrotti & Glatt Law Firm PLLC, Scarsdale (Anthony Pirrotti, Jr. of counsel), for appellant.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Nicholas Hurzeler of counsel), for respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered May 29, 2012, which granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff alleges that she was injured when, after exiting a door of defendant's catering facility, she tripped over a single step that separated the area where the door was located from a patio. Defendant submitted evidence, both testimonial and photographic, demonstrating that the step was open and obvious and not inherently dangerous (see *Remes v 513 W. 26th Realty, LLC*, 73 AD3d 665, 666 [1st Dept 2010]).

Plaintiff's opposition failed to raise a triable issue of fact. The record fails to support plaintiff's argument that the concrete step created an optical confusion, since it was a different color than the tiled floor (see *Langer v 116 Lexington Ave., Inc.*, 92 AD3d 597, 599-600 [1st Dept 2012]). Although there were people present attending a party, there was no evidence that their presence rendered the step dangerous (compare *Cassone v State of New York*, 85 AD3d 837 [2d Dept 2011]). Indeed, plaintiff testified that she did not see the step because she was looking straight ahead at a friend when she fell (see *Outlaw v Citibank, N.A.*, 35 AD3d 564, 565 [2d Dept 2006]).

Plaintiff's reliance on the unsworn report of her expert is unavailing. The expert failed to identify any applicable code, regulation or industry standards that were violated (see *Boatwright v New York City Tr. Auth.*, 304 AD2d 421 [1st Dept 2003]).

Plaintiff's argument that the stainless steel trough into which she fell created a dangerous condition is raised for the first time on appeal and therefore we decline to consider it (see e.g. *Bitter v Renzo*, 101 AD3d 465 [1st Dept 2012]). In any event, the trough did not cause the accident or present a foreseeable risk of harm (see e.g. *Shatz v Kutshers Country Club*, 247 AD2d 375 [2d Dept 1998]).

We have considered plaintiff's remaining arguments, including that defendant had notice of the allegedly defective condition of the step and trough, and find them unavailing.

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

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policy, such charges are deemed to be pending if the employee has been informed that they are being prepared. Here, respondent informed petitioner, prior to February 10, 2012, the effective date of his resignation as stated in the notice of resignation submitted by petitioner, that disciplinary action was being taken against him based on his failure to obtain the requisite permission to engage in outside employment. Respondent reasonably complied with its own regulations when it determined that the lack of good standing disqualified petitioner from eligibility to participate in the Vested Benefits Program (see *Matter of Hanchard v Facilities Dev. Corp.*, 85 NY2d 638, 641-642 [1995]; *O'Neill v New York Univ.*, 97 AD3d 199, 213 [1st Dept 2012]).

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

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Petitioner was laid off by DESCO on June 9, 2009; she filed her administrative complaint with DHR on June 9, 2010. To the extent her claims are premised upon alleged adverse action by DESCO, that action must have occurred before June 9, 2009. Those claims therefore are untimely (see Executive Law § 297[5]). To the extent petitioner's retaliation claim is premised upon being laid off, that claim fails because the activity for which petitioner alleges she was retaliated against was not a protected activity (see Executive Law § 296[7]; *Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 312-313 [2004]; *Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 528 [1st Dept 2013]). Further, the alleged protected activity occurred nearly three years before petitioner was laid off and therefore was "not temporally proximate enough" to establish a causal connection to the layoff (see *Baldwin v Cablevision Sys. Corp.*, 65 AD3d 961, 967 [1st Dept 2009], *lv denied* 14 NY3d 701 [2010]).

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

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10292 The People of the State of New York,
Respondent,

Ind. 3133/09
1247/10

-against-

George Campbell,
Defendant-Appellant.

Center for Appellate Litigation, New York (Robert S. Dean 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
(Daniel FitzGerald, J.), rendered on or about June 4, 2010,

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

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

ENTERED: JUNE 6, 2013


CLERK

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

Gonzalez, P.J., Andrias, Richter, Clark, JJ.

10293N Gregory A. Clark, etc., et al., Index 102464/11
Plaintiffs-Respondents,

-against-

Archdiocese of New York, et al.,
Defendants-Appellants.

An appeal having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Lucy Billings, J.), entered on or about September 20, 2012,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated May 20, 2013,

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10294N Galen Technology Solutions, Inc., Index 102397/08
Plaintiff-Appellant,

-against-

VectorMAX Corporation,
Defendant-Respondent.

Saiber LLC, New York (Christle R. Garvey of counsel), for
appellant.

Folkenflik & McGerity, LLP, New York (Max Folkenflik of counsel),
for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.),
entered May 11, 2012, which, to the extent appealed from, denied
plaintiff's motion pursuant to CPLR 5228 for the appointment of a
receiver to take possession of four patents owned by defendant,
unanimously affirmed, with costs.

In October 2009, plaintiff, a search and consulting firm
that had provided services to defendant, VectorMAX Corporation,
obtained a judgment against VectorMAX, which develops video
streaming software, used by, among others, Time Warner Cable.
VectorMAX has paid approximately half of the judgment, leaving a
balance of about \$175,000.

The motion court properly exercised its discretion in
declining to appoint a receiver to take possession of and sell
four patents held by VectorMAX (*see Hotel 71 Mezz Lender LLC v
Falor*, 14 NY3d 303, 317 [2010]). Plaintiff failed to demonstrate
a "special reason" to justify the appointment of a receiver

(Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C5228:1, at 324). Plaintiff failed to show that it had exhausted all its alternative remedies, since it took no action to collect its judgment, other than serving restraining notices and information subpoenas. There was no showing that a receivership would increase the likelihood that the judgment would be satisfied, since plaintiff has not demonstrated the value or marketability of the four patents and whether their sale would be sufficient to cover the remainder of its judgment. Moreover, the sale of the four patents would likely jeopardize defendant's operations, run the risk of insolvency, thereby preventing it from paying any of its creditors, including plaintiff. Finally, plaintiff did not show a risk of fraud or insolvency if a receiver is not appointed, since there was no showing that defendant acted fraudulently. Further, appointing a receiver and selling the four patents could create a risk of insolvency, which receivership was designed to avoid (see *Hotel 71 Mezz Lender LLC v Falor*, 14 NY3d at 317). The court could also take into consideration that plaintiff's application was opposed by another judgment creditor who filed a lien encumbering the four patents after plaintiff sought appointment of a receiver.

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

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10295N Flame S.A., Index 105607/10
Plaintiff-Appellant,

-against-

Worldlink International (Holding) Ltd., et al.,
Defendants-Respondents,

Worldlink Shipping Ltd.,
Defendant.

Blank Rome LLP, New York (William R. Bennett, III of counsel),
for appellant.

Mahoney & Keane, LLP, New York (Garth S. Wolfson of counsel), for
respondents.

Order, Supreme Court, New York County (Paul Wooten, J.),
entered December 10, 2012, which granted the motion of defendants
Worldlink International (Holding) Ltd. (Holding), Worldlink
Tanker Ltd. (Tanker), Worldlink Energy Ltd. (Energy), Worldlink
(HK) Resources Ltd. (HK), and Worldlink (Canada) Resources Ltd.
(Canada) to dismiss the complaint based on forum non conveniens,
and denied plaintiff's cross motion to compel discovery,
unanimously affirmed, with costs.

In 2009, plaintiff - a Swiss corporation with its principal
place of business in Switzerland, but registered to do business
in New York - obtained a judgment in London against defendant
Shipping Ltd. (Shipping), which is another foreign corporation
registered to do business in New York. In 2010, the United
States District Court for the Southern District of New York

recognized the foreign judgment. Thereafter, plaintiff brought the instant action, alleging that all of the defendants were alter egos and therefore jointly and severally liable for the judgment against Shipping.

Holding, Tanker, and Energy are Samoan companies with offices in Samoa. As of the date this action was commenced, these defendants were registered to do business in New York. They subsequently surrendered their authority to do business.

HK is a Hong Kong company with its principal place of business in Hong Kong. Canada is a Canadian company with its principal place of business in Vancouver.

Defendants moved to dismiss based on forum non conveniens or, in the alternative, failure to state a cause of action. As a further alternative, Holding, HK, and Canada moved to dismiss for lack of personal jurisdiction.

The court should have addressed the issue of personal jurisdiction before forum non conveniens because, if a court lacks jurisdiction over a defendant, it is "without power to issue a binding forum non conveniens ruling as to" that defendant (*Wyser-Pratte Mgt. Co., Inc. v Babcock Borsig AG.*, 23 AD3d 269, 269 [1st Dept 2005]).

New York courts have personal jurisdiction over Holding because, at the time this action was commenced, Holding was registered to do business in New York (*see Doubet LLC v Trustees of Columbia Univ. in the City of N.Y.*, 99 AD3d 433, 434-435 [1st

Dept 2012]; *Minmetals Shipping & Forwarding Co. Ltd. v HBC Hamburg Bulk Carriers, GmbH & Co. KG*, 2008 US Dist LEXIS 48639, *8-*10 [SD NY, June 24, 2008, No. 08 Civ. 3533]).

HK and Canada are subject to personal jurisdiction because they are "nothing more than the name under which" Holding, which is subject to New York jurisdiction, did business in Hong Kong and Canada (*Public Adm'r of County of N.Y. v Royal Bank of Can.*, 19 NY2d 127, 131 [1967]). In support of its motion to dismiss, Holding submitted a declaration stating that it had offices in Samoa. However, defendants' marketing materials say that Holding has offices in Hong Kong and Vancouver, i.e., they attribute HK's and Canada's offices to Holding. Similarly, *Public Adm'r* found that New York had personal jurisdiction over Royal Bank of Canada (France), even though that defendant was separately incorporated from Royal Bank of Canada (which was subject to New York jurisdiction), where, inter alia, Royal Bank of Canada declared in its advertising that France was one of the countries in which it had branches (*id.* at 131-132).

The motion court properly dismissed based on forum non conveniens. Contrary to plaintiff's claim, an alternative forum is not absolutely required under New York law, as opposed to federal law (see e.g. *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478, 481, 483-484 [1984], *cert denied* 469 US 1108 [1985]; *Shin-Etsu Chem. Co., Ltd. v ICICI Bank Ltd.*, 9 AD3d 171, 179 [1st Dept 2004]). In any event, "the burden of demonstrating that [no

alternative forum is available] . . . fall[s] on plaintiff” (*Pahlavi*, 62 NY2d at 481). Plaintiff has not shown that Samoa, Hong Kong, and Canada are inadequate alternative fora.

“The applicability of foreign law is an important consideration in determining a forum non conveniens motion and weighs in favor of dismissal” (*Shin-Etsu*, 9 AD3d at 178 [citations omitted]). The question of whether defendants’ corporate veils should be pierced will be determined by the laws of each defendant’s state of incorporation (see e.g. *Klein v CAVI Acquisition, Inc.*, 57 AD3d 376, 377 [1st Dept 2008]). That means that a New York court will have to apply the laws of Samoa, Hong Kong, and Canada.

The witnesses and documents required to show that defendants are alter egos will likely be located in Samoa, Hong Kong, and Canada. This also weighs in favor of dismissal (see e.g. *Zelouf v Republic Natl. Bank of N.Y.*, 225 AD2d 419 [1st Dept 1996]).

Other than the fact that plaintiff is trying to enforce a judgment of the Southern District of New York (which merely recognized a London judgment against Shipping), this case has no tie to New York. Therefore, the motion court properly dismissed based on forum non conveniens (see e.g. *OneBeacon Am. Ins. Co. v Newmont Min. Corp.*, 82 AD3d 554, 555 [1st Dept 2011]; *Lehrer v Procope & Co.*, 35 AD2d 794 [1st Dept 1970]).

In light of the forum non conveniens dismissal, the court properly denied plaintiff's cross motion to compel discovery as moot.

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

ENTERED: JUNE 6, 2013


CLERK

Gonzalez, P.J., Sweeny, Richter, Clark, JJ.

10296 In re Jeffrey Wilson,
[M-2252] Petitioner,

Ind. 2615/08

-against-

Hon. Barbara Newman, etc., et al.,
Respondents.

Jeffrey Wilson, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for Hon. Barbara Newman, respondent.

Robert T. Johnson, District Attorney, Bronx (Jason S. Whitehead of counsel), for L. Newton Mendys, respondent.

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

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

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

ENTERED: JUNE 6, 2013


CLERK

Mazzarelli, J.P., Moskowitz, DeGrasse, Feinman, Clark, JJ.

9687N Theresa Abdur-Rahman, etc., Index 309809/10
Plaintiff-Appellant,

-against-

Catherine G. Pollari, et al.,
Defendants-Respondents,

The City of New York,
Defendant.

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

Picciano & Scahill, P.C., Westbury (Andrea E. Ferrucci of
counsel), for Catherine G. Pollari and Thomas C. Pollari,
respondents.

Law Office of James J. Toomey, New York (Evy L. Kazansky of
counsel), for Armao, Costa & Ricciardi, CPA's P.C., respondent.

Nelson Levine De Luca & Hamilton, LLC, New York (Christopher J.
Soverow of counsel), for Barak Speedy Lube, Inc., respondent.

Order, Supreme Court, Bronx County (Larry S. Schachner, J.),
entered February 8, 2012, which, in this wrongful death action,
to the extent appealed from as limited by the briefs, granted the
motions of defendant Speedy Lube and the Pollari defendants to
compel discovery, and denied plaintiff's cross motion for a
protective order, unanimously modified, on the law and the facts,
to deny that part of defendants' motions, and grant that part of
plaintiff's cross motion, concerning records related to any
HIV/AIDS status that plaintiff's decedent may have and, with
respect to defendants' demand for authorizations to inspect the
medical records of any and all physicians and hospitals that

treated decedent in the 10 years prior to his death, to grant their motion only to the extent of compelling plaintiff to produce authorizations for records of physician and hospital treatment in the 5 years prior to decedent's death, and otherwise affirmed, without costs.

Plaintiff's husband, the decedent, stopped his car on the side of an overpass on the Bruckner Expressway to close the hood. Plaintiff alleges that the hood had not been properly closed by defendant Speedy Lube after it performed an oil change on the car earlier that day. While decedent was standing in front of the car, another car, driven by defendant Catherine Pollari, rear-ended decedent's vehicle. This caused decedent's car to roll into him and push him off the overpass, which was apparently missing a guardrail. Decedent was killed by the fall, and plaintiff commenced this wrongful death action.

The court ordered defendants to take plaintiff's deposition before she would be required to execute any authorizations for the release of medical records related to physician and hospital visits made by decedent prior to his death. However, at her deposition, plaintiff refused to answer questions concerning her husband's health while he was alive, claiming application of the spousal privilege. She mentioned that he had received social security disability benefits for an eight-year period ending approximately five years before his death, but would not disclose

the nature of the disability. Speedy Lube then moved to compel plaintiff to provide it with authorizations to request the medical records related to the treatment of plaintiff by any and all medical providers within 10 years of his death.

Speedy Lube also asserted in the motion that plaintiff had unreasonably objected to protocols it had proposed regarding a scheduled inspection of decedent's car, and sought an order compelling plaintiff to abide by those protocols. Also, because plaintiff retained exclusive control over the vehicle, and had arranged for an expert to inspect it on an ex parte basis, defendant sought disclosure of the identity of the expert, as well as any recordings the expert had made relating to the inspection or any reports the expert had generated.

The other defendants moved for the same relief. Plaintiff cross-moved for, inter alia, a protective order. In his affirmation in support of the cross motion, plaintiff's counsel invoked Public Health Law § 278(2)(a), asserting that the law "shields from disclosure confidential HIV related information, unless an application is made showing 'a compelling need for disclosure of the information for the adjudication of a criminal or civil proceeding.'" Plaintiff argued that defendants had not demonstrated any compelling need for such records. Plaintiff also opposed defendants' request for medical records in general,

contending that she had not placed decedent's health at issue, and that defendants were on a fishing expedition. Plaintiff asserted that defendants' proposed inspection protocol was vague and unnecessary, and that it was likely to result in destruction of evidence. Further, she argued that the expert discovery requested by defendants went beyond the scope of what she was obligated to exchange pursuant to CPLR 3101(d). In reply, defendants collectively asserted that, by invoking Public Health Law § 2785, plaintiff had "suggested" that decedent had HIV or AIDS, which was sufficient to require inspection of related medical records.

The IAS court granted defendants' motions to compel and denied plaintiff's application for a protective order. It found that decedent's medical records were relevant and material to plaintiff's wrongful death claim. The court also granted defendants the relief they sought with respect to inspection of the car, but provided that there would be no destructive testing of the car.

It is well settled that, in determining the types of material discoverable by a party to an action, whether something is "material and necessary" under CPLR 3101(a) is "to be interpreted liberally to require disclosure, upon request, of any facts bearing on the controversy which will assist preparation for trial by sharpening the issues and reducing delay and

prolixity" (*Allen v Crowell-Collier Publ. Co.*, 21 NY2d 403, 406 [1968]). Under that broad standard, defendants are entitled to records shedding light on decedent's health at the time of his death and prior thereto. Plaintiff is seeking "fair and just compensation for the pecuniary injuries resulting from the decedent's death to the persons for whose benefit the action is brought" (EPTL 5-4.3[a]). One of the factors in determining fair and just compensation is the decedent's health and life expectancy at the time of death (see *Johnson v Manhattan & Bronx Surface Tr. Operating Auth.*, 71 NY2d 198, 203 [1988]). Accordingly, it is appropriate for defendants to have access to records reflecting decedent's health condition in the months and years prior to his death.

At the same time, plaintiff is entitled to some reasonable restriction on the scope of the records. Defendants have made no showing why 10 years of records are material and necessary to the defense of this action. A limitation in scope to records preceding decedent's death by five years is far more reasonable under the circumstances (see *Chervin v Macura*, 28 AD3d 600, 601 [2d Dept 2006]).

Defendants' argument that they are entitled to records bearing on any HIV infection or AIDS which decedent may have had requires a closer analysis than simply deciding whether it is

material and necessary. That is because Public Health Law § 2785(2) limits the circumstances under which a court may order disclosure of such records, and the only one applicable here mandates that the requesting party demonstrate a “compelling need” for the records. This Court has rejected as “flawed” the argument that “a ‘compelling need’ under Public Health Law § 2785(2) can be established by a showing that the information [sought] is ‘material and necessary’ within the purview of CPLR 3101(a)” (*Del Terzo v Hospital for Special Surgery*, 95 AD3d 551, 552 [1st Dept 2012]). Further, in demonstrating a compelling need, the requesting party must, as a threshold matter, establish that the subject of the requested records actually has or had HIV or AIDS (*id.* at 553; *Budano v Gurdon*, 97 AD3d 497, 499 [1st Dept 2012]).

Defendants’ sole argument for establishing that decedent had HIV or AIDS is that plaintiff invoked Public Health Law § 2785(2) in her cross motion for a protective order. However, something more direct and concrete is required for purposes of compelling production of such sensitive medical records. For example, in *Budano* (97 AD3d 497), we found that the plaintiff’s counsel’s representation that it would not be feasible to redact information related to any HIV status was not probative as to whether the plaintiff actually had HIV (*id.* at 499). Defendants here have failed to offer any direct evidence suggesting that decedent had HIV or AIDS.

Even if they had made such a showing, we would not find that they demonstrated a compelling need for records related to decedent's condition. The mere fact that decedent was infected with HIV or had AIDS would not necessarily be material in determining the pecuniary value of his life had the accident not occurred. In order to satisfy the requirements of Public Health Law § 2785(2), defendants were required to present an expert affidavit linking any such condition to an expected diminution in plaintiff's quality of life and life expectancy (see *Budano*, 97 AD3d at 499). After all, without such evidence it would be impossible for any court to satisfy its obligation, codified in Public Health Law § 2785(5), to support any ruling finding a compelling need to disclose HIV and AIDS records with "written findings of fact, including scientific or medical findings, citing specific evidence in the record which supports [such a] finding." Certainly here the court did not make any such findings, or, at the very least, order a fact-finding hearing to more closely assess whether a compelling need existed (*cf. Doe v Sutlinger Realty Corp.*, 96 AD3d 898, 899 [2d Dept 2012]).

Defendants, citing this Court's decision in *Matter of Plaza v Estate of Wisser* (211 AD2d 111 [1st Dept 1995]), argue that it is unnecessary to show a compelling need for HIV and AIDS records where the subject of the records is deceased. However, in that case this Court merely observed that one of the goals of Public Health Law § 2785 is to preserve confidentiality in order to

encourage HIV testing, and that such a consideration does not exist where a person who had HIV or AIDS has died (211 AD2d at 123). The Court still performed a compelling need analysis as required by the statute (*id.*). Accordingly, we do not interpret that case as eliminating the requirement to show compelling need where the subject of the HIV or AIDS records is deceased.

As for the expert discovery sought by defendants, CPLR 3101(d)(2) only permits the discovery of materials prepared in anticipation of trial "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Because the condition of the hood latch at the time of the accident will be a key factor in plaintiff's case, the IAS court properly exercised its discretion in ordering plaintiff to identify the expert or experts who performed the *ex parte* inspection of the vehicle in question. Further, the court properly directed plaintiff to disclose to defendants written materials and recordings made in connection with the inspection (whether photographic, video, or other), since without them defendants will be at a palpable disadvantage and unable to determine whether any spoliation occurred. However, the court should have made clear that plaintiff is only required to

disclose those materials that are reasonably capable of shedding light on the precise type of testing plaintiff's expert or experts performed on the hood latch of the car, and of revealing the condition of the latch before and after the testing.

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

ENTERED: JUNE 6, 2013


CLERK

motion to set aside NYCHA's determination terminating her public housing tenancy, and remanding the matter for a new hearing at which petitioner would be afforded the assistance of a guardian ad litem, reversed, on the law, without costs, the petition denied and the proceeding brought pursuant to CPLR article 78 dismissed.

As petitioner concedes, in the order entered July 28, 2010, the Supreme Court erred in sua sponte remanding the matter for a second mental competence evaluation, since no challenge to the mental health evaluation was raised in the administrative proceedings or in the subject petition (*see e.g. Lombardo v Mastec N. Am., Inc.*, 68 AD3d 935, 936-937 [2d Dept 2009]).

The findings of nondesirability and breach of NYCHA's rules and regulations were supported by substantial evidence that petitioner pleaded guilty to criminal sale of a controlled substance in the third degree in 2007, and that the conviction arose from petitioner's sale of crack cocaine to an undercover officer on NYCHA's premises (*see Matter of Rodriguez v New York City Hous. Auth.*, 84 AD3d 630, 631 [1st Dept 2011]; *Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]).

The penalty of termination does not shock our sense of fairness. Even accepting petitioner's assertions of rehabilitation, such evidence does not warrant a different determination (*see Rodriguez*, 84 AD3d at 631).

Upon introduction of evidence of petitioner's purported mental illness, the Hearing Officer properly adjourned the proceedings so that petitioner could undergo a mental competency evaluation by NYCHA's Social Services Department (see NYCHA GM-3742 Revised, ¶ III[E][3]). Upon completion of the evaluation, the Hearing Officer properly reviewed the Social Services' report (*id.* at ¶ III[F][1][a]), and noted that Social Services had determined that petitioner was competent and did not require a guardian ad litem. Accordingly, the hearing resumed and petitioner appeared pro se and without the assistance of a guardian, although she was assisted by her daughter, a lay person.

Petitioner failed to meet her burden of establishing that she was not mentally competent at the time of the hearing (see GM-3742 Revised, ¶ III[F][4]; compare *Matter of Smalls v New York City Hous. Auth.*, 25 AD3d 478, 479 [1st Dept 2006], with *Matter of Padilla v Martinez*, 300 AD2d 96, 99-101 [1st Dept 2002]). Moreover, there is no support for the Supreme Court's determination, in the order entered July 18, 2012, that the Hearing Officer was obligated to "err on the side of caution," disregard the mental competence evaluation, and appoint a guardian. Nor is there support for the court's determination that the mental competence evaluation was insufficient, or that the evaluator should have followed-up with petitioner's providers after the evaluation (see GM-3742 Revised; see also *Blatch v*

Hernandez, 2008 WL 4826178, 2008 US Dist LEXIS 92984 [SD NY, Nov. 3, 2008, No. 97-Civ-3918(LTS) (HBP)] [approving NYCHA settlement, which included GM-3742 Revised]).

There is no support for our concurring colleague's view that petitioner's mental competence evaluation was rendered "incomplete" because it did not reflect an attempt to contact collateral sources such as petitioner's daughter, son, sister and case manager. Under ¶ GM-3742 IIIC[2][a] and [b], mental competence is defined as a tenant's ability to understand the nature of the proceedings and to adequately protect and assert his/her rights and interests in the tenancy. On this record, such contacts were not required by GM-3742 and it is speculative to say that they would have yielded relevant information. It also does not follow, as the concurrence asserts, that the Hearing Officer failed to critically examine the evaluation simply because she adopted its conclusions. The concurrence's citation to GM-3742 IIIF[1][b] is inapt because this appeal does not involve a guardian ad litem's pre-decision request for a mental competence evaluation or a stipulation of settlement. Also, the Hearing Officer's decision recites evidence of respondent's 2007 guilty plea to the drug charge as well as her 2009 guilty plea to a violation that was committed three days before the hearing commenced. As a matter of law, respondent was presumptively competent to enter those pleas (*see People v Gelikkaya*, 84 NY2d 456, 459 [1994]). This unrebutted presumption

is itself sufficient as a rational basis for the Hearing Officer's determination that respondent failed to establish that she was not mentally competent at the time of her hearing.

All concur except Gische, J. who concurs in a separate memorandum as follows:

GISCHE, J. (concurring)

Like my colleagues, I would reverse each of the judgments entered in favor of the petitioner, but on narrower grounds. I agree that the Supreme Court erred when, in the order entered July 28, 2010, it sua sponte remanded the matter for a second mental competence evaluation. I also agree that the July 18, 2012 application to set aside the post-hearing determination, on the basis that petitioner was not mentally competent at the time of hearing, was correctly decided by the Hearing Officer because, under the applicable regulation, petitioner did not sustain her burden of proof.

I write separately, however, because I do not agree with the majority that the mental competence evaluation performed by the Social Services Department (Social Services) was sufficient, or that the Hearing Officer complied, at the initial hearing, with all of her obligations under GM-3742, as revised after the stipulation and order of settlement as approved in *Blatch v Hernandez* (2008 WL 4826178, 2008 US Dist LEXIS 92984 [SD NY, Nov. 3, 2008, No. 97-Civ-3918) [Blatch Consent Decree].

Revised GM-3742 sets forth the procedures NYCHA must follow in assessing the mental competence of public housing tenants facing termination proceedings. These procedures are also part of NYCHA's obligation under the *Blatch* Consent Decree. Where a tenant is identified as possibly having a mental condition, the Department of Social Services is required to "perform an

evaluation of the tenant's mental competence, complete a report setting forth any relevant information and recommend whether or not a Guardian Ad Litem (GAL) should be appointed for the tenant" (GM-3742 III[C][1]). GM-3742 defines a mentally competent tenant as someone who is able to "[u]nderstand the nature of the proceedings" and "[a]dequately protect and assert his/her rights ... in the tenancy" (*id.* at III[C][2][a], [b]). If Social Services cannot determine that the tenant is mentally competent, then it "shall" recommend the appointment of a GAL (*id.* at III[C][3]).

At the underlying hearing, a letter was presented from Fordham-Tremont Community Mental Health Center stating that petitioner had been admitted to its day treatment program in 2008 and been diagnosed with schizoaffective disorder and cannabis dependence. The letter refers to petitioner's treatment through therapy and mentions that petitioner was expected to meet on a monthly basis with a staff psychiatrist for "medication review." Petitioner's daughter corroborated that her mother suffered from mental illness. Although the diagnosis of mental illness did not, in itself, provide a sufficient basis for the Hearing Officer to have appointed a GAL (*see Matter of Smalls v. New York City Hous. Auth.*, 25 AD3d 478 [1st Dept 2006]), Hearing Officer Miller properly stayed the termination hearing and ordered a mental assessment of petitioner at that time.

The referral to Social Services reflects that an evaluation

was made because petitioner "exhibited seriously confused or disordered thinking" in the past year. The competence evaluator, whose credentials are unknown, nonetheless found the petitioner competent and able to navigate the hearing process on her own, without the need for a GAL. The report, however, appears to have been based solely on an interview with petitioner herself, despite listing names and phone numbers of important collateral sources that could have provided useful information about whether petitioner's diagnosed mental illness was interfering with her ability to understand the nature of the proceedings and adequately protect her tenancy rights. The collateral sources included petitioner's daughter, son, sister and petitioner's case manager at the Fordham-Tremont Community Center. There is no indication that the evaluator ever asked for petitioner's permission to contact these sources. The failure to follow up with known collateral sources rendered the report, at best, incomplete. I share each of the Supreme Court Justices' concern about the adequacy of this report.

When the hearing resumed on May 19, 2009, Hearing Officer Miller noted the competency determination and stated that since there had been a determination that petitioner did not need a GAL, the hearing would proceed. The Hearing Officer, however, did not make any independent review of the assessment at that time, including whether the finding of competency had been based on sufficient information or whether it comported with her own

observations of petitioner during the course of the hearing. The report was not placed into evidence and petitioner was not asked to review the report or be heard on the issue before a decision was made about whether she needed a GAL. GM-3742 provides that pre-decision, an "impartial" hearing officer "shall review the GAL: Mental Competence Evaluation Request and any underlying Social Services reports" (*id.* at III[F][1][a]). By initially deferring to the mental competency evaluator's recommendation, that petitioner was mentally competent and no GAL was needed, the Hearing Officer did not critically examine the nature or quality of the report she was provided with and, in doing so, relinquished her own important, independent role in assessing petitioner's competency to understand the serious nature of the proceedings against her (*id.* at III[F][1], [2]).

After an adverse decision was made at the completion of the hearing, petitioner made a motion before the Hearing Officer to vacate the termination determination and for the appointment of a GAL. In denying petitioner's application, Hearing Officer Miller stated that she had personally, fully complied with the procedures set forth in GM-3742 by ordering petitioner evaluated. It was then, for the first time, that the hearing officer addressed the assessment made of petitioner and compared it to her own observations of petitioner's demeanor and affect during the hearing. Although I believe that the initial determination denying a GAL was not made on a fully developed record, I still

believe that the application denying vacatur was properly made by the agency.

GM-3742 provides that a hearing officer can set aside a determination even after a hearing has been held, on the grounds that the tenant was not mentally competent and not represented by a GAL at that hearing (*id.* at III[F][2]). With certain exceptions not present here, GM-3742 shifts the burden of proving mental incompetence to the petitioner in these post-decision applications. Petitioner included only a copy of the Fordham letter, the transcript of the hearing and her own sworn affidavit stating that she remembered "feeling very confused at [the termination hearing], and not completely understanding what was going on . . . I felt like I couldn't express myself fully." She also stated that "I have suffered from mental illness for many years" but was first "properly diagnosed" after her conviction. She also stated that she suffers from severe mood swings, is forgetful and has taken medication for her schizoaffective disorder." Petitioner explained that she typically does not "feel comfortable talking about my mental illness, especially [with] strangers" stating that it is a "very personal issue for me, and I am not comfortable disclosing it."

While I believe the underlying competency assessment should have included some effort at contacting collateral sources with relevant information about petitioner's competency, petitioner's post decision application does not provide that information

either. The application was primarily based upon her diagnosis of mental illness, which could not by itself support the necessary finding (see *Matter of Smalls v. New York City Hous. Auth.*, 25 AD3d at 479). It is for this reason that there is no basis to set aside the decision denying vacatur.

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

ENTERED: JUNE 6, 2013


CLERK

"[T]he only restriction upon its use by either is that [the] use shall not be detrimental to the other" (*Negus v Becker*, 143 NY 303, 308 [1894]). It is well settled that "if one of the owners carries the wall several stories higher, the other party has no right to complain . . . and the latter has an equal right to use the addition" (*Wechsler v Elbeco Realty Corporation*, 119 Misc 178, 180 [Sup Ct, NY County 1922], *affd* 213 AD 820 [1st Dept 1925]). However, neither party has a right to do anything on top of the party wall "which would exclude the other party from its equal use" (*id.* at 181). Further, it is permissible for an adjoining property owner to make commercial use of a party wall so long as it does not weaken or encroach on the other party (*Lei Chen Fan v New York SMSA Ltd. Partnership*, 94 AD3d 620, 621 [1st Dept 2012]).

Defendant is the fee owner of a three-story building located at 149 W. 10th Street in Manhattan. To the east of defendant's building sits 145-147 West 10th Street, a six-story brick apartment building owned by plaintiff. The parties each own half of a party wall between the premises. Further, there is a brick wall that has been constructed adjacent to the party wall on the westernmost point of the property (the western wall). Defendant undertook substantial renovations to her building, which included having a roof deck installed. One side of each support beam for the deck was drilled and placed into the western wall.

Defendant maintains that the wall in question is an addition

to an extension of the original party wall that stands between the properties and that she has an easement in it. Plaintiff counters that the western wall on its property is independent of the old party wall. Thus, plaintiff maintains that defendant has no easement in it.

At issue, is the use of a wall between the subject premises, and whether, in fact, it is a party wall. Here, there is no evidence in the record that would permit resolution of the issue of whether the western wall is part of the party wall. Thus, there is a question of fact warranting the denial of defendant's motion for summary judgment dismissing the complaint.

Moreover, the record is undeveloped as to the extent of damage, if any, to plaintiff's building as a result of plaintiff's renovation. Accordingly, plaintiff's cross motion is granted to the extent of directing that discovery continue. Both parties must make their premises available for inspection by their retained experts. The deposition of plaintiff should continue, defendant should be deposed, and any experts retained

by the parties should be deposed.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: JUNE 6, 2013


CLERK

Mazzarelli, J.P., Andrias, DeGrasse, Freedman, Manzanet-Daniels, JJ.

10205 Lia Joseph, Index 104429/11
Plaintiff-Appellant,

-against-

Denis M. Joseph, et al.,
Defendants-Respondents,

John Doe, et al.,
Defendants.

Feder Kaszovitz LLP, New York (Murray L. Skala of counsel), for appellant.

Wade Clark Mulcahy, New York (Cheryl D. Fuchs of counsel), for Denis M. Joseph, respondent.

Harris Beach PLLC, New York (Marina L. Schwarz of counsel), for Automotive Realty Partners, LLC, respondent.

Lewis Brisbois Bisgaard & Smith, LLP, New York (Jamie R. Wozman of counsel), for Arthur Russell, respondent.

Order, Supreme Court, New York County (Jeffrey K. Oing, J.), entered March 7, 2012, which granted defendants' motions and cross motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff and her son, defendant Denis Joseph, have been embroiled in multiple lawsuits involving their claimed interests in a property in Connecticut and a second property in Brooklyn, which is held in the name of defendant Automotive Realty Partners, LLC (ARP). In this defamation action, plaintiff alleges that Denis and his attorney, defendant Arthur Russell, caused ARP to file a complaint in which they unnecessarily

included disparaging and false allegations, including, among other things, that plaintiff was a "scorned" woman, had a "maniacal rage," went into "terroristic binges," and had lied about her medical condition to secure a court adjournment. ARP's underlying complaint asserted a single cause of action for intentional interference with an existing contract and sought compensatory and punitive damages.

The court properly concluded that the statements made in the underlying complaint were pertinent to the action and therefore absolutely protected by the judicial proceedings privilege (see *Sexter & Warmflash, P.C. v Margrave*, 38 AD3d 163, 171-174 [1st Dept 2007]). The allegedly defamatory allegations were broadly pertinent to the tortious interference claim, as they bore on the mother's intent, provided the context for the dispute, and supported the claim for punitive damages (see *Pomerance v McTiernan*, 51 AD3d 526, 528 [1st Dept 2008]). The pertinence of the statements negates any finding of abuse of the judicial proceedings privilege (see *Sexter*, 38 AD3d at 172; compare *Halperin v Salvan*, 117 AD2d 544, 548 [1st Dept 1986]). Moreover, the statements were expressions of opinion, not fact, or they constituted hyperbole, which are also absolutely protected (see *Mann v Abel*, 10 NY3d 271, 276 [2008], cert denied 555 US 1170 [2009]; see also *Farber v Jefferys*, 103 AD3d 514, 516 [1st Dept 2013]; *Shchegol v Rabinovich*, 30 AD3d 311 [1st Dept 2006]).

The court below justifiably found that defendants cannot be

held liable for any "media attention" drawn to a news story subsequently published about the allegations in the complaint. None of the defendants had control over the newspaper publishing the article (see *Geraci v Probst*, 15 NY3d 336, 342 [2010]).

The court properly dismissed plaintiff's remaining causes of action, sounding in intentional infliction of emotional distress, abuse of process, and prima facie tort, since they rest on the same facts and allegations supporting the alleged defamation claim (see *Casa de Meadows Inc. [Cayman Is.] v Zaman*, 76 AD3d 917, 920-921 [1st Dept 2010]).

Nevertheless, although we affirm, we note our disapproval of defendants' use of a filed pleading as a vehicle for offensive, albeit nondefamatory invective. Such conduct offends the dignity of judicial proceedings and should not be condoned.

We have considered plaintiff's remaining contentions and find them unavailing.

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

ENTERED: JUNE 6, 2013


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existing record, to the extent it permits review, we find that defendant received effective assistance under the state and federal standards (see *People v Benevento*, 91 NY2d 708, 713-714 [1998]; see also *Strickland v Washington*, 466 US 668 [1984]).

After defendant testified, on direct examination, that the undercover officer gave her a "tip" of a bag of cocaine for connecting her with a seller, the prosecutor stated that defendant was obviously pursuing an agency defense and requested permission to cross-examine her regarding several past convictions for selling drugs to show that she did not act as an agent of the buyer. The court concluded that the fairest course was to make a final determination regarding the permissibility of such cross-examination after the prosecutor had cross-examined defendant on other matters. The court ultimately permitted the cross-examination regarding the prior drug sales.

Prior drug sale convictions are clearly admissible in response to an agency defense (see e.g. *People v Massey*, 49 AD3d 462, 462 [2008], *lv denied* 10 NY3d 866 [2008]). Defendant argues, however, that in light of the fact that defense counsel had already informed the court, after the People rested, that an agency defense would be presented, it was error for the court to delay ruling on the admissibility of the past drug sale convictions until after defendant's direct testimony. Defendant argues that this was an improper modification of the court's pretrial *Sandoval* ruling, which had precluded identification of

these convictions as drug sales, and that the modification deprived her of "definitive advance knowledge of the scope of cross-examination as to prior conduct" (*People v Sandoval*, 34 NY2d 371, 375 [1974]). Defendant claims that her lawyer was ineffective because he failed to object to this belated modification.

Regardless of the nomenclature used by the court and counsel, the court's ruling was not a modification of its *Sandoval* ruling, but a ruling, pursuant to *People v Molineux* (168 NY 264 [1901]), that evidence of prior drug sale convictions was admissible to rebut the claim of lack of intent to sell implicit in an agency defense (see *People v Castaneda*, 173 AD2d 349 [1st Dept 1991]). As a result of the agency defense, the admissibility of the prior sales was no longer a *Sandoval* matter, because the sales were not simply admissible to impeach the credibility of defendant's testimony, but had become admissible as evidence in chief to prove intent. Even if counsel's announcement of the agency defense, before defendant's testimony, was as definitive as defendant claims, she had no legitimate expectation that she could give testimony that made out such a defense and escape questioning regarding past drug transactions in which she acted as a seller. Indeed, such evidence would have been admissible even if she did not take the stand at all, but instead asserted an agency defense on the basis of other evidence.

Accordingly, defendant has not established either that it was unreasonable for her attorney to acquiesce in the admission of the drug sales, and in the timing of the court's ruling, or that her attorney's conduct deprived her of a fair trial or affected the outcome. Similarly, we decline to review her unpreserved challenges to the court's ruling and its timing in the interest of justice. As an alternative holding, we find that the prior sale convictions were admissible, that defendant was not prejudiced by the sequence of events, and that there is no basis for reversal.

As noted, defendant's remaining claims of ineffective assistance are likewise unreviewable on the present record. To the extent the present record permits review, we conclude that defendant has not shown that any of the alleged deficiencies fell below an objective standard of reasonableness, or that, viewed individually or collectively, they deprived defendant of a fair trial or affected the outcome of the case.

We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 6, 2013


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Tom. J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10298 & Alice Boynton, et al.,
M-2604 Plaintiffs-Respondents,

Index 106827/11

-against-

Haru Sake Bar,
Defendant-Appellant.

Cartafalsa, Slattery, Turpin & Lenoff, New York (Patricia Zincke of counsel), for appellant.

Law Offices of Brad A. Kauffman, New York (Brad A. Kauffman of counsel), for respondents.

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 22, 2013, which denied defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its entitlement to judgment as a matter of law in this action where plaintiff Alice Boynton was injured when she fell while walking over cellar doors located on the sidewalk outside defendant restaurant. Defendant submitted evidence, including hospital records, showing that at the time of her fall, Ms. Boynton suffered a fainting spell and pointed to Ms. Boynton's testimony that she had no recollection of the accident. Defendant also submitted evidence demonstrating that it did not receive a delivery on the afternoon of Ms. Boynton's fall and that its sidewalk cellar doors were not opened.

In opposition, plaintiffs raised a triable issue of fact. Plaintiff John Boynton stated that his wife, immediately after

her fall, pointed to the cellar hatch doors and said that they moved. Viewing this hearsay together with other competent evidence, including that Mr. Boynton observed that deliverymen were, at the time, depositing boxes on the sidewalk, at the edge of the cellar door hatch, triable issues were raised as to whether the cellar doors might have been handled from the inside, causing them to move, at the moment Ms. Boynton traversed over them (see *Bah v Benton*, 92 AD3d 133, 135 [1st Dept 2012]). Ms. Boynton's hearsay statements may be relied upon to defeat the motion since they are not too vague and speculative to support an inference of negligence and there exists other competent evidence supporting plaintiffs' theory of liability.

It is noted, however, that plaintiffs' negligence theory predicated upon an alleged hazardous one-half-inch differential between the level of the sidewalk and the frame to the cellar hatch doors fails. Photographic evidence shows that the height

differential is trivial, and an insufficient basis for finding liability on the part of defendant (see *Schwartz v Bleu Evolution Bar & Rest. Corp.*, 90 AD3d 488 [1st Dept 2011]).

M-2604 - *Boynton, et al., v Haru Sake Bar,*

Motion seeking to strike portions of reply brief denied.

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

ENTERED: JUNE 6, 2013


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Tom, J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10299 In re Reven W.,
 Petitioner-Appellant,

 -against-

 Jenny Virginia D.,
 Respondent-Respondent.

Leslie S. Lowenstein, Woodmere, for appellant.

Dora M. Lassinger, East Rockaway, for respondent.

Karen Freedman, Lawyers for Children, New York (Shirim Nothenberg of counsel), attorney for the child.

Order, Family Court, New York County (Diane Costanzo, Referee), entered on or about April 9, 2012, which, after trial, dismissed petitioner father's motion for a modification of custody, unanimously affirmed, without costs.

The determination that it is in the child's best interests to remain in the custody of respondent mother in Rhode Island has a sound and substantial basis in the record (*see Matter of Ricardo S. v Carron C.*, 91 AD3d 556 [1st Dept 2012]). Petitioner failed to establish that there has been a change of circumstances warranting a modification of the parties' custody arrangement (*see Matter of Gant v Higgins*, 203 AD2d 23 [1st Dept 1994]). The evidence demonstrates that the move did not weaken petitioner's relationship with the child; indeed, that relationship was strained long before the move. The evidence shows further that respondent has always been the child's primary caretaker and that

the child has thrived since moving with her to Rhode Island. The child no longer needs specialized educational services, has made friends and engages in many social activities, and is happier and calmer than before the move. Further, while it is not dispositive, the child's preference is an important factor in a custody decision, and the court found that the child preferred to remain with his mother in Rhode Island (*see Matter of Gant*, 203 AD2d at 24). Contrary to petitioner's contention, the court considered the factors relevant to a custody determination, and found that there were many valid reasons for respondent's move, including financial stress, the child's special needs, and the child's anxiety and anger at petitioner (*see id.*; *see also Matter of Tropea v Tropea*, 87 NY2d 727, 740-741 [1996]).

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

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

ENTERED: JUNE 6, 2013


CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10302 In re Malik H.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Marcia Egger of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Suzanne K. Colt of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about January 17, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of rape in the first and third degrees, sexual abuse in the first degree, sexual misconduct and forcible touching, and placed him in the custody of the Office of Children and Family Services for a period of 3 years, with the first 12 months to be in a secure facility and without credit for time spent in detention, unanimously affirmed, without costs.

The court properly exercised its discretion in ordering restrictive placement pursuant to Family Court Act § 353.5. This disposition was warranted by, among other things, the seriousness of the offense and appellant's history of recidivism and violence (see e.g. *Matter of Shameel R.*, 68 AD3d 425 [1st Dept 2009]). We note that while awaiting disposition of this case, appellant

reached the age of 16 and was convicted in Supreme Court of another sex offense. Although a psychologist and psychiatrist who evaluated appellant both recommended that he not receive restrictive placement, they nevertheless recommended that he be placed in a highly structured environment outside the community, with various services including sex offender treatment (see *Matter of David B.*, 186 AD2d 352, 352-353 [1st Dept 1992]), which the court properly concluded would best be provided in restrictive placement.

The court properly exercised its discretion when it denied appellant's belated request for an adjournment to call the psychologist and the psychiatrist to testify, since their testimony would have been cumulative, in light of their reports, which were admitted into evidence (see *Matter of Anthony M.*, 63 NY2d 270, 283-284 [1984]).

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: JUNE 6, 2013


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Tom, J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10304 In re Le Cave LLC,
Petitioner,

Index 104327/12

-against-

New York State Liquor Authority,
Respondent.

Flynn & Flynn PLLC, Rockaway (Terrence Flynn, Jr. of counsel),
for petitioner.

Jacqueline P. Flug, New York, for respondent.

Determination of respondent, dated November 23, 2012, which,
after a hearing, revoked petitioner's liquor license, unanimously
confirmed, the petition denied, and the proceeding brought
pursuant to CPLR article 78 (transferred to this Court by order
of Supreme Court, New York County [Donna M. Mills, J.], entered
December 12, 2012), dismissed, without costs.

The determination is supported by substantial evidence (see
generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights,
45 NY2d 176, 180-181 [1978]). Evidence supporting the sustained
charges includes numerous complaint reports, as well as the
testimony of two police officers and an investigator employed by
respondent, detailing incidents of, inter alia, disorderly
activity, assaults, and violations of fire and safety regulations
at petitioner's premises in violation of sections 106(6), 114(6)
and 118 of the Alcoholic Beverage Control Law and the Rules of
the State Liquor Authority (see 9 NYCRR 48.2, 48.3 and 53.1).

There exists no basis to disturb the credibility determinations of the Administrative Law Judge (see *Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]).

The penalty imposed does not shock one's sense of fairness. The record shows that petitioner has a lengthy history of violations and there is no indication that petitioner took any steps to prevent the repeated incidents of disorderly conduct on or about its premises (see e.g. *Matter of MGN, LLC v New York State Liq. Auth.*, 81 AD3d 492 [1st Dept 2011]; *Matter of Monessar v New York State Liq. Auth.*, 266 AD2d 123 [1st Dept 1999]).

We have considered petitioner's remaining arguments, including that respondent improperly considered evidence outside the record of the proceedings when issuing its determination, and find them unavailing.

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

ENTERED: JUNE 6, 2013


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Tom, J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10306 The Goldman Sachs Group, Inc., et al., Index 602060/09
Plaintiffs-Respondents,

-against-

Almah LLC,
Defendant-Appellant.

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellant.

Morrison Cohen LLP, New York (Mary E. Flynn of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered September 18, 2012, awarding plaintiffs the principal sum of \$3,131,897, and bringing up for review an order, same court and Justice, entered August 6, 2012, which granted plaintiffs' motion for summary judgment and denied defendant's cross motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The motion court properly found, based on plaintiff partnership's unchallenged evidence, that it held a real estate broker's license at the time its services were rendered and its cause of action for commissions arose in 1998 (Real Property Law § 442-d). We decline to consider defendant's argument raised for the first time in a surreply that, even if *arguendo* the date for requiring a license was plaintiff partnership's May 2008 deadline for giving notice that it would not be exercising its option to terminate the lease early, the license held by a partner at that

time did not satisfy the partnership's licensing requirement (see *Ostrov v Rozbruch*, 91 AD3d 147, 155 [1st Dept 2012]). The obligation to pay the commission arose from the lease (*cf. Thorne Real Estate v Nezelek*, 100 AD2d 651, 652 [3rd Dept 1984]), which plaintiff partnership was entitled to enforce (see *Joseph P. Day Realty Corp. v Chera*, 308 AD2d 148, 152 [1st Dept 2003]).

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

THIS CONSTITUTES THE DECISION AND ORDER
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Garcia v New York City Indus. Dev. Agency, 279 AD2d 328 [1st Dept 2001]). Moreover, even accepting plaintiff's claim that she was locked out of the building after entering the plaza, her action of leaning over the 45-inch parapet wall was an unforeseeable, superseding cause of the accident (see e.g. *Rhodes v East 81st, LLC*, 81 AD3d 453 [1st Dept 2011]).

We have considered plaintiff's remaining arguments, including that defendant's motion was untimely, and find them unavailing.

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

ENTERED: JUNE 6, 2013


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Tom, J.P., Andrias, Renwick, DeGrasse, Gische, JJ.

10312N Omar S. Pickering, Index 108057/09
Plaintiff-Respondent,

-against-

Union 15 Restaurant Corp.,
doing business as Belmont Lounge, et al.,
Defendants-Appellants.

Nicoletti Gonson Spinner & Owen LLP, New York (Benjamin N. Gonson of counsel), for appellants.

Subin Associates, LLP, New York (Brooke Lombardi of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered June 20, 2012, which denied defendants' motion to vacate the note of issue and certificate of readiness, finding that defendants had waived their right to an independent medical examination (IME) of plaintiff, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted, and plaintiff directed to submit to an IME within 45 days of service of a copy of this order with notice of entry.

The court improvidently exercised its discretion by denying defendants a one-day adjournment to conduct the already scheduled IME, as there is no evidence that the failure to conduct it previously was willful, and no evidence that plaintiff would have been prejudiced by the delay (*see Smith v Mousa*, 305 AD2d 313 [1st Dept 2003]). Moreover, the court could have allowed the IME without vacating the note of issue (*see Torres v New York City*

Tr. Auth., 192 AD2d 400 [1st Dept 1993]; *Grossman v Amalgamated Warbasse Houses, Inc.*, 21 AD3d 448 [2d Dept 2005]), thereby causing no delay in the trial. Although there appears to have been no transcript of oral argument when this adjournment was requested, plaintiff does not deny that such a request was made, nor does he deny that the IME, scheduled for the day after the return date on the motion, was confirmed with plaintiff's counsel's office at least three weeks prior to the return day. Moreover, plaintiff's certificate of readiness was incorrect in that it indicated that "[a]ll relevant information, party statements, medical records, reports (in plaintiff's attorney's possession) and/or authorizations [had] been exchanged." However, plaintiff did not provide his supplemental bill of particulars or authorization for Social Security Unemployment records until approximately six weeks after filing the note of issue and certificate of readiness (see *Vargas v Villa Josefa Realty Corp.*, 28 AD3d 389, 391 [1st Dept 2006]).

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it reasonably relied on that representation, and that it suffered pecuniary losses as a result of defendant's fraudulent concealment of additional documents because the arbitration panel would have awarded it greater damages had it been aware of the concealed documents. Defendant sought discovery concerning, among other things, plaintiff's arbitration counsels' reliance on its representation that the document production was complete and the litigation strategy plaintiff's counsel would have pursued had the concealed documents been produced during the arbitration. After plaintiff invoked the attorney-client privilege, defendant brought a motion to preclude, arguing that an "at issue" waiver of privilege had occurred.

Although the privileged information sought by defendant is relevant to plaintiff's fraud claims, plaintiff disavows any intention to use privileged materials and defendant fails to show that the materials are necessary to determine the validity of the claims or to its defense against them (see *Nomura Asset Capital Corp. v Cadwalader, Wickersham & Taft LLP*, 62 AD3d 581 [1st Dept

2009]; *Veras Inv. Partners, LLC v Akin Gump Strauss Hauer & Feld LLP*, 52 AD3d 370 [1st Dept 2008]). Accordingly, defendant failed to establish that an "at issue" waiver of the attorney-client privilege occurred.

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

ENTERED: JUNE 6, 2013


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

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9535

Index 40000/88

In re New York City
Asbestos Litigation
- - - - -
Weitz & Luxenberg P.C.,
Plaintiffs-Respondents,

-against-

Georgia-Pacific LLC,
Defendant-Appellant.

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

Weitz & Luxenberg P.C., New York (Jerry Kristal of counsel), for respondents.

Order, Supreme Court, New York County (Sherry Klein Heitler, J.), entered December 12, 2011, affirmed, without costs. Appeal from order, same court and Justice, entered June 14, 2012, dismissed, without costs, as taken from a nonappealable order.

Opinion by Andrias, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Richard T. Andrias, J.P.
John W. Sweeny, Jr.
Helen E. Freedman
Paul G. Feinman
Judith J. Gische, JJ.

9534-9535
Index 40000/88

x

In re New York City
Asbestos Litigation

- - - - -
Weitz & Luxenberg P.C.,
Plaintiffs-Respondents,

-against-

Georgia-Pacific LLC,
Defendant-Appellant.

x

Defendant appeals from the order of the Supreme Court, New York County (Sherry Klein Heitler, J.), entered December 12, 2011, which confirmed recommendations of the Special Master directing an in camera review of all internal attorney-client and work-product documents identified on defendant Georgia-Pacific LLC's privilege log and directing the production of all materials and raw data underlying several published studies funded by Georgia-Pacific LLC, and from the order, same court and Justice, entered June 14, 2012, which denied GP's motion for reargument.

Quinn Emanuel Urquhart & Sullivan, LLP, New York (Kathleen M. Sullivan of counsel), and Lynch Daskal Emery LLP, New York (Scott Emery of counsel), for appellant.

Weitz & Luxenberg P.C., New York (Jerry Kristal and Alani Golanski of counsel), for respondents.

ANDRIAS, J.P.

This discovery dispute pertains to all of the Weitz & Luxenberg New York City Asbestos Litigation (NYCAL) cases in which Georgia-Pacific (GP) is a defendant. For the following reasons, we find that the motion court providently exercised its discretion when it denied GP's motions to vacate the Special Master's recommendations and directed an in camera review of certain internal communications identified in GP's privilege log and the production to plaintiffs of certain underlying data related to eight published research studies funded by GP concerning the health effects of its joint compound.

GP funded these studies in 2005 to aid in its defense of asbestos-related lawsuits. The studies were performed by experts from various organizations, who, among other things, recreated GP's historical joint compound product for the purpose of testing its biopersistence and pathogenicity. To facilitate the endeavor, GP entered into a special employment relationship with Stewart Holm, its Director of Toxicology and Chemical Management, to perform expert consulting services under the auspices of its in-house counsel, who also was significantly involved in the pre-publication review process.

At Holm's deposition, plaintiffs requested that GP produce all documents relating to the studies. GP produced certain

documents and a privilege log asserting that all communications with its consulting experts were protected by the attorney work product privilege and that its internal communications were protected by the attorney-client privilege. The Special Master directed an in camera review of all documents identified in GP's privilege log (Recommendation #1), and production of all materials and raw data underlying the published studies (Recommendation #2).

The motion court denied GP's motion to vacate the Special Master's recommendations, as well its motion for leave to reargue the in camera prong of that decision to narrow its scope. GP appeals, arguing that plaintiffs failed to make the necessary showings to warrant in camera review of internal privileged communications or production of work product data and that ordering that review and production is an unwarranted intrusion into GP's privileged communications.¹

¹GP complied with Recommendation #1 to the extent that it submitted for in camera review all communications to and from its consulting experts. On July 11, 2011, the Special Master found that the documents she reviewed were privileged and that no documents were discoverable other than those that GP had agreed to supply. The ruling was limited to GP's communications to and from its consulting experts that GP had produced, and did not otherwise modify or vacate the recommendations in respect of GP's claim of attorney-client privilege (internal communications) and the attorney work-product privilege regarding the underlying data, which remained in full force and effect.

The motion court providently exercised its broad discretion in supervising disclosure when it confirmed Recommendation #1 and granted in camera review of the documents to determine whether the crime-fraud exception to the attorney-client privilege applied (see *Those Certain Underwriters at Lloyds, London v Occidental Gems, Inc.*, 11 NY3d 843, 845 [2008]).

The crime-fraud exception encompasses “‘a fraudulent scheme, an alleged breach of fiduciary duty or an accusation of some other wrongful conduct’” (*Art Capital Group LLC v Rose*, 54 AD3d 276, 277 [1st Dept 2008], quoting *Ulico Cas. Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 1 AD3d 223, 224 [1st Dept 2003]). “[A]dvice in furtherance of a fraudulent or unlawful goal cannot be considered ‘sound.’ Rather advice in furtherance of such goals is socially perverse, and the client’s communications seeking such advice are not worthy of protection” (*In re Grand Jury Subpoena Duces Tecum*, 731 F2d 1032, 1038 [2d Cir 1984]).

A party seeking “to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed and that the communications in question were in furtherance of the fraud or crime” (*United States v Jacobs*, 117 F3d 82, 87 [2nd Cir 1997]; see also *Ulico Cas. Co.*, 1 AD3d at 224; *Matter of Grand Jury Subpoena*, 1 AD3d 172 [1st Dept 2003]).

However, “[a] lesser evidentiary showing is needed to trigger *in camera* review than is required ultimately to overcome the privilege” (*United States v Zolin*, 491 US 554, 572 [1989]).

To permit *in camera* review of the documents to analyze whether the communications were used in furtherance of such wrongful activity, there need only be “a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies” (*id.* [internal quotation marks and citation omitted]). “Once that showing is made, the decision whether to engage in *in camera* review of the evidence rests in the sound discretion of the [] court” (*id.*).

Holm co-authored nearly all of the studies, which were intended to cast doubt on the capability of chrysotile asbestos to cause cancer. On the two articles that he did not co-author, he and GP's counsel participated in lengthy “WebEx conferences” in which they discussed the manuscripts and suggested revisions. Despite this extensive participation, none of the articles disclosed that GP's in-house counsel had reviewed the manuscripts before they were submitted for publication. Two articles falsely stated that “[GP] did not participate in the design of the study, analysis of the data, or preparation of the manuscript.” For

articles lead-authored by David M. Bernstein, Ph.D., and co-authored by Holm, the only disclosure was that the research was "sponsored" or "supported" by a grant from GP. The articles did not disclose that Holm was specially employed by GP for the asbestos litigation or that he reported to GP's in-house counsel. Furthermore, there were no grant proposals, and Dr. Bernstein was hired by GP on an hourly basis. Nor did the articles reveal that Dr. Bernstein has been disclosed as a GP expert witness in NYCAL since 2009, that he had testified as a defense expert for Union Carbide Corporation in asbestos litigation, or that he had been paid by, and spoken on behalf of, the Chrysotile Institute, the lobbying arm of the Quebec chrysotile mining industry. Although GP belatedly endeavored to address the inadequacies of certain of its disclosures, its corrections failed to acknowledge its in-house counsel's participation and did not make clear that Dr. Bernstein's testimony as an expert witness preceded the publication of the first GP reformulated joint compound article in 2008.

The foregoing constitutes a sufficient factual basis for a finding that the relevant communications could have been in furtherance of a fraud, and the motion court properly confirmed the recommendation directing in camera review of the internal documents. As the court remarked, it is of concern that GP's

in-house counsel would be so intimately involved in supposedly objective scientific studies, especially in light of GP's disclosures denying such participation (see *United States v Philip Morris USA, Inc.*, 449 F Supp 2d 1 [D DC 2006] [applying the fraud-crime exception, in regard to defendants' litigation-related efforts to skew smoking and health research], *affd in relevant part* 566 F3d 1095 [DC Cir 2009], *cert denied* _ US _, 130 S Ct 3501 [2010]).²

The motion court providently exercised its discretion when it confirmed Recommendation #2 and directed GP to produce all documents and materials underlying the published studies over which it has possession, custody, or control, including, but not limited to, microscopy images, the data generated in the chambers where the reformulated compounds were created, and numerical calculations, and to act in good faith to secure its consulting experts' compliance with the direction to produce.

Attorney work product under CPLR 3101(c), which is subject

²Plaintiffs' contention that this portion of the appeal is moot because GP complied with the order and produced the data pending review on appeal is without merit. While this Court may not be able to return the parties to the status quo ante since plaintiffs now have acquired the information in the underlying data, "a court can fashion *some* form of meaningful relief in circumstances such as these," including ordering the destruction or return of materials disclosed (*Church of Scientology of California v United States*, 506 US 9, 12-13 [1992]).

to an absolute privilege, is limited to “documents prepared by counsel acting as such, and to materials uniquely the product of a lawyer’s learning and professional skills, such as those reflecting an attorney’s legal research, analysis, conclusions, legal theory or strategy” (*Brooklyn Union Gas Co. v American Home Assur. Co.*, 23 AD3d 190, 190-191 [1st Dept 2005]). Documents generated for litigation are generally classified as trial preparation materials (CPLR 3101[d][2]) unless they contain otherwise privileged communications, such as memoranda of private consultations between attorney and client (see *People v Kozlowski*, 11 NY3d 223, 244 [2008]). Trial preparation materials are subject to a conditional privilege and may be disclosed “only upon a showing that the party seeking discovery has a substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means” (CPLR 3101[d][2]; *Giordano v New Rochelle Mun. Hous. Auth.*, 84 AD3d 729, 732 [2d Dept 2011]). This Court has also observed that “it is unfair for the opposing party in a litigated controversy to . . . use this privilege both as a sword and a shield, to waive when it enures to her advantage, and wield when it does not” (*Matter of Farrow v Allen*, 194 AD2d 40, 45 [1st Dept 1993] [internal quotation marks omitted]).

The results of the published studies commissioned by GP are relevant, and it cannot be seriously disputed that plaintiffs have a substantial need for the underlying data in the preparation of their cases. "Large corporations often invest strategically in research agendas whose objective is to develop a body of scientific knowledge favorable to a particular economic interest or useful for defending against particular claims of legal liability" (*In re Welding Fume Prods. Liability Litig.*, 534 F Supp 2d 761, 769 n10 [ND Ohio 2008] [internal quotations omitted]). "The publication of [research] findings and conclusions invites use by persons whom the findings favor and invites reliance by the finders of fact. The public has an interest in resolving disputes on the basis of accurate information" (*In re American Tobacco Co.*, 880 F2d 1520, 1529 [2d Cir 1989]). Here, GP commissioned the studies in anticipation of litigation and has admitted that "[a]t an appropriate time and after their publication is complete, GP plans to introduce the results of the studies in litigation."

In determining whether plaintiffs are unable without undue hardship to obtain the substantial equivalent of the materials by other means, due consideration must be given to the fact that discovery in NYCAL is governed by the September 20, 1996 Case Management Order (CMO), as amended May 26, 2011, which is

designed to “allow the parties to obtain reasonably necessary documents and information without imposing undue burdens in order to permit the parties to evaluate the case, reach early settlements, and prepare unsettled cases for trial.” The court has “full authority, under the controlling [CMO], to issue its discovery order pertaining to ongoing cases” (*Matter of New York City Asbestos Litig.*, 66 AD3d 600, 600 [1st Dept 2009] [denying the defendant’s claims that it be permitted to shield analogous materials via a protective order]).

Given the complexity of the studies, the motion court was rightfully wary of prejudicing plaintiffs by permitting the sudden introduction of the studies or experts on the eve of trial, or in the many other pending asbestos trials. As the court found, principles of fairness, as well as the spirit of the CMO, require more complete disclosure, and GP should not be allowed to use its experts’ conclusions as a sword by seeding the scientific literature with GP-funded studies, while at the same time using the privilege as a shield by withholding the underlying raw data that might be prone to scrutiny by the opposing party and that may affect the veracity of its experts’ conclusions (*see John Doe Co. v United States*, 350 F3d 299, 302 [2d Cir 2003]; *see also Niagara Mohawk Power Corp. v Stone & Webster Eng’g Corp.*, 125 FRD 578, 587 [ND NY 1989]).

Plaintiffs will be prejudiced if they are prevented from discovering the data, protocols, process, conduct, discussion, and analyses underlying these studies. A significant expenditure of time and money would be required to duplicate the studies, if they could be exactly duplicated at all, whereas scrutiny of the underlying data may provide a permissible manner in which to attack the findings that would be consistent with the intent of the CMO to minimize the cost of and streamline discovery.

In this regard, we note that the court limited its ruling to the data, samples, and materials that relate to those studies whose results have been published or will be published. GP is not required at this juncture to produce to plaintiffs any internal communications that portray its attorneys' or consultants' notes, comments or opinions. Moreover, GP will be free to make whatever pretrial in limine application it deems appropriate.

Finally, no appeal lies from the order denying reargument (*Stratakis v Ryjov*, 66 AD3d 411 [1st Dept 2009]).

Accordingly, the order of the Supreme Court, New York County (Sherry Klein Heitler, J.), entered December 12, 2011, which confirmed recommendations of the Special Master directing an in camera review of all internal attorney-client and work-product documents identified on defendant GP's privilege log, and

directing the production of all materials and raw data underlying several published studies funded by GP, should be affirmed, without costs. The appeal from the order, same court and Justice, entered June 14, 2012, which denied GP's motion for reargument, should be dismissed, without costs, as taken from a nonappealable order.

All concur.

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

ENTERED: JUNE 6, 2013


CLERK