

SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 4, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

11929 Evelyn Rivera, as Administratrix Index 307017/09
of the Estate of Wilbur
Rodriguez, Deceased,
Plaintiff-Appellant-Respondent,

-against-

Montefiore Medical Center,
Defendant-Respondent-Appellant.

Sullivan Papain Block McGrath & Cannavo P.C., New York (Brian J. Shoot of counsel), for appellant-respondent.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about October 24, 2012, which, to the extent appealed from as limited by the briefs, granted defendant's motion to reduce the jury's award for future economic loss attributable to household services by reducing the award from \$680,000 to \$340,000, and denied plaintiff's cross motion to strike the testimony of defendant's expert concerning the cause of the decedent's death and to set aside the award of \$0 for conscious pain and suffering, affirmed, without costs.

This action against defendant, Montefiore Medical Center, is

based on the death of plaintiff's 44-year-old son, Wilbur Rodriguez, in defendant's hospital. He had arrived at its emergency room with respiratory difficulty on January 24, 2009 at 11:45 a.m. and had been admitted to the hospital that night at about 11:00 p.m. with a suspected diagnosis of pneumonia, and he died on January 25, 2009 between 4:00 and 4:40 a.m.

Following trial, the jury returned a verdict in plaintiff's favor, finding the hospital liable for failing to place the decedent in a ward where his vital signs could be continuously monitored, and awarding plaintiff \$40,000 for past economic loss and \$680,000 for future economic loss over 17 years, and \$0 for the decedent's conscious pain and suffering.

Both parties moved to set aside the verdict. Supreme Court denied plaintiff's motion to strike from the record all testimony that the decedent's death was caused by a sudden cardiac event and set aside the award of \$0 for the decedent's pain and suffering, or for a new trial on the issue of the decedent's pain and suffering. The court granted in part defendant's motion to set aside the award by reducing the jury award for loss of future household services from \$680,000 to \$340,000. Both sides appeal from this order. We affirm.

We reject plaintiff's challenge to the aspect of the order that declined to strike the testimony of defendant's expert, Dr.

Marc Silberman, in which he asserted that the cause of the decedent's death was a sudden, unexpected cardiac arrhythmia. Plaintiff's in limine application during trial to preclude Dr. Silberman's testimony was properly denied as untimely. Plaintiff's argument at trial for precluding Dr. Silberman's testimony was based on the lack of specificity of defendant's CPLR 3101(d) statement. The statement recited, with regard to the causation of the decedent's death, that defendant's expert would "testify as to the possible causes of the decedent's injuries and contributing factors ... [and] on the issue of proximate causation"; also included in its formulaic recitation was the assertion that "the grounds for the expert's opinion will be said expert's knowledge and experience ... and [the] trial testimony."

CPLR 3101(d)(1) requires expert disclosure, "in reasonable detail," of "the substance of the facts and opinions on which each expert is expected to testify," in order to provide the plaintiff with the defendant's theories of the case in advance of trial (see *Chapman v State of New York*, 189 AD2d 1075 [3d Dept 1993]). Here, upon receipt of this 3101(d) statement, the only objection that plaintiff voiced was that the expert's qualifications failed to include the dates of his residency, which deficiency defendant then cured. Plaintiff neither

rejected the document nor made any objection to the lack of specificity regarding the cause of death.

Having failed to timely object to the lack of specificity in defendant's expert disclosure statement regarding the cause of the decedent's death, plaintiff was not justified in assuming that the defense expert's testimony would comport with the conclusion reached by the autopsy report, and plaintiff cannot now be heard to complain that defendant's expert improperly espoused some other theory of causation for which there was support in the evidence.

Plaintiff now argues that the testimony that the decedent's death was caused by a sudden, unexpected cardiac event should be stricken because it came as a surprise. However, after plaintiff's own experts acknowledged on cross-examination that such a sudden cardiac event was a possibility based on the decedent's medical history and condition, defendant's expert appropriately elaborated on that theory of causation, and there is no valid basis on which to strike either side's experts' testimony as to the decedent's death from a sudden cardiac event.

The decedent's emergency room attending physician, Dr. Mukherji, testified that based on his review of the medical record, he believed the decedent died of a cardiac arrest that was not preceded by respiratory failure, since the decedent's

vital signs would have progressively worsened throughout the night had he died of respiratory failure. And, while plaintiff's internal medicine and cardiology expert, Dr. Mark Schiffer, offered the opinion that the decedent's death from pneumonia was preceded by 5 to 10 minutes of a painful struggle to breathe, he acknowledged on cross-examination that, particularly in view of the left ventricular hypertrophy found at autopsy, there was a possibility that the decedent's death occurred as a result of a sudden and unexpected cardiac event.

Not only did Dr. Silberman's properly admitted testimony comport with plaintiff's experts' testimony on cross-examination, it comported with evidence showing that the decedent was not in any respiratory distress the last time he was seen before the 40-minute window of his death; that he had a call button, but never used it, suggesting he died suddenly; and that he had a heart abnormality and other ailments that made him more susceptible to sudden cardiac arrest. All the foregoing sufficiently supports the jury's rejection of plaintiff's pain and suffering claim.

We also affirm the aspect of the trial court's order reducing the jury's award for future household services from \$680,000 to \$340,000. Plaintiff's economic expert testified that the value of the decedent's past household service to his mother from January 2009 to the date of the verdict was \$39,052 and that

the future value of his household service was \$247,150, considering her life expectancy of 17 years. The jury's award of \$680,000 for future economic loss vastly exceeded the evidence regarding that loss. However, while pecuniary damages must be proven with reasonable certainty, and may not be based on speculation or guesswork, they need not match the expert's assessment exactly where, as here, the expert's valuation is based on a statistical average rather than an exact calculation of services lost (*see Baker v Sportservice Corp*, 175 AD2d 654 [4th Dept 1991], *lv denied* 78 NY2d 860 [1991]; *James v Eber Bros. Wine & Liq. Corp.*, 153 AD2d 329, 334 [4th Dept 1990], *lv denied* 75 NY2d 711 [1990]). Accordingly, the trial court's reduction of that award to \$340,000 was an appropriate assessment.

Finally, plaintiff challenges on appeal a ruling by the trial court, not raised or discussed in the context of the post-verdict motion, that precluded plaintiff's economist from including in his calculations of lost income plaintiff's testimony that the decedent had given her \$300 every two weeks, because of the absence of any corroborating documentary evidence. However, the issue is not properly before us on this appeal.

The problem is not one of preservation; we agree that the issue was preserved by the objection made at trial. Rather, that trial ruling is not brought up for review on this appeal, which

is solely from the order on the motion to set aside the verdict. Unlike an appeal from a judgment, which brings up for review any ruling to which the appellant objected and any non-final order adverse to the appellant (CPLR 5501[a][1], [3]), “[a]n appeal from an order usually results in the review of only the narrow point involved on the motion that resulted in the order” (David D. Siegel, Practice Commentaries, CPLR C5501:1).

All concur except Gonzalez, P.J. who dissents in a memorandum as follows:

GONZALEZ, P.J. (dissenting)

I would find the court's denial of plaintiff's motion to preclude defendant's expert from testifying as to a new hypothesis first introduced mid-trial - that decedent had a sudden, lethal cardiac event - reversible error, and I would remand for a new trial on pain and suffering.

The decedent was being treated by defendant hospital for bilateral bronchopneumonia. As of mid-trial, both parties' actions and submissions were consistent with the medical examiner's autopsy report finding that the decedent died of that pneumonia, a death necessarily accompanied by pain and suffering attendant to the patient's eventual suffocation.

A few days into the trial, however, Dr. Mukherji, one of the emergency room doctors who triaged the decedent and treated his bronchopneumonia for approximately 12 hours (while the patient was on a continuous heart monitor), testified on cross-examination that the 44-year-old decedent likely had a lethal heart attack in the middle of the night, after having been transferred from the emergency room to a general medicine floor.

Meanwhile, the continuous telemetry monitoring that took place throughout the 12 hours the decedent spent under Dr. Mukherji's care showed no evidence of any arrhythmia. This doctor was a fact witness; he was not called as an expert.

Notably, at his deposition, two months before trial, Dr. Mukherji testified that he could not give an opinion as to how the patient died.

Having been alerted to the new theory by Dr. Mukherji's trial testimony, plaintiff moved to preclude Dr. Silberman, defendant's expert, from opining as to the cause of decedent's death. I disagree with the majority that this objection was untimely. There was no basis for this specific objection to have been raised in response to the CPLR 3101(d) exchange, since no one had hypothesized that the decedent died of a heart attack.

Plaintiff could not have anticipated this entirely new theory as to the cause of the decedent's death before hearing Dr. Mukherji's testimony, and plaintiff was certainly prejudiced by defendant's expert testimony, as evidenced by the jury verdict of \$0 for pain and suffering. In my view, disallowing a motion to limit expert testimony by excluding a new theory revealed for the first time at trial would eviscerate the procedural protection that CPLR 3101(d) was drafted to create. Accordingly, I would vacate the pain and suffering award and remand the matter for a trial on that issue (*Green v William Penn Life Ins Co. of N.Y.*, 74 AD3d 570, 575 [1st Dept 2010]; *Lissak v Cerabona*, 10 AD3d 308 [1st Dept 2004]).

Under our interest of justice jurisdiction, I would also

find that the court erred in precluding plaintiff's economist from testifying as to projected lost earnings. Plaintiff was entitled to recover "for the pecuniary injuries resulting from the decedent's death" (EPTL 5-4.3[a]), the calculation of which rests within the jury's province (see *Parilis v Feinstein*, 49 NY2d 984 [1980]). In addition to the losses attributable to household services provided to plaintiff by the decedent, plaintiff's unrefuted testimony concerning the close relationship she had with her son and his biweekly financial contributions to her, which she claims would likely have continued, are subject to consideration by a jury in determining her future economic losses, even in the absence of supporting documentation (*Zelizo v Ullah*, 2 AD3d 273 [1st Dept 2003]; *Abruzzo v City of New York*, 233 AD2d 278 [2d Dept 1996]).

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

ENTERED: DECEMBER 4, 2014


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Tom, J.P., Acosta, Andrias, DeGrasse, Richter, JJ.

12415 In re Jamal S.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

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Presentment Agency

Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Tahirih M. Sadrieh of counsel), for presentment agency.

Order, Family Court, Bronx County (Peter J. Passidomo, J.), entered on or about November 19, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree, and placed him on probation for a period of 18 months, reversed, on the law, without costs, the motion to suppress granted, the dispositional order vacated, and the petition dismissed.

We hold that the police search that yielded the firearm found in Jamal S.'s shoe was unreasonable as a matter of law and that the weapon should have been suppressed.

Officer Leo and other police officers took Jamal and another individual into custody after seeing the two riding bicycles in

the wrong direction on a one-way street. Both were charged with disorderly conduct under Penal Law § 240.20(7). The officers intended to issue summonses for the violations. Jamal, who said he was 16 years old, could not be given a summons because he had no identification. The officers therefore decided to take him to the precinct, ascertain his identity and issue the summons afterwards. Jamal was handcuffed, searched and taken to the precinct in a motor patrol car. Upon his arrival at the precinct, Jamal was searched again at the desk. No contraband was recovered as a result of either of these two searches.

After 20 minutes of detention at the precinct, Jamal admitted that he was only 15 years old. Once informed of Jamal's actual age, Officer Leo testified that he intended to notify his parents of his whereabouts and then complete a juvenile report. Officer Leo testified that he then spoke with Jamal's mother at approximately 11:00 p.m. Although the mother said she would come and get Jamal, Leo instructed her to "come in the morning." The record discloses no reason for such delay in releasing Jamal to his mother prior to the search in question. At Leo's request, Officer Dooley lodged Jamal in the juvenile room where the police intended to hold him pending his parents' arrival at the precinct. Dooley testified that he had no reason to expect that Jamal "had anything on him" at that time. At Dooley's direction,

Jamal removed his belt, shoelaces and shoes. Dooley found the gun inside of Jamal's right shoe after Jamal removed it as directed. When asked why he directed Jamal to remove his shoes, Officer Dooley responded, "Just he could be hiding anything [sic]." This unfounded suspicion provided no basis for the search.

CPL 140.10 permits a police officer to arrest a person for any "offense" that is committed in the officer's presence. The term "offense" is broadly defined to include conduct for which a sentence to a term of imprisonment or a fine is provided by state or local law (see Penal Law § 10.00 [1]). Family Court Act § 305.2(2), however, provides that "[a]n officer may take a child under the age of sixteen into custody without a warrant in cases in which he [or she] may arrest a person for a crime" The term "crime" includes only misdemeanors and felonies, not violations (see Penal Law § 10.00[6]). Accordingly, a search may be conducted where a juvenile is taken into custody for conduct which, if committed by an adult, would constitute a crime (see e. g. *Matter of Curtis H.*, 216 AD2d 173, 174 [1st Dept 1995]). As disorderly conduct is not a crime, Family Court Act § 305.2(2) prohibited Jamal's warrantless arrest for that offense (see *Matter of Victor M.*, 9 NY3d 84, 87 [2007]). Based on this record, it is clear that upon learning that Jamal was a juvenile

the police nonetheless kept him under arrest with no statutory authority for doing so.

The dissent cites *People v Ellis* (62 NY2d 393 [1984]) and *People v Copeland* (39 NY2d 986 [1976]) for the proposition that Jamal's failure to produce identification "justified the police conduct." Each of these cases involved an authorized arrest for a traffic infraction in a situation where an adult could not be issued a summons on the spot because of his inability to produce identification (see e.g. *Ellis*, 62 NY2d at 396-397). In *Matter of Charles M.* (143 AD2d 96 [2d Dept 1988]), the Court held that the arrest of a juvenile for a violation was not vitiated by § 305.2(2) because of the youth's physical appearance which gave the police reason to believe he was 16 years of age or older (*id.* at 97). Even assuming Jamal's arrest for disorderly conduct was justifiable under *Ellis*, *Copeland* and *Charles M.*, the gun was recovered from his shoe by means of an unreasonable search.

The police had no reason to believe Jamal was more than 15 years old when he was searched for the third time and directed to remove his shoes. To be sure, on the presentment agency's direct examination, Officer Leo testified as follows:

"Q. And upon *learning* that the respondent was, *in fact*, 15 years old what did you do? [emphasis added]

A. I asked Officer Dooley to lodge him in the juvenile room"¹

At this point, when Jamal was being held pending his parents' arrival, he was under temporary detention as opposed to arrest. "A temporary detention justifies only a frisk, not a full-fledged search" (*Victor M.*, 9 NY3d at 88). The removal of Jamal's shoes was far more intrusive than a frisk or a patdown (*compare Matter of Shamel C.*, 254 AD2d 87 [1st Dept 1998] [momentary lifting of a pant leg held to be incidental to a patdown]). We find no merit to the presentment agency's argument that safety required the removal of Jamal's shoes. "The touchstone of the Fourth Amendment is reasonableness . . ." (*People v Molnar*, 98 NY2d 328, 331 [2002] [internal quotation marks omitted]). Considerations of safety provide no justification in this case where Jamal was continuously in police custody and had been searched twice before being directed to remove his shoes. It is of no moment that Jamal was directed to remove his shoes pursuant to an alleged standard procedure. "[A]n unreasonable search is not somehow rendered reasonable, and therefore constitutionally permissible, by the mere fact that a departmental procedure was followed" (*People v Galak*, 80 NY2d 715, 718 [1993]). The standard of

¹This testimony refutes the dissent's position that Jamal's actual age was in question when the officers decided to hold him.

reasonableness still applies (*id.*). We recognize that in appropriate cases law enforcement officers are authorized to employ reasonable measures to guard against detainees' self-infliction of harm. Such reasonable measures may include the removal of belts and shoelaces (*cf. State Bank of St. Charles v Camic*, 712 F2d 1140, 1146 [7th Cir 1983], *cert denied* 464 US 995 [1983]). Nonetheless, the removal of Jamal's shoes cannot be justified as a protective measure where, as noted above, he had been twice searched by police officers who had no reason to expect that he had "anything on him" or otherwise posed a danger.

The dissent's suggestion that the search conducted here was necessary to prevent Jamal from shooting himself or a police officer is inflammatory, and unsupported by the record of events in this case, which began with the detention of a juvenile who did nothing more than ride a bicycle in the wrong direction on a roadway. The dissent's position, if taken to its logical extreme, would call for a full search of any juvenile even temporarily detained in a precinct for any reason. This position finds no support in the Fourth Amendment.

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

ANDRIAS, J. (dissenting)

Holding that the revolver discovered in appellant's shoe while he was detained in a police station should have been suppressed, the majority would reverse the order which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute the crime of criminal possession of a weapon in the second degree. Because I believe that appellant was lawfully taken into custody, and, considering the totality of the circumstances, that the limited search undertaken when appellant was about to be placed in the precinct's juvenile room, unguarded, was reasonable in scope and manner of execution, I respectfully dissent.

At approximately 10:30 p.m., a police officer observed appellant and another individual riding bicycles against the flow of traffic on a one way street. Because the individuals were swerving in and out of cars and "creating hazardous conditions," the officer stopped them, intending to issue summonses for disorderly conduct. However, when the officer asked for identification, appellant responded that he was 16 years old, and that he did not have identification with him. Consequently, the officer decided to take appellant back to the precinct to confirm his identity before issuing a summons. Appellant's companion, an

adult, was also taken into custody.

Appellant was patted down, handcuffed, placed in a police vehicle, and taken to the precinct, where he was searched a second time at the desk. No contraband was discovered in either search. Approximately 20 minutes later, appellant told the officer that he was only 15 years old. At that point, the officer, intending to notify appellant's parent and complete a juvenile report, asked another officer to place appellant in the precinct's juvenile room.

Appellant told the first officer that he did not know his mother's phone number because it was in his cell phone, and that the officer would have to charge the phone before calling her. The officer then charged the phone and completed the juvenile report. Meanwhile, the second officer frisked appellant when he first took him to the juvenile room and did not discover any contraband. Although he had no reason to expect that appellant "had anything on him," the officer then asked appellant, who was not handcuffed, to sit in a chair and to remove his belt and shoelaces, and to take off his shoes one by one and bang them on the ground. When appellant removed his right shoe and slid it towards the officer, the officer saw a black revolver inside it in plain view. Both officers testified that the requests for appellant to remove his belt, shoelaces and shoes were made in

accordance with the precinct's standard lodging procedure to ensure that appellant did not possess anything that he could use to harm himself and was not secreting any weapon or contraband.

Having probable cause to believe that appellant committed in his presence the offense of disorderly conduct, a violation under Penal Law § 240.20(7), the officer lawfully elected to take appellant into custody, rather than issuing a summons, based on appellant's inability to produce identification (*see People v Soto*, 297 AD2d 581 [1st Dept 2002], *lv denied* 99 NY2d 564 [2002]; *see also People v Rodriguez*, 84 AD3d 500, 501 [1st Dept 2011], *lv denied* 17 NY3d 861 [2011]). Although a warrantless arrest of a juvenile is authorized only in cases where an adult could be arrested "for a crime" (Family Court Act § 305.2 [2]), under the circumstances before us the fact that appellant was under age 16 did not vitiate the arrest. While appellant told the officer at the precinct that he was only 15, he had lied to the officer about his age at the scene of the offense, which gave the officer reasonable justification to believe that appellant was legally an adult (*see People v Wilson*, 254 AD2d 316 [2d Dept 1998]; *Matter of Charles M.* 143 AD2d 96 [2d Dept 1998]). Thus, the arrest of appellant for a violation was lawful because it was based on a reasonable belief as to age, and probable cause that an offense had been committed (*id.*; *see also Matter of Carlton F.*, 25 AD3d

610 [2d Dept 2006]; *Matter of Michael W.*, 295 AD2d 134 [1st Dept 2002], *lv denied* 98 NY2d 614 [2002]; *Matter of James T.*, 189 AD2d 580 [1st Dept 1993]; *compare Matter of Victor M.*, 9 NY3d 84, 87 [2007] [arrest not authorized where the appellant "was 15 years old at the time of his arrest, and there (was) no evidence in the record that the officer either believed or had reason to believe that he was older"]. Having lawfully arrested defendant, the police were justified in conducting a search incident to that arrest (see *People v Lewis*, 50 AD3d 595 [1st Dept 2008], *lv denied* 11 NY3d 790 [2008]; *People v Hernandez*, 27 AD3d 292 [1st Dept 2006], *lv denied* 6 NY3d 848 [2006]).

Appellant argues that since the alleged disorderly conduct involved the unlawful operation of a bicycle, it was essentially a minor traffic offense, for which an arrest and incidental search would not be proper (see *People v Marsh*, 20 NY2d 98 [1967]). However, the conduct observed by the police satisfied the elements of the nontraffic offense of disorderly conduct, including the element of, at least recklessly, creating a risk of public inconvenience, annoyance or alarm (see Penal Law § 240.20[7]). In any event, even treating appellant's conduct as a traffic infraction, his failure to produce identification, thus rendering it impracticable to issue a summons, justified the police conduct (see *People v Ellis*, 62 NY2d 393, 396 [1984];

People v Copeland, 39 NY2d 986 [1976]).

The majority believes that the search that revealed the revolver was nevertheless unreasonable because it took place after appellant had told the officer that he was 15 years old. However, appellant's continued detention, at midnight, pending the arrival of his mother, was reasonable. Although appellant now claimed that he was only 15, he still did not have any identification, which would have enabled the officer to confirm that he was in fact a juvenile, and not 16 as he had originally claimed. As appellant's actual age was still in question, the officer appropriately determined that the proper course was to contact appellant's mother, and have her come to the precinct to pick him up. Once it was determined that appellant would be further detained, it was reasonable and prudent for the police to conduct a protective patdown search and, in accordance with standard lodging procedure, to request that appellant, for his own safety and the safety of others, remove his belt, shoelaces and shoes before leaving him by himself in the juvenile room to await his mother (see e.g. *Matter of Shamel C.*, 254 AD2d 87 [1st Dept 1998] [check for weapons in shoe was a permissible minimum intrusion, incidental to patdown search, where officer reasonably believed juvenile was a runaway within meaning of Family Court Act § 718(a)).

In this regard, it is worthy to note that a police direction to a detainee to remove footwear does not transform that search, without more, into a strip search (see *People v Vega*, 56 AD3d 578 [2d Dept 2008], *lv denied* 12 NY3d 763 [2009]). Only unreasonable searches are prohibited, "and the individual's reasonable expectation of privacy is a significant factor in determining reasonableness" (*People v Perel*, 34 NY2d 462, 466 [1974]). Even assuming that the police knew that appellant was in fact a minor when they took him to the juvenile room, the majority fails to explain why procedures undertaken for the juvenile's own protection are unreasonable or violate his legitimate expectation of privacy. Unlike the juvenile in *Matter of Victor M.* (9 NY3d 84 [2007], *supra*), cited by the majority, appellant was properly brought to the precinct house, largely as a result of his own misrepresentation.

Indeed, the majority concedes that in an appropriate case law enforcement officers are authorized to employ reasonable measures to guard against a detainee's self infliction of harm. Nevertheless, the majority finds that the removal of appellant's shoes cannot be justified as a protective measure because he had twice been searched by police officers who had no reason to expect that he had "anything on him," or otherwise posed a danger. However, in *United States v Edwards* (415 US 800 [1974]),

the Supreme Court held that a search incident to arrest may take place after the arrestee has been transported to a place of detention, even where officers may have conducted a brief patdown search at the original time and place of arrest. Furthermore, the State has a significant interest in preserving life and preventing suicidal acts of its detainees (*see generally Matter of Bezio v Dorsey*, 21 NY3d 93, 104-105 [2013]), and the legitimate ends of a detainee safety search are broader than a search incident to a lawful arrest (*see Fate v Charles*, __ F Supp 2d __, 2014 WL 2527234, 2014 US Dist LEXIS 77670 [SD NY 2014]). Thus, while the majority assigns great significance to the fact that no contraband was discovered in the prior patdowns, it remains that appellant was subject to the actual supervision and control of police officers, who were responsible for his safety until such time as he could be released to his mother's custody. Significantly, while the majority notes that the purpose of asking appellant to remove his belt, shoelaces and shoes was unjustified as a safety measure for the protection of police officers, two patdown searches having been conducted previously, it fails to acknowledge its reasonableness as a safety measure for the protection of the juvenile himself.

In sum, considering the totality of the circumstances, it was reasonable, both in scope and manner of execution, for the

second officer, who had not participated in appellant's arrest or the prior patdown searches, to ask appellant to remove his shoes as a protective measure before appellant was left by himself in the juvenile room. As a practical matter, neither the interest of the juvenile detainee nor the interest of law enforcement, including the safety of police officers and juvenile detainees, will be promoted by the establishment of a rule that prohibits the search of a juvenile's shoes in a police station. Such a holding would unduly restrict police searches of detainees in police precincts and may facilitate the secretion of weapons in shoes by detainees to avoid detection. Indeed, had the police failed to properly search appellant before placing him in the juvenile room, one can only imagine the public outcry had appellant shot himself or harmed an officer with the gun secreted in his shoe.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: DECEMBER 4, 2014


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dismissed on the ground that, in the face of respondents' evidence in support of the motion to dismiss, the executor "failed to demonstrate the existence of any *specific* personal property or money which belongs to the estate" (*Matter of Castaldo*, 180 AD2d 421, 421 [1st Dept 1992] [internal quotation marks omitted]), or even a reasonable likelihood that such specific property or money might exist. In support of their motion, respondents offered contemporaneous documentary evidence indicating that, in 1990, decedent had sold her interest (0.36 of one share of stock) in family-owned Hudson County News Company (Hudson) back to the company for consideration comprising \$28,500 in cash and a promissory note in the amount of \$200,000 payable in installments over five years, and that she thereafter had no interest in that entity, its successors or other family enterprises. In opposition, the executor failed to come forward with any evidence suggesting that (aside from a 401[k] account not at issue on this appeal) decedent may have held any interest in any of the family's businesses after 1990. Notwithstanding the executor's suggestion of the possibility that decedent may not have been paid in full for her interest in Hudson, the executor offers only speculation that decedent might have held some interest in the family businesses after the 1990 transaction. Any claim by decedent to recover Hudson stock or

other business interests allegedly converted by respondents would have accrued at the time of the conversion and thus would have been barred by the three-year statute of limitations (CPLR 214[3]) long before decedent's death in 2007 (see *Matter of Peters v Sotheby's Inc.*, 34 AD3d 29, 36 [1st Dept 2006], *lv denied* 8 NY3d 809 [2007]). Further, any claim for breach of contract based on the 1990 transaction would have become time-barred in 2001, six years after the last installment payment for decedent's fractional share of Hudson stock became due in 1995 (see CPLR 213[2]), and, in any event, such a contractual cause of action would not confer a right to possession of specific personal property or money, as is required to invoke SCPA 2103 (see *Castaldo*, 180 AD2d at 42). Finally, the executor has presented no evidence suggesting that decedent, at the time of her death, may have had a viable fraud cause of action based on the 1990 transaction and, as with a contractual claim, a claim

for damages based on any such fraud would not entitle the estate to possession of specific personal property or money.

In view of the foregoing, we need not reach the parties' remaining contentions.

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

ENTERED: DECEMBER 4, 2014


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Friedman, J.P., Moskowitz, Feinman, Gische, JJ.

13188-

Index 603431/08

13189 Sebastian Holdings, Inc.,
Plaintiff-Appellant,

-against-

Deutsche Bank AG,
Defendant-Respondent.

Zaroff & Zaroff LLP, Garden City (Ira S. Zaroff of counsel), for
appellant.

Cahill Gordon & Reindel LLP, New York (David G. Januszewski of
counsel), for respondent.

Order, Supreme Court, New York County (Barbara R. Kapnick,
J.), entered August 1, 2013, which, as modified by an order of
the same court and Justice, entered January 23, 2014, (1) granted
defendant Deutsche Bank AG's motion to modify that branch of the
order of the Special Referee (Kathleen A. Roberts), dated March
25, 2013, applying Swiss law regarding attorney-client privilege,
(2) held New York attorney-client privilege law applicable, and
(3) directed an *in camera* review to determine the applicability
of the privilege to individual documents, unanimously affirmed,
without costs.

The underlying facts of this action are not in dispute.
Plaintiff is a Turks and Caicos company formed for the purpose of
making and holding investments. In 2004, plaintiff became a

client of defendant's private wealth management division, Deutsche Bank Suisse, in Geneva, Switzerland. In 2006, plaintiff opened a foreign exchange (FX) prime brokerage account at Deutsche Bank in New York; in 2008, the FX account incurred hundreds of millions of dollars in losses. Plaintiff then commenced this action, alleging that Deutsche Bank failed to accurately report plaintiff's exposure on trades and exercise proper trading control in the account.

After plaintiff commenced this action, it sought production of materials from Deutsche Bank Suisse. To shield Deutsche Bank Suisse employees who assisted in the production of documents from criminal penalties under Article 271 of the Swiss Penal Code, Deutsche Bank insisted on an order and request under the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (Hague Convention).

As a result, the motion court, on consent of the parties, entered two orders initiating the Hague Convention process - specifically, an Order Appointing Commissioner and Directing Submission of Hague Convention Application (the Order Appointing Commissioner) and a Request for International Judicial Assistance in the Authorization of a Commissioner Pursuant to Chapter II of the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters (the Request). Under the

Order Appointing Commissioner, a Swiss attorney was appointed "to take documents in the above-captioned action pending in this Court, including the transmission to counsel for the parties of Documents . . . that are provided to the commissioner in accordance with the New York Civil Practice Law and Rules." Similarly, the Request specified that Deutsche Bank would prepare a privilege log "in accordance with the standards of the New York Civil Practice Law and Rules for determination by the Court upon application as to such privilege designations and redactions."

Deutsche Bank produced documents from Deutsche Bank Suisse, but withheld or redacted as privileged documents reflecting communications between employees of Deutsche Bank Suisse and its in-house counsel (the in-house documents). Plaintiff moved, among other things, to compel production of the in-house documents under CPLR 3124 and 3126, contending that Swiss law - which Deutsche Bank concedes does not recognize attorney-client privilege for communications with in-house counsel - must be applied to the in-house documents.

By order dated March 25, 2013, the discovery referee determined that Swiss law governed application of the attorney-client privilege and ordered Deutsche Bank to produce all responsive in-house documents. However, the motion court modified the referee's order in part, holding that New York

privilege law applied. In so holding, the court noted that under the stipulated Hague Convention orders, discovery is to proceed under the CPLR.

We agree with the motion court that the stipulated orders, directing that discovery is to proceed under the CPLR, are dispositive. Indeed, the Request specifically states that Deutsche Bank would prepare a privilege log "in accordance with the standards of the New York Civil Practice Law and Rules for determination by the Court upon application as to such privilege designations and redactions." We reject plaintiff's assertion that this language creates a reservation of rights on privilege challenges; on the contrary, the language merely allows plaintiff to challenge Deutsche Bank's privilege designation and redactions. Accordingly, the motion court properly concluded that privilege determinations are governed by New York law, as the parties stipulated.

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

ENTERED: DECEMBER 4, 2014


CLERK

Tom, J.P., Sweeny, Andrias, Moskowitz, Gische, JJ.

13379 Tamara Howell, Index 310048/09
Plaintiff-Respondent-Appellant,

-against-

New York City Transit Authority,
Defendant-Appellant-Respondent.

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

Davidson & Cohen, P.C., Rockville Centre (Robin Mary Heaney of
counsel), for respondent-appellant.

Order, Supreme Court, Bronx County (Faviola A. Soto, J.),
entered August 30, 2013, which denied defendant's CPLR 4404
motion to set aside the verdict finding it 100% liable in
negligence for plaintiff's injuries, and granted its motion to
set aside the jury's damages award and ordered a new trial on
damages, unanimously modified, on the law, to grant defendant's
motion to set aside the verdict, and otherwise affirmed, without
costs. The Clerk is directed to enter judgment dismissing the
complaint.

Plaintiff, a large woman, was standing near the doors inside
a crowded number 4 express train. When it stopped, she attempted
to back out and pivot sharply to the right, so that she could
face and re-enter the train after other passengers exited. As
she attempted to do so, plaintiff noticed a gap between the train

and the platform and believed that she could clear it.

Unfortunately, she did not succeed and her leg became wedged in the gap at a point two inches below the knee.

The jury found that defendant was negligent and that its negligence was a substantial factor in causing the accident. The jury also found that plaintiff was not negligent. However, "there is simply no valid line of reasoning and permissible inferences which could possibly lead rational [persons] to the conclusion reached by the jury on the basis of the evidence presented at trial" (*Cohen v Hallmark Cards*, 45 NY2d 493, 499 [1978]).

The existence of a gap between a train and a platform, necessary to the operation of the train because the cars must not scrape the platform and must be far enough away to allow for the oscillation and swaying of the train, is insufficient, in and of itself, to establish defendant's negligence (*see Ryan v Manhattan Ry. Co.*, 121 NY 126, 131 [1890]; *Johnson v New York City Tr. Auth.*, 7 Misc 3d 42, 44 [App Term, 2d Dept 2005]). Here, plaintiff failed to establish that the size of the gap between the train and the platform was unreasonably large, or that defendant breached its duty of care (*see Glover v New York City Tr. Auth.*, 60 AD3d 587 [1st Dept 2009], *lv denied* 13 NY3d 706 [2009]; *Williams v New York City Tr. Auth.*, 31 AD3d 631, 632 [2d

Dept 2006]).

In *Glover*, the plaintiff claimed that the Transit Authority breached its duty of care by allowing the gap between the platform and the train to exceed six inches, the maximum tolerable gap between a subway car and a platform under the Transit Authority's internal policies. The plaintiff's engineering expert testified that the diameter of the plaintiff's leg above the knee was 6.68 inches and therefore, the gap must have exceeded six inches.

This Court reversed, ruling that the verdict was based upon speculative and insufficient evidence, which did not establish that the gap exceeded six inches at the time of the accident or that the Transit Authority breached its duty of care. The plaintiff's engineering expert based his testimony on leg measurements, taken four years after the accident, and never measured the gaps at the station. Furthermore, a violation was not shown by the measurement of plaintiff's leg diameter as 6.68 inches because this did not account for compression. In contrast, the Transit Authority's engineers measured the gap nine months before and 15 months after the accident and showed that it varied between 1.75 inches and 3.75 inches.

Here, plaintiff estimated that the gap, based on her visual observations, was 12 inches. However, this estimate may have been

influenced by the measurement of her leg by one of her doctors, who found her calf to have a circumference of 20 inches, and defense counsel demonstrated, with the use of a ruler, that a 12-inch gap would have greatly exceeded the width of plaintiff's calf. Significantly, plaintiff did not know the width of her foot and admitted that she could not be certain as to the size of the gap. Nor did she produce any expert testimony as to the size of the gap or defendant's alleged negligence.

On the other hand, a road car inspector for defendant testified that he did a "rough estimate" of the gap after the accident and found it to be "three-and-a-half" inches, which "wasn't that big of a gap." Defendant's professional engineer and "Director of Gap Management" testified that when her crew had visited the station in 2004 and 2013, the horizontal gap measured 3.75 inches. A police officer testified that she could not help plaintiff get her leg out because the space the leg was trapped in was "really tight." The officer did not recall how much space was between plaintiff's leg, the train, and the platform, but it was not "that much."

The Transit Authority's Director of Track Engineering, testified that a horizontal gap between the platform and the car was necessary to "assure that the car, while it's traveling on the track, never touches the platform," i.e., "to prevent

physical contact between the car body and the platform itself." He also stated that defendant's policies permitted a "nominal" gap to exist of no more than six inches between the train and the platform's ledge. In arriving at this permitted maximum gap, the Clearance Committee consulted the practices of other subway systems and drew on the guidance of the International Union of Public Transport, a clearinghouse of worldwide transit practice and information.

Plaintiff's estimate that the gap measured 12 inches, from which she ultimately wavered, is speculative and insufficient to demonstrate the size of the gap or defendant's negligence (see *Trudnowski v New York Cent. R.R. Co.*, 220 App Div 503 [4th Dept 1927] [rejecting a passenger's self-serving description of a huge gap, where the objective measurements suggested a far smaller opening]). Nor could plaintiff reconcile a 12-inch gap with the circumference of her calf. Had the gap measured 12 inches, plaintiff's calf would have measured approximately 36" around, not the approximately 20" her doctor reached when he measured her calf three years after the accident. Furthermore, as we noted in *Glover*, human tissue is subject to compression and plaintiff's description of her leg as large did not rule out a relatively narrow gap.

Plaintiff did not produce any expert testimony and could not

challenge defendant's conclusion that a six-inch gap sufficed to protect both the integrity of the station platforms and the safety of passengers leaving and entering its trains. Indeed, with no expert, plaintiff could not prove that the gap, whether it was 12 inches or something smaller, posed a hazard, given the realities of train traffic and engineering.

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13650 In re Gregory Dancil,
Petitioner,

Index 102261/12

-against-

New York City Housing Authority,
Respondent.

Gregory Dancil, petitioner pro se.

Kelly D. MacNeal, New York (Andrew M. Lupin of counsel), for
respondent.

Determination of respondent, dated November 23, 2011, which denied petitioner's grievance seeking succession rights as a remaining family member to the tenancy of his sister, 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 [Peter H. Moulton, J.], entered February 22, 2013), dismissed, without costs.

The determination that petitioner is not entitled to succession rights as a remaining family member (RFM) is supported by substantial evidence (*see generally 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]). Petitioner's occupancy was not pursuant to respondent's written authority and was not reflected in the affidavits of income (*see Matter of Adler v New York City Hous. Auth.*, 95 AD3d 694 [1st Dept 2012],

lv dismissed 20 NY3d 1053 [2013]; *Matter of Weisman v New York City Hous. Auth.*, 91 AD3d 543 [1st Dept 2012], *lv dismissed* 19 NY3d 921 [2012]). “[R]espondent may not be estopped from denying RFM status even if it ... failed to assist the tenant of record with the necessary forms or was aware of petitioner’s occupancy” (*Rosello v Rhea*, 89 AD3d 466, 466 [1st Dept 2011]). Furthermore, since public housing apartments are not private property, the tenant of record could not bequeath or transfer the apartment to petitioner (see e.g. *Matter of Hernandez v New York City Hous. Auth.*, 2009 WL 357467, 2009 NY Misc LEXIS 3808 [Sup Ct, NY County 2009]).

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

ENTERED: DECEMBER 4, 2014



CLERK

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

13656- Index 158896/12
13656A OneBeacon America Insurance Company,
Plaintiff-Appellant,

-against-

Whitman Packaging Corporation,
Defendant-Respondent.

Steptoe and Johnson LLP, New York (Michael Vatis and Jeffrey Novack of counsel), for appellant.

Reed Smith, LLP, New York (John Schryber of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol R. Edmead, J.), entered August 13, 2013, dismissing the complaint, and awarding costs and disbursements in the amount of \$385.00 to defendant, Whitman Packaging Corporation (Whitman), unanimously affirmed, with costs. Appeal from order, same court and Justice, entered June 17, 2013, which granted Whitman's motion to dismiss the complaint, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Plaintiff, OneBeacon America Insurance Company, seeks to recover from Whitman payments it made in 2012 to its insured, nonparty Estee Lauder, Inc. (Estee Lauder), an entity affiliated with Whitman through its corporate parent, The Estee Lauder Companies, for costs incurred between July 1999 and March 2009

defending and resolving claims asserted jointly against Estee Lauder and Whitman by the New York State Department of Environmental Conservation (NYSDEC) for cleanup costs of environmental hazards at two landfills. OneBeacon has failed to sufficiently plead its claim for unjust enrichment since it has not alleged any expenses that would make allocation "factually possible" between Estee Lauder and Whitman (*Health-Chem Corp. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 148 Misc 2d 187, 190 [Sup Ct, NY County 1990]). The complaint does not allege any facts in support of OneBeacon's contention that Whitman increased the costs of the joint defense, despite the fact that OneBeacon had more than a decade to investigate the facts and conduct discovery, and more than three years to analyze the legal bills. Thus, the allegations are conclusory and this claim was properly dismissed (see e.g. *Security Police and Fire Professionals of Am. Retirement Fund v Mack*, 93 AD3d 562, 564 [1st Dept 2012]). Whitman's mere awareness, at some point, that OneBeacon paid its defense costs does not alter the result (see *Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511, 517 [2012]). The claim for unjust enrichment also fails because no facts are alleged that indicate a relationship between the parties that could have caused reliance or inducement (see *Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 182 [2011]).

OneBeacon's claim for equitable subrogation is also unavailing. OneBeacon does not dispute that a 2009 consent order, to which Whitman was a party, released Whitman from all claims by the remaining settling respondents, including its insured, Estee Lauder, with respect to the claims arising from one of the landfills. Since plaintiff "can only recover if the insured could have recovered and its claim as subrogee is subject to whatever defenses the third party might have asserted against its insured" (*Federal Ins. Co. v Arthur Andersen & Co.*, 75 NY2d 366, 372 [1990]), this claim is precluded by the release. Although OneBeacon now contends, for the first time on appeal, that the release was entered into as a result of collusion between Estee Lauder and Whitman, the allegations that Whitman and Estee Lauder shared the same counsel, and that counsel submitted invoices to OneBeacon for legal fees that included work performed for both Whitman and Estee Lauder, are patently insufficient to state such a claim.

Even if a 2004 consent order (relating to the other landfill), to which Whitman was not a party, did not release all of the claims against Whitman, OneBeacon still cannot recover under the equitable doctrine of subrogation since there are no allegations of Whitman's wrongdoing separate and apart from those made against Estee Lauder for which OneBeacon was forced to pay

defense costs (see *Kaf-Kaf, Inc. v Rodless Decorations, Inc.*, 90 NY2d 654, 660 [1997]).

Based on the insufficiency of the allegations as to any separate and distinct wrongdoing on the part of Whitman, OneBeacon's claim for implied indemnification also fails (see *Mas v Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]).

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13657 In re Iskritsa O.,
 Petitioner-Appellant,

-against-

 Steven Michael U.,
 Respondent-Respondent.

Leslie S. Lowenstein, Woodmere, for appellant.

Bruce A. Young, New York, for respondent.

 Order, Family Court, New York County (Mary E. Bednar, J.),
entered on or about July 1, 2013, which, in a proceeding brought
pursuant to article 8 of the Family Court Act, dismissed the
petition seeking an order of protection, unanimously affirmed,
without costs.

 The determination that respondent's actions did not rise to
the family offense of either harassment in the second degree or
aggravated harassment in the second degree is supported by a fair
preponderance of the evidence (*see Matter of Everett C. v Oneida
P.*, 61 AD3d 489 [1st Dept 2009]; Penal Law §§ 240.26[1], [3];
240.30). There exists no basis to disturb the court's decision

to credit respondent's version of events over petitioner's version (see *Matter of Peter G. v. Karleen K.*, 51 AD3d 541 [1st Dept 2008]).

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

ENTERED: DECEMBER 4, 2014


CLERK

Tom, J.P., Sweeny, DeGrasse, Richter, JJ.

13659-

13660 Arie Genger,
 Plaintiff-Appellant-Respondent,

Index 104249/07

-against-

Sagi Genger,
 Defendant-Respondent-Appellant,

Dalia Genger,
 Defendant.

Law Offices of Leon Friedman, New York (Leon Friedman of
counsel), for appellant-respondent.

Morgan, Lewis & Bockius LLP, New York (John Dellaportas of
counsel), for respondent-appellant.

Order, Supreme Court, New York County (Cynthia S. Kern, J.),
entered October 15, 2013, which, to the extent appealed from as
limited by the briefs, denied plaintiff's motion for summary
judgment on three promissory notes and a stock purchase
agreement, and granted his motion to dismiss defendant Sagi
Genger's counterclaim alleging breach of fiduciary duty,
unanimously modified, on the law, the motion for summary judgment
granted as to notes 2 and 3 and the stock purchase agreement, and
the matter remanded for calculation of damages and interest
thereon consistent herewith, and otherwise affirmed, without
costs. Order, same court and Justice, entered January 21, 2014,
which, to the extent appealable, denied defendant Sagi Genger's

motion to renew, unanimously affirmed, with costs.

The motion court properly found that plaintiff Arie Genger established his prima facie entitlement to judgment under note 2 (for \$100,000), note 3 (for \$50,000), and the stock purchase agreement, since these documents constitute instruments for the payment of money only, and it is undisputed that Sagi defaulted in his obligation to make payment thereunder. However, we disagree with the motion court's finding that Sagi's conclusory and unsubstantiated allegation that the notes and purchase agreement were never intended to be enforced was sufficient to raise a triable issue of fact to defeat summary judgment (see *Kornfeld v NRX Technologies*, 93 AD2d 772 [1st Dept 1983], *affd* 62 NY2d 686 [1984]). The motion court's reliance on *Greenleaf v Lachman* (216 AD2d 65 [1st Dept 1995], *lv denied* 88 NY2d 802 [1996]), is misplaced and the record does not support the motion court's statement that "Sagi claim[ed] that the Notes were executed between him and [Arie] 'as tax planning mechanisms.'" We reject Sagi's contention that Arie's delay in demanding payment establishes that the notes and stock purchase agreement were not intended to be enforced, since "[i]ndulgence or leniency in enforcing a debt when due is not an alteration of the contract" (*Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 316 [1989]). Summary judgment was properly denied with

respect to note 1 (for \$11,700), which, although signed by Sagi, lists nonparty Orly Genger as the maker of the note. Accordingly there is an issue of fact as to whether Sagi assumed the obligation to make the payment called for by the note.

The motion court properly found that no issue of fact exists as to the notes' ownership, since, as we observed on a prior appeal, Notes 2 and 3 were not marital assets, as they were not in existence at the January 2002 commencement of Arie and Dalia's divorce proceeding. We are not persuaded by Sagi's claim that he validly transferred the notes and stock purchase agreement to Dalia, pursuant to his authority as attorney-in-fact, since as this Court recognized, on a prior appeal, the stipulation of settlement did not state that Sagi had "the power to transfer or assign assets from one party to the other," and Sagi has failed on this motion for summary judgment to provide evidence to the contrary (87 AD3d 871, 873 [1st Dept 2011]). The email exchange on which he relied did not establish Arie's consent to any such transfer.

To the extent the notes and stock purchase agreement were considered "non-liquid assets," subject to a "coin toss" procedure set forth in the divorce settlement, Arie owns the instruments and the debts are owed to him.

Sagi's unsupported claim that he lacked the mental capacity

at the time two of the notes were executed is insufficient to raise an issue of fact, since he failed to sustain his burden of demonstrating "that his mind was so affected as to render him wholly and absolutely incompetent to comprehend and understand the nature of the transaction and that such incompetence or incapacity existed when he executed the document" (*Lansco Corp. v NY Brauser Realty Corp.*, 63 AD3d 513, 514-515 [1st Dept 2009]).

We find Sagi's claim that his remaining affirmative defenses raised issues of fact unavailing. When Arie established his prima facie entitlement to judgment, it was incumbent upon Sagi to "assemble, lay bare, and reveal his proofs in order to show his defenses are real and capable of being established on trial . . . and it is insufficient to merely set forth averments of factual or legal conclusions" (*Schiraldi v U.S. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993] [internal quotation marks omitted]).

Sagi's second counterclaim, for breach of fiduciary duty, was properly dismissed, because he failed to adequately allege the first element of the claim, i.e., the existence of a fiduciary relationship (see *Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). Although the counterclaim complaint alleged that "Arie, as Sagi's father, and knowledgeable of Sagi's then-incapacitation, owed Sagi a duty to not knowingly

take advantage [of] Sagi during a period of incapacitation," we have already found that any claim of incapacitation is not supported by the requisite evidentiary showing.

The denial of renewal should be affirmed, as the excerpt from Arie's complaint in another action was available to Sagi at the time of his opposition to the original motion to dismiss, and he offered no viable reason why he failed to provide such information at that time (*see e.g. Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], *appeal dismissed* 15 NY3d 820 [2010]). In any event, the parties' relationship arising out of the business entity at issue in that other case has no bearing here. The motion was not premature. Sagi failed to identify any facts that were exclusively within Arie's knowledge and control (*see Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 103 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]). "Vague and speculative allegations of wrongdoing are insufficient to support a request for disclosure" (*Artigas v Renewal Arts Realty Corp.*, 22 AD3d 327, 328 [1st Dept 2005]).

We remand to Supreme Court for a calculation of the amount of damages owed to Arie under the stock purchase agreement, including any "Contingent Amount," as provided for therein, to the extent applicable, and calculation of the simple interest owed to him in accordance with the terms of notes 2 and 3 and the

stock purchase agreement. Contrary to Arie's contention, compound interest may be collected only where the agreement expressly so provides (see *Gutman v Savas*, 17 AD3d 278, 279 [1st Dept 2005]). *520 E. 81st St. Assoc. v State of New York* (19 AD3d 24 [1st Dept 2005], *lv denied* 5 NY3d 712 [2005]), which applies to "just compensation" cases, is inapplicable here.

We have considered the parties' remaining contentions and find them unavailing.

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13661-

Index 652735/12

13662 Edith Wiener,
Plaintiff-Appellant,

-against-

Laura Spahn,
Defendant-Respondent.

Schlam Stone & Dolan LLP, New York (Jeffrey M. Eilender of counsel), for appellant.

Anderson & Ochs, LLP, New York (Mitchell H. Ochs of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered July 17, 2013, which, insofar as appealed from as limited by the briefs, granted defendant's motion to dismiss the first through third causes of action, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered January 7, 2014, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Since the parties' mother's will contains no language indicating that noncompliance with the terms of paragraph 7 will result in forfeiture of a bequest thereunder, the first cause of action, which seeks forfeiture of all bequests defendant received under paragraph 7, fails to state a cause of action (*Allen v*

Trustees of Great Neck Free Church, 240 AD 206 [2d Dept 1934],
affd 265 NY 570 [1934]). Thus, notwithstanding that defendant's
interests in the properties located in Westchester County that
were bequeathed to her were not the subject of prior litigation
and therefore are not barred by the doctrine of res judicata or
collateral estoppel, the first cause of action was correctly
dismissed.

The second and third causes of action, which arise from
defendant's attempt to sell her interests in two Bronx properties
in breach of the terms of the will, are barred by the doctrine of
res judicata.

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

ENTERED: DECEMBER 4, 2014

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

CLERK

guilt.

Defendant was not deprived of his right to exculpatory or impeachment material under *Brady v Maryland* (373 US 83 [1963]) when, after an in camera inspection, the court declined to compel the People to disclose a police report of a person who did not witness the homicide. Although defendant now asserts that there were discrepancies between this person's account of events surrounding the homicide and the account given by the People's main witness, these discrepancies had little or no exculpatory or impeachment value. Accordingly, defendant was not prejudiced by the court's ruling (see *People v Garrett*, 23 NY3d 878, 885 [2014]).

The court properly admitted a recording of a telephone call made by defendant while incarcerated. There was no violation of defendant's right to counsel (see *People v Johnson*, 120 AD3d 1154 [1st Dept 2014], and cases cited therein), and we reject defendant's remaining challenges to this evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 4, 2014


CLERK

the parties' express, written agreement covered the same subject matter as the alleged subsequent agreement, plaintiff's unjust enrichment claim was also properly dismissed (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009]). Finally, while plaintiff's arguments are unavailing, they are not so devoid of merit as to be frivolous. As such, defendant's request for sanctions pursuant to 22 NYCRR Part 130 is denied.

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13666 Judith Ann Abrams, Index 570765/12
Petitioner-Respondent-Appellant,

-against-

4-6-8, LLC, et al.,
Respondents-Appellants-Respondents,

The Department of Housing
Preservation and Development (DHPD),
Respondent.

Rosenberg & Estis, P.C., New York (Michael E. Feinstein of
counsel), for appellants-respondents.

Hartman, Ule, Rose & Ratner, LLP, New York (David Ratner of
counsel), for respondent-appellant.

Order of the Appellate Term of the Supreme Court, First
Department, entered December 28, 2012, which affirmed a judgment
of the Civil Court, New York County (David B. Cohen, J.), entered
on or about January 28, 2010, after a nonjury trial, dismissing
the petition, and reversed a judgment, same court (David J.
Kaplan, J.), entered March 21, 2011, after a hearing, awarding
respondents 4-6-8, LLC, Transrealty Inc. and Michael King (the
owner) attorneys' fees, unanimously affirmed, without costs.

Dismissal of the petition was based on a fair interpretation
of the evidence, consisting largely of credibility findings with
respect to the parties' experts. The owner was the prevailing

party in having obtained dismissal (see *Solow v Wellner*, 205 AD2d 339 [1st Dept 1994], *affd* 86 NY2d 582 [1995]). However, its claim for attorneys' fees was properly denied, this matter having been unnecessarily prolonged by both sides (see *Solow Mgt. Corp. v Lowe*, 1 AD3d 135 [1st Dept 2003]).

We do not reach the collateral issue regarding the interpretation of the attorneys' fees provision of the lease because it was not raised at the trial level.

We have considered the parties' other arguments for affirmative relief and find them unavailing.

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

ENTERED: DECEMBER 4, 2014


CLERK

swinging a meat cleaver (*see e.g. People v Ross*, 270 AD2d 36 [1st Dept 2000] *lv denied* 95 NY2d 803 [2000]). Even if defendant's motive was to escape with stolen property, the jury could have reasonably found that he nevertheless intended to kill the person who sought to apprehend him.

The court properly exercised its discretion in denying defendant's mistrial motion, made after the People's loss of exhibits already in evidence and viewed by the jury, consisting of the bloody clothing of both defendant and the victim. There was no evidence of bad faith on the part of the People, who inadvertently caused the exhibits to be discarded, and any prejudice to defendant from the absence of the exhibits from the courtroom for the remainder of the trial was highly speculative (*see e.g. People v Rubero*, 294 AD2d 310 [1st Dept 2002], *lv denied* 98 NY2d 713 [2002]). The clothing was not critical to the People's case or to any trial issues. Although defendant claims that he needed the presence of the coat in order to raise certain issues, we note that the coat was present during the testimony of the victim and another important witness, and defendant had a full opportunity to cross-examine these witnesses on all matters relating to the coat. Furthermore, the court gave the jury an adverse inference instruction. Defendant has not preserved any

of his arguments regarding that instruction, and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13669-

Index 106008/11

13670N 55 Gans Judgment LLC as Successor in
Interest to Union Center National Bank,
Plaintiff-Respondent,

-against-

Gerald Romanoff, et al.,
Defendants-Respondents.

The Sheryl Romanoff Irrevocable
Grantor Trust, et al.,
Defendants-Appellants,

John Does 1 through 10 ("John Does"),
Defendants.

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55 Gans Judgment LLC as Successor in
Interest to Union Center National Bank,
Plaintiff-Respondent,

-against-

Gerald Romanoff, et al.,
Defendants-Respondents,

The Sheryl Romanoff Irrevocable
Grantor Trust, et al.,
Defendants.

- - - - -

Robert Romanoff,
Proposed Intervenor-Appellant,

Frank D. Platt, Esq., etc.,
Respondent-Respondent.

Law Office of James M. Haddad, New York (James M. Haddad of
counsel), for appellants.

Woods Oviatt Gilman, Buffalo (William F. Savino of counsel), for
55 Gans Judgment LLC, respondent.

Venturini & Associates, New York (August C. Venturini of counsel), for Gerald Romanoff and Sheryl Romanoff, respondents.

Speyer & Perlberg, LLP, Melville (Dennis M. Perlberg of counsel), for The Sheryl Romanoff Irrevocable Grantor Trust, The Sheryl Romanoff Grantor Retained Annuity Trust and Frank D. Platt, respondents.

Appeal from order, Supreme Court, New York County (Manuel J. Mendez, J.), entered February 6, 2013, which, inter alia, granted plaintiff's motion for partial summary judgment on its second and fourth causes of action (constructive fraudulent conveyance and intentional fraudulent conveyance), and voided defendants Gerald Romanoff and Sheryl Romanoff's transfer of certain shares of stock to defendant The Sheryl Romanoff Irrevocable Grantor Trust and The Sheryl Romanoff Grantor Retained Annuity Trust (Trusts), unanimously dismissed, without costs. Appeal from order, same court and Justice, entered on or about March 24, 2014, which, inter alia, denied Robert Romanoff's motion to intervene as a defendant and co-trustee of the Trusts, and, upon intervention, to have co-trustee Frank D. Platt removed and replaced, and granted in part Gerald Romanoff and Sheryl Romanoff's cross motion to seal certain exhibits submitted in support of the motion to intervene, unanimously dismissed, without costs.

Robert Romanoff, one of two co-trustees of both Trusts, seeks to appeal, on behalf of the Trusts, from the grant of

plaintiff's motion for partial summary judgment on two of its fraudulent conveyance causes of action and, for the purpose of protecting the rights of the Trusts, from the denial of his motion to intervene as a defendant and co-trustee. However, having failed to obtain the consent of the other co-trustee to pursue these appeals, Romanoff lacks standing to appeal.

Whether the appeals are in the best interest of the Trusts and should be pursued on behalf of the Trusts is a question that calls for the exercise of discretion by the trustees (*Cooper v Illinois Cent. R.R. Co.*, 38 App Div 22, 28 [1st Dept 1899]; see *Jones v Incorporated Vil. of Lloyd Harbor*, 277 App Div 1124 [2d Dept 1950], *affd* 302 NY 718 [1951]). Absent a contrary provision in the trust instrument, the consent of all trustees is required to pursue an appeal either on behalf of the Trusts or for the stated purpose of protecting the rights of the Trusts (*Jones*, 277 App Div at 1125; *Matter of Sarkissian*, 33 AD2d 652 [4th Dept 1969]; see also *Cooper*, 38 App Div at 28; *Brennan v Willson*, 71 NY 502, 507 [1877]).

Co-trustee Frank D. Platt states that he does not join the appeal from the grant of plaintiff's motion. Contrary to Romanoff's contentions, the co-trustee's consent to the appeal may not be inferred merely from his failure to move to strike or otherwise correct the notice of appeal filed on behalf of the

Trusts. Nor did Romanoff obtain the co-trustee's consent to the appeal from the denial of his motion to intervene, and he does not argue that any independent basis exists for his appeal from the grant of the cross motion to seal certain exhibits.

THIS CONSTITUTES THE DECISION AND ORDER
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arose in New York County, where the alleged misconduct occurred and where he was arrested and prosecuted, the motion for a change of venue pursuant to CPLR 504(3) was properly granted, notwithstanding that he was held in Rikers Island in Bronx County for 20 months prior to and during the criminal trial (see *Thames v New York City Police Dept.*, 105 AD3d 481 [1st Dept 2013]; *Smith v City of New York*, 60 AD3d 540 [1st Dept 2009]).

Although plaintiff also alleges that he suffered physical injury when he was attacked by an inmate at Rikers Island, that incident does not form the basis of any distinct claim against the City based on misconduct of City officials occurring in Bronx County (see *Thames*, 105 AD3d 481; compare *Rodriguez v City of New York*, 92 AD3d 596 [1st Dept 2012]). Plaintiff's tangential allegation in support of his federal civil rights claims, that the Police Department was deliberately indifferent to a pattern of similar police misconduct, including misconduct in other cases occurring in the Bronx, is an insufficient basis for finding that

his own claims arose in Bronx County.

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

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: DECEMBER 4, 2014


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

13672- Ind. 3386/10
13673 The People of the State of New York,
Respondent,

-against-

Gerald Ross,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered April 7, 2011, convicting defendant, after a jury trial, of two counts of attempted sexual abuse in the first degree and endangering the welfare of a child, and sentencing him, as a second felony offender, to an aggregate term of eight years, unanimously affirmed. Order, same court and Justice, entered on or about January 16, 2014, which denied defendant's CPL 440.10 motion to vacate the judgment of conviction, unanimously affirmed.

The verdict was not against the weight of the evidence (see *People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant's commission of attempted sexual abuse in the first degree was established by evidence that he attempted to subject the eight-

year-old victim to sexual contact, by twice approaching her and requesting that she touch his penis. In each instance, defendant's conduct constituted an attempt under Penal Law § 110.00 because he came dangerously close to achieving his objective (see *People v Bracey*, 41 NY2d 396, 299-300 [1977]), in that all that was necessary to complete the crime was compliance by the child, who was legally incapable of consent.

The court properly denied defendant's motion to vacate the judgment, made on the ground of ineffective assistance of counsel regarding defendant's rejection of a plea offer. The submissions on the motion failed to demonstrate that, but for counsel's allegedly incorrect advice regarding the possibility of consecutive sentencing, there was a reasonable probability that defendant would have accepted the People's plea offer (see *Lafler v Cooper*, 566 US __, 132 S Ct 1376, 1384-1385 [2012]). We note that defendant had access to his trial lawyer's notes and did not produce them in support of his motion.

We perceive no basis for reducing the sentence.

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

ENTERED: DECEMBER 4, 2014


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

13674 TAC Air Co., Index 400350/13
Plaintiff-Appellant,

-against-

NYU Hospital for Joint Diseases,
Defendant-Respondent.

Meyers, Saxon & Cole, Brooklyn (Charles Zolot of counsel), for
appellant.

Holland & Knight LLP, New York (Henry A.H. Rosenzweig of
counsel), for respondent.

Order, Supreme Court, New York County (Donna M. Mills, J.),
entered August 8, 2013, which granted defendant's motion for
summary judgment dismissing the complaint, unanimously affirmed,
without costs.

The complaint alleges a breach by defendant of a service
agreement, dated April 21, 2006, which was a Purchase Order (PO)
covering the last three years of a four-year contract that had
begun in 2005 with the execution of a Purchase Requisition
(together, the four-year agreement). The 2006 contract, changing
the contract number to J176324, was necessitated by defendant's
installation of new software.

Defendant demonstrated its prima facie entitlement to
judgment as a matter of law by submitting the four-year
agreement, and proof of full payment of the agreement, including

invoices and cancelled checks (see generally *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Plaintiff's president, Raymond Chouinard, failed to raise a triable issue of fact by his conclusory denial of payment. Moreover, none of the evidence submitted in opposition to the motion raised any reasonable inference that plaintiff had performed work outside the contract, which, in any event, would contradict the complaint, as well as the disputed invoices, each of which expressly referred to PO# J176324. Plaintiff's assertion of a separate oral agreement is improperly raised for the first time on appeal (see *Matter of Birnbaum v Ford Motor Co.*, 182 AD2d 524 [1st Dept 1992]), and, in any event, none of the evidence supports any such oral agreement. At most, Chouinard testified that he requested that defendant let him use certain new products on one Air Handling Unit (AHU), to demonstrate what they could do, in an attempt to solicit additional work. Other than that one AHU, he could not point to any additional work performed, and he never testified that defendant ever agreed to pay for even this one demonstration. Defendant expressly averred below that it had never agreed to renew the original four-year contract, nor did it agree to otherwise engage plaintiff to continue performing

additional work. Plaintiff never denied this. Under these circumstances, the court properly granted defendant's motion for summary judgment.

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plaintiff's fall (see *Seleznyov v New York City Tr. Auth.*, 113 AD3d 497, 498 [1st Dept 2014]; *Cater v Double Down Realty Corp.*, 101 AD3d 506 [1st Dept 2012]; *Aviles v 2333 1st Corp.*, 66 AD3d 432 [1st Dept 2009]).

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

ENTERED: DECEMBER 4, 2014


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

13676- Ind. 4079/09
13676A The People of the State of New York, 137/11
Respondent,

-against-

Nathaniel Croskey,
Defendant-Appellant.

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

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

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about February 2, 2012,

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

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

ENTERED: DECEMBER 4, 2014



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

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

13677 Orlando Ocampo, Index 103064/10
Plaintiff-Respondent, 590319/10

-against-

Bovis Lend Lease LMB, Inc.,
Defendant-Appellant.

[And a Third-Party Action]

Newman Myers Kreines Gross Harris, P.C., New York (Patrick M. Caruana of counsel), for appellant.

Arnold E. DiJoseph, P.C., New York (Arnold DiJoseph III of counsel), for respondent.

Order, Supreme Court, New York County (Richard F. Braun, J.), entered August 7, 2013, which, inter alia, denied defendant's motion for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 241(6) claims, unanimously modified, on the law, to the extent of dismissing the Labor Law § 200 and common-law negligence claims and so much of the Labor Law § 241(6) claim as based upon an alleged violation of Industrial Code (12 NYCRR) § 23-1.7(e), and otherwise affirmed, without costs.

Plaintiff allegedly slipped and fell on ice covering most of the 27th floor of the subject building, while he was carrying metal pipes in the course of performing wall demolition work on an asbestos abatement project. The Labor Law § 200 and common-

law negligence claims are dismissed because the record shows that defendant did not exercise supervisory control over the means and methods of the work, which required plaintiff's employer to use water to minimize the risks associated with asbestos (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Francis v Plaza Constr. Corp.*, ___ AD3d ___, 2014 NY Slip Op 06672 [1st Dept 2014]; *Dalanna v City of New York*, 308 AD2d 400 [1st Dept 2003]). The evidence indicated that the ice resulted solely from such work, inasmuch as the building was sealed off from the elements, and no companies other than plaintiff's employer and defendant were permitted to be present on the contamination site.

The court properly declined to dismiss that part of the Labor Law § 241(6) claim based on an alleged violation of 12 NYCRR 23-1.7(d), since the evidence indicates that plaintiff slipped and fell while he was working on ice on the floor, which had not been removed, sanded, or covered (see *Booth v Seven World Trade Co., L.P.*, 82 AD3d 499, 500-501 [1st Dept 2011]; *Temes v Columbus Ctr. LLC*, 48 AD3d 281 [1st Dept 2008]). Contrary to defendant's argument, the ice was not integral to the work (*cf. O'Sullivan v IDI Constr. Co., Inc.*, 7 NY3d 805 [2006]), notwithstanding the testimony that the work required the use of a solution of water and a chemical intended to reduce its freezing point.

There is no dispute that dismissal of that part of the Labor Law § 241(6) claim as predicated on an alleged violation of 12 NYCRR 23-1.7(e) is warranted, since the provision is inapplicable.

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

ENTERED: DECEMBER 4, 2014


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

13680 In re Victor R.,

A Person Alleged to
be a Juvenile Delinquent,
Appellant.

- - - - -

Presentment Agency

Kenneth Walsh, New York, for appellant.

Zachary W. Carter, Corporation Counsel, New York (Richard Dearing
of counsel), for presentment agency.

Order of disposition, Family Court, Bronx County (Sidney
Gribetz, J.), entered on or about July 12, 2012, which
adjudicated appellant a juvenile delinquent upon his admission
that he committed an act that, if committed by an adult, would
constitute the crime of possession of box cutters in a public
place or on school premises, and placed him on probation for a
period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion.
School officials received information that appellant had made a
threat, involving the use of a weapon, against a fellow student.
The threatened student provided first-hand information that met
the standard of reasonable suspicion applicable to school
searches (*see Matter of Gregory M.*, 82 NY2d 588, 592-93 [1993]),

“particularly in light of the urgency of interdicting weapons in schools” (*Matter of Steven A.*, 308 AD2d 359, 359 [1st Dept 2003]).

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13681-		Ind. 4605/09
13682-		2315/10
13683	The People of the State of New York, Respondent,	5597/10

-against-

Anna Michalska,
Defendant-Appellant.

Scott A. Rosenberg, The Legal Aid Society, New York (Heidi Bota of counsel), for appellant.

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

Appeals having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Edward J. McLaughlin, J.), rendered on or about February 7, 2011,

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

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

ENTERED: DECEMBER 4, 2014


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

11, 22 [2005]). Moreover, even read liberally, the complaint does not establish that defendants exercised control and dominance over plaintiffs - limited liability companies who, by their own description, frequently purchased, sold, and exchanged works of art as investments (see *People v Coventry First LLC*, 13 NY3d 108, 115 [2009]).

The amended complaint alleges that defendants misrepresented the value of certain works of art and that the values were supported by market data, when they were not. As to the latter, the complaint fails to state a cause of action for fraud because plaintiffs did not allege justifiable reliance (see e.g. *VisionChina Media Inc. v Shareholder Representative Servs., LLC*, 109 AD3d 49, 57 [1st Dept 2013]). As a matter of law, these sophisticated plaintiffs cannot demonstrate reasonable reliance because they conducted no due diligence; for example, they did not ask defendants, "Show us your market data" (see e.g. *HSH Nordbank AG v UBS AG*, 95 AD3d 185, 194-195, 197-198 [1st Dept 2012]). As to the claim that defendants misrepresented the value of certain art works, statements about the value of art constitute "nonactionable opinion that provide[s] no basis for a fraud claim" (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 179 [2011]).

In light of the above disposition, it is unnecessary to

consider defendants' argument that the documents they submitted refute plaintiffs' fraud claim.

Plaintiffs contend that, when plaintiff MacAndrews & Forbes Group, LLC (MacAndrews) and defendant Gagosian Gallery, Inc. (the Gallery) entered into a contract whereby MacAndrews bought a sculpture from the Gallery (the MacAndrews Purchase Agreement), defendants knew that plaintiffs expected to resell the sculpture. Plaintiffs allege that defendants breached the covenant of good faith and fair dealing implicit in the MacAndrews Purchase Agreement by entering into a subsequent agreement that decreased their incentive to be involved in resales of the sculpture, because without defendants' involvement, plaintiffs would not realize as high a price on the resale. However, the essence of the MacAndrews Purchase Agreement was that MacAndrews was going to buy a sculpture, not that it would later resell it. As important as defendants' involvement in the resale was to

plaintiffs, the parties did not include it in the MacAndrews Purchase Agreement, and we will not interpret the agreement as impliedly stating it (see *Rowe v Great Atl. & Pac. Tea Co.*, 46 NY2d 62, 72 [1978]).

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outweighed by the extreme seriousness of the underlying pattern of repeated, predatory sex crimes. We also note that defendant's point score was 160, which was well above the level three threshold.

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ENTERED: DECEMBER 4, 2014


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

13687 In re Elizabeth Safran,
Petitioner-Respondent,

-against-

Edgard Nau,
Respondent-Appellant.

Peter L. Cedeno & Associates, P.C., New York (Peter L. Cedeno of
counsel), for appellant.

Coffinas & Lusthaus, P.C., Brooklyn (Meredith A. Lusthaus of
counsel), for respondent.

Order, Family Court, New York County (Susan R. Larabee, J.),
entered on or about August 13, 2013, which to the extent appealed
from as limited by the briefs, denied respondent's objection to
an order, same court (Lewis A. Borofsky, Support Magistrate),
entered on or about May 14, 2013, imputing income to him for
child support purposes and declining to impute income to
petitioner, unanimously affirmed, without costs.

Contrary to petitioner's contention, this appeal was not
rendered moot by the parties' subsequent stipulation, since the
stipulation did not settle the issue raised by respondent on
appeal. We note in any event that the stipulation is not
included in the record on appeal, and there is no evidence that
it was so-ordered by the court.

In determining respondent's income, the support magistrate

was not bound by the figure reported on respondent's most recent (2012) income tax return (*Matter of Childress v Samuel*, 27 AD3d 295 [1st Dept 2006]). Respondent has been practicing podiatry in the New York area since 1989. He testified that he had no unreported income, but his financial disclosure affidavit indicated monthly expenses greatly exceeding his reported income, and he failed to provide any reasonable explanation for this; the money given to him by his mother in 2012 does not account for it. In imputing income to him, the support magistrate properly considered respondent's established podiatry practice and the evidence that he was working only three days a week (see *K. v B.*, 13 AD3d 12 [1st Dept 2004], *appeal dismissed* 4 NY3d 776, 20 [2005]).

Respondent failed to support his claim that the support magistrate's determination of petitioner's income was improper; he did not challenge either petitioner's testimony about her income or the documents she introduced at trial, including her financial disclosure affidavit and her profit and loss statement.

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trial motion are unpreserved (see e.g. *People v Luperon*, 85 NY2d 71, 77-78 [1995]), and we decline to review them in the interest of justice.

THIS CONSTITUTES THE DECISION AND ORDER
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ENTERED: DECEMBER 4, 2014


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

13689 Vineyard Sky, LLC, et al., Index 650392/12
Plaintiffs-Respondents,

-against-

Ian Banks, Inc.,
Defendant,

Everest National Insurance Company,
Defendant-Respondent,

PCF State Restoration, Inc., et al.,
Defendants-Appellants.

- - - - -

Everest National Insurance Company,
Third-Party Plaintiff Respondent,

-against-

Thomas Melone,
Third-Party Defendant-Respondent,

Brown Harris Stevens,
Third-Party Defendant.

Litchfield Cavo LLP, New York (Michael J. Kozoriz of counsel),
for appellants.

Thomas M. Melone, New York, for Vineyard Sky, LLC, Allco Realty,
LLC, respondents, and respondent pro se.

Stewart Bernstiel Rebar & Smith, New York (Michael J. Smith of
counsel), for Everest National Insurance Company, respondent.

Order, Supreme Court, New York County (Ellen M. Coin, J.),
entered October 4, 2013, which, to the extent appealed from,
denied defendants PCF State Restoration, Inc. (PCF) and Endurance
American Insurance Company's (Endurance) motion to dismiss the

second, sixth, seventh and eighth causes of action sounding in breach of contract, unanimously modified, on the law, to dismiss the sixth through eighth causes of action, and otherwise affirmed, without costs.

Plaintiffs, property owners that are alleged additional insureds under a commercial general liability policy (CGL) issued by Endurance to PCF, a roofing subcontractor that performed work at plaintiffs' property, have no right to coverage under the policy for losses resulting from water damage to the property allegedly caused by PCF's failure to adequately cover the building's roof, allowing heavy rains to infiltrate the upper floors of the building. The CGL policy provides coverage for claims brought by third parties; it does not provide first-party coverage for damage to plaintiffs' own property (see *The Gap, Inc. v Fireman's Fund Ins. Co.*, 11 AD3d 108 [1st Dept 2004]; *Sus, Inc. v St. Paul Traveler Group*, 75 AD3d 740 [3d Dept 2010]).

Additionally, the CGL policy explicitly excludes coverage for any damage to plaintiffs' property that is attributable to PCF's construction operations (see generally *Renaissance Art Investors, LLC v AXA Art Insurance Corporation*, 102 AD3d 604 [1st Dept 2013]). Plaintiffs cannot avoid the policy language by attempting to recast themselves as intended third party beneficiaries. To the extent plaintiffs argue that they are

entitled to indemnification and contribution because they were assigned the rights of their construction manager, defendant Ian Banks, Inc. (IBI), under the CGL policy, their argument is unavailing. Endurance denied coverage to IBI on the ground that plaintiffs' claimed damages arose from PCF's actions and/or inactions and IBI never challenged Endurance's position on the denial of coverage. Moreover, to the extent IBI settled with plaintiffs on the water damage claim, the policy required Endurance's signature on the settlement together with a release of its liability before it would be bound by the settlement and nothing in the record indicates that Endurance authorized the settlement. Accordingly, plaintiffs may not maintain a direct action against Endurance absent proof that they obtained a judgment against PCF, the insured (see Insurance Law § 3420). Plaintiffs' sixth, seventh and eighth causes of action against Endurance must therefore be dismissed.

The portion of the motion seeking dismissal of plaintiffs' second cause of action for breach of contract based on PCF's failure to pay for losses and damages resulting from the failure to adequately cover the building's roof during the renovation was properly denied. The allegations, along with the submission of a sworn affirmation from plaintiffs' attorney/managing agent, and an insurance letter indicating that there is a factual basis for

potentially finding, *inter alia*, the functional equivalent of privity between PCF and plaintiffs, and that plaintiffs were covered by the hold harmless provisions in the PCF subcontract, were not conclusively refuted by the documentary evidence.

We have considered the parties' remaining arguments and find that they are either unpreserved or unavailing.

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

ENTERED: DECEMBER 4, 2014

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

CLERK

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

13692 Jaime Ortiz, Index 304518/10
Plaintiff,

-against-

CEMD Elevator Corp., doing
business as City Elevator,
Defendant-Appellant,

845 Third L.P., et al.,
Defendants-Respondents.

Gottlieb Siegel & Schwartz, LLP, New York (Daniel J. Goodstadt of
counsel), for appellant.

Law Firm of Andrew R. Leder, PLLC, Lynbrook (Andrew R. Leder of
counsel), for respondents.

Order, Supreme Court, Bronx County (Kenneth L. Thompson,
Jr., J.), entered August 21, 2013, which granted defendants 845
Third L.P. and Rudin Management Co. Inc.'s motion for summary
judgment dismissing the complaint as against them, unanimously
affirmed, without costs.

Defendants 845 Third, the building owner, and Rudin, the
manager, demonstrated that they had no obligation to make repairs
to the misleveled elevator. The lease between 845 Third and the
nonparty tenant establishes that the owner was an out-of-
possession landlord with a right to reenter the premises to make
repairs. However, since the defect in the elevator was not a
structural or design defect that violated a specific statutory

provision, defendants cannot be held liable for plaintiff's injuries. Whether or not defendants had notice of the defect is immaterial (see *Devlin v Blaggards III Rest. Corp.*, 80 AD3d 497 [1st Dept 2011], *lv denied* 16 NY3d 713 [2011]).

Contrary to defendant City Elevator's contention, Administrative Code of City of NY former §§ 27-127 and 27-128 (see Administrative Code § 28-301.1) were general, not specific, safety provisions (*Kittay v Moskowitz*, 95 AD3d 451, 452 [1st Dept 2012], *lv denied* 20 NY3d 859 [2013]). Multiple Dwelling Law § 78 is inapplicable because the building at issue is not a multiple dwelling but a commercial building.

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13694 & In re State of New York, Index 30198/11
M-5309 Petitioner-Respondent,

-against-

I.M.,
Respondent-Appellant.

Marvin Bernstein, Mental Hygiene Legal Service, New York (Diane Goldstein Temkin of counsel), for appellant.

Eric T. Schneiderman, Attorney General, New York (Bethany Davis Noll of counsel), for respondent.

Order, Supreme Court, New York County (Cassandra M. Mullen, J.), entered on or about September 20, 2013, which, upon a jury verdict that respondent is a detained sex offender who suffers from a mental abnormality, directed that respondent be committed to a secure treatment facility, unanimously reversed, on the law, without costs, and the petition dismissed.

“[A] civil commitment under Mental Hygiene Law article 10 may [not] be based solely on a diagnosis of ASPD [anti-social personality disorder], together with evidence of sexual crimes” (*Matter of State of New York v Donald DD.*, __ NY3d __, 2014 NY Slip Op 07295 [October 28, 2014]). Since ASPD is the sole diagnosis underlying the jury’s finding of mental abnormality

(Mental Hygiene Law § 10.03[i]), the verdict is not supported by legally sufficient evidence, and the petition must be dismissed.

M-5309 - *State of New York v I.M.*

Motion to amend caption granted.

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

ENTERED: DECEMBER 4, 2014


CLERK

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

13696N Sanford Mohel, Index 302094/10
 Plaintiff-Respondent,

-against-

Gavriel Plaza, Inc., et al.,
Defendants,

Highland Builders Group, LLC,
Defendant-Appellant.

[And A Third-Party Action]

Ahmuty, Demers & McManus, Albertson (Nicholas M. Cardascia of counsel), for appellant.

Hausman & Pendzick, Harrison (Elizabeth M. Pendzick of counsel), for respondent.

Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered May 30, 2013, which, upon granting defendant Highland Builders Group, LLC's (Highland) motion for reargument, adhered to its prior order conditionally striking its answer and only modified the conditions, unanimously affirmed, without costs.

The record supports the motion court's conditional order striking Highland's answer if it did not comply with the stated conditions, given Highland's repeated failure to properly respond to plaintiff's notice for discovery and inspection, and its failure to produce its sole member for deposition in New York

(see *Arts4All Ltd v Hancock*, 54 AD3d 286 [1st Dept 2008], *affd* 12 NY3d 846 [2009], *cert denied* 559 US 905 [2010]; *Cespedes v Mike & Jac Trucking Corp.*, 305 AD2d 222, 222-223 [1st Dept 2003]).

Plaintiff was under no obligation to consent to a deposition of Highland's member, who resided in Israel, by video conference (see CPLR 3113[d]).

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

ENTERED: DECEMBER 4, 2014

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

CLERK

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

13697 In re Johnny Mason,
[M-5268] Petitioner,

Ind. 1301/14
2075/14
3232/14

-against-

Hon. Ronald Zweibel, etc., et al.,
Respondents.

Johnny Mason, petitioner pro se.

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas of counsel), for Assistant District Attorney Zachary Weintraub, 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: DECEMBER 4, 2014


CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Karla Moskowitz
Leland G. DeGrasse
Rosalyn H. Richter
Barbara R. Kapnick, JJ.

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x

Ambac Assurance Corporation, et al.,
Plaintiffs-Respondents,

-against-

Countrywide Home Loans, Inc., et al.,
Defendants,

Bank of America Corp.,
Defendant-Appellant.

x

Defendant Bank of America Corp. (BAC) appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered October 16, 2013, which denied its motion to vacate the decision and order of the Special Referee, holding that documents relating to the pending merger between BAC and Countrywide Financial Corp. are not protected from disclosure by the common interest doctrine.

O'Melveny & Myers LLP, New York (Jonathan Rosenberg, B. Andrew Bednark, and Anton Metlitsky of counsel), for appellant.

Patterson Belknap Webb & Tyler LLP, New York (Robert P. LoBue, Peter W. Tomlinson, Harry Sandick, and Joshua Kipnees of counsel), for respondents.

MOSKOWITZ, J.

In general, the presence of a third party at a communication between counsel and client is sufficient to deprive the communication of confidentiality. However, there is an exception to this rule: the common-interest privilege. Under this doctrine, a third party may be present at the communication between an attorney and a client without destroying the privilege if the communication is for the purpose of furthering a nearly identical legal interest shared by the client and the third party. New York courts have taken a narrow view of the common-interest privilege, holding that it applies only with respect to legal advice in pending or reasonably anticipated litigation. On this appeal, we are asked to decide the continued viability of the New York approach.

We hold that, in today's business environment, pending or reasonably anticipated litigation is not a necessary element of the common-interest privilege. Our conclusion holds particularly true in this case, where the parties have a common legal interest because they were engaged in merger talks during the relevant period and now have a completed and signed merger agreement. Indeed, the circumstances presented in this case illustrate precisely the reason that the common-interest privilege should apply - namely, that business entities often have important legal

interests to protect even without the looming specter of litigation.

Facts

This discovery dispute arose from a lawsuit commenced by plaintiff Ambac Assurance Corporation (Ambac), a financial-guaranty, or monoline, insurer that guaranteed payments on certain residential mortgage backed securities (RMBS) issued by defendant Countrywide Home Loans, Inc. and its affiliated entities (together Countrywide). The complaint alleged that between 2004 and 2006, Countrywide fraudulently induced Ambac to enter into agreements to insure RMBS transactions. Ambac further alleged that Countrywide breached, and continues to breach, the terms of those agreements.

Ambac also asserted secondary claims against defendant Bank of America Corp. (BAC), alleging that BAC would be liable for any judgment as Countrywide's successor-in-interest. These secondary claims relate to a merger between a BAC subsidiary and Countrywide Financial Corp. (CFC), a Countrywide entity. After due diligence and negotiations, CFC and BAC signed a merger agreement on January 11, 2008; under the terms of that agreement, CFC would merge into the wholly-owned BAC subsidiary, Red Oak Merger Corporation (the merger). The transaction closed on July 1, 2008, and the companies merged. All information and material

exchanged between BAC and CFC under the merger agreement was subject to confidentiality provisions and a common interest agreement the parties entered into shortly before they signed the merger agreement.

The merger agreement bound the parties to work together on several pre-closing issues, including maintaining employee benefit plans, consulting on state and federal tax consequences, and securing the appropriate merger approvals and consents of third parties and regulators. Because all shares of CFC would be converted into BAC shares, BAC and CFC intended to prepare and file a joint proxy and registration statement that would serve both to obtain CFC shareholder approval of the merger and to allow BAC to register its new shares. The joint statement required SEC approval before becoming effective. Because of these and other merger agreement provisions, BAC claims that it and CFC – two heavily regulated public financial institutions – required shared legal advice from counsel together in order to ensure their accurate compliance with the law and to advance their common interests in resolving the many legal issues necessary for successful completion of the merger.

The resulting communications between BAC and CFC and their counsel during the pre-merger period of January 11, 2008 to July 1, 2008 – some several hundred documents – are at issue on this

appeal. Ambac argues that BAC must produce these pre-merger communications because they are significant to Ambac's successor liability claims, which arise from the merger and the merger's associated transfers of assets and liabilities to BAC. Ambac further argues that documents BAC previously produced in the underlying litigation suggest that BAC may have been "put on notice of the prevalence of unreported fraud at Countrywide well before the [merger]."

In June 2013, the referee supervising discovery granted Ambac's motion to compel BAC to produce the challenged communications. The referee held that New York law does not permit the withholding of a large class of joint communications between parties and their counsel, thereby immunizing the communications from disclosure. The referee concluded that the common interest rule, an exception to the attorney-client privilege, does not apply unless the parties share a common legal interest that impacts potential litigation involving all parties, and that to hold otherwise would be inconsistent with the narrow scope of the attorney-client privilege.

The motion court denied BAC's motion to vacate the referee's order. In so doing, the court agreed that New York law requires pending or reasonably anticipated litigation in order for the common interest doctrine to apply. The court concluded that BAC

sought not an application of existing law, but rather “an extension of New York’s common-interest doctrine.”

Analysis

As noted above, the common-interest privilege is an exception to the rule that the presence of a third party at a communication between counsel and client will render the communication non-confidential (*Kelly v Handy & Hartman*, 2009 WL 2222712, *2, 2009 US Dist. LEXIS 63715, *5-*6 [SD NY July 23, 2009]). The doctrine, a limited exception to waiver of the attorney-client privilege, requires that: (1) the communication qualify for protection under the attorney-client privilege, and (2) the communication be made for the purpose of furthering a legal interest or strategy common to the parties (*see id.*; *see also U.S. Bank N.A. v APP Intl. Fin. Co.*, 33 AD3d 430, 431 (1st Dept 2006)). This Court has never squarely decided whether there is a third requirement: that the communication must affect pending or reasonably anticipated litigation. We answer that question today in the negative.

To properly understand the common-interest doctrine, it is necessary to examine the purpose of the privilege from which it descends – namely, the attorney-client privilege. The attorney-client privilege is “the oldest among common-law evidentiary privileges” (*Spectrum Sys. Intl. Corp. v Chemical Bank*, 78 NY2d

371, 377 [1991]). The purpose of this privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice" (*Upjohn Co. v United States*, 449 US 383, 389 [1981]).

Further, "[i]n New York, we recognize that 'the public interest is served by shielding certain communications ... from litigation, rather than risk stifling them altogether'" (*U.S. Bank N.A. v APP Intl. Fin. Co.*, 33 AD3d 430, 431 [1st Dept 2006], quoting *Liberman v Gelstein*, 80 NY2d 429, 437 [1992]). A delicate balance exists between this goal and the CPLR's objective of "full disclosure of all evidence material and necessary in the prosecution or defense of an action" (CPLR 3101[a]). Indeed, as the Court of Appeals has noted, an "[o]bvious tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence" (*Spectrum Sys. Intl. Corp.*, 78 NY2d 371 at 377). Consequently, the party asserting the privilege has the burden of establishing any right to protection (*id.*).

The "attorney-client privilege is not tied to the contemplation of litigation," because "advice is often sought, and rendered, precisely to avoid litigation, or facilitate compliance with the law, or simply to guide a client's course of

conduct" (*id.* at 380). For that reason, and because of "the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, constantly go to lawyers to find out how to obey the law, particularly since compliance with the law in this area is hardly an instinctive matter" (*Upjohn Co.*, 449 US at 392 [internal quotation marks omitted]).

Similarly, the Restatement of the Law Governing Lawyers notes that the common-interest privilege is not tied to the contemplation of litigation, but rather that the privilege applies either to a "litigated or nonlitigated matter" (Restatement [Third] of the Law Governing Lawyers § 76 [2000]). This conclusion flows logically from the attorney-client privilege, from which the common-interest privilege derives, and furthers its same basic purpose – namely, it "encourages parties with a shared legal interest to seek legal assistance in order to meet legal requirements and to plan their conduct accordingly," and therefore "serves the public interest by advancing compliance with the law, facilitating the administration of justice and averting litigation" (*United States v BDO Seidman, LLP*, 492 F3d 806, 816 [7th Cir 2007] [internal quotation marks omitted], *cert denied sub nom Cuillo v U.S.*, 552 US 1242 [2008]).

Neither this Court nor the Court of Appeals has yet

considered the propriety of a litigation requirement for the common-interest privilege. However, the federal courts that have addressed the issue have overwhelmingly rejected that requirement. For example, in *United States v Schwimmer* (892 F2d 237 [2d Cir 1989]), an appeal concerning criminal co-defendants, the Second Circuit took a more liberal approach to the common-interest doctrine, holding that the communications between the defendants and their counsel were protected from disclosure because the doctrine “serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel” (*id.* at 243).

The Second Circuit further held, “The need to protect the free flow of information from client to attorney logically exists whenever multiple clients share a common interest about a legal matter” (*id.* at 243) [quotation marks and citation omitted]. Thus, the Court concluded, it was “unnecessary that there be actual litigation in progress for the common interest rule of the attorney-client privilege to apply” (*id.* at 244; see also, *In re Teleglobe Commns. Corp*, 493 F3d 345 [3d Cir 2007] [“community-of-interest privilege applies in civil and criminal litigation, and even in purely transactional contexts”]; *BDO Seidman, LLP*,

492 F3d at 816 ["communications need not be made in anticipation of litigation to fall within the common interest doctrine"]; *In re Regents of the Univ. of California*, 101 F3d 1386, 1390-91 [Fed Cir 1996], *cert denied sub nom Genentech, Inc. v Regents of the University of California*, 520 US 1193 [1997] [holding that common-interest doctrine "is not limited to actions taken and advice obtained in the shadow of litigation"]).

The IAS court rejected BAC's argument advancing *Schwimmer*, finding that the Second Circuit had held that there must be a reasonable anticipation of litigation, not actual litigation in progress, for the common-interest doctrine to apply. We disagree with this interpretation of *Schwimmer*. The Second Circuit did not discuss the "reasonable anticipation of litigation" requirement, and in fact, a fair reading of the case makes clear that the court rejected that interpretation. Indeed, the United States District Court for the Southern District of New York has observed, "Although the [common interest] doctrine is most frequently applied in the context of litigation, it also has been successfully invoked with respect to joint legal strategies in non-litigation settings" (*Fox News Network, LLC v United States Dept. of the Treasury*, 739 F Supp 2d 515, 563 [SD NY 2010]).

Accordingly, because the federal approach extends logically from the attorney-client privilege, we adopt this approach, the

weight of which “holds that litigation need not be actual or imminent for communications to be within the common interest doctrine” (*Dura Global Tech., Inc. v Magna Donnelly Corp.*, No. 07-CV-10945-DT, 2008 WL 2217682, *3, 2008 US Dist LEXIS 41432, *10 [ED Mich May 27, 2008]). So long as the primary or predominant purpose for the communication with counsel is for the parties to obtain legal advice or to further a legal interest common to the parties, and not to obtain advice of a predominately business nature, the communication will remain privileged (see *Rossi v Blue Cross and Blue Shield of Greater N.Y.*, 73 NY2d 588 [1989]; see also *Delta Fin. Corp. v Morrison*, 69 AD3d 669 [2d Dept 2010]).

We acknowledge that a line of New York cases requires pending or reasonably anticipated litigation for the common-interest privilege to apply (see *Hyatt v State of Cal. Franchise Tax Bd.*, 105 AD3d 186, 205 [2d Dept 2013]; *Hudson Val. Mar., Inc. v Town of Cortlandt*, 30 AD3d 377, 378 [2d Dept 2006]; *Aetna Cas. & Sur. Co. v Certain Underwriters at Lloyd’s, London*, 176 Misc 2d 605, 612-613 [Sup Ct, NY County 1998], *affd* 263 AD2d 367 [1st Dept 1999], *lv dismissed* 94 NY2d 875 [2000]; see also *Allied Irish Banks, P.L.C. v Bank of Am. N.A.*, 252 FRD 163, 171-172 [SD NY 2008]).

However, the better policy requires that we diverge from

this approach. These cases provide that when two parties with a common legal interest seek advice from counsel together, the communication is not privileged unless litigation is within the parties' contemplation; on the other hand, when a single party seeks advice from counsel, the communication is privileged regardless of whether litigation is within anyone's contemplation. We cannot reconcile this contradiction, as it undermines the policy underlying that attorney-client privilege.¹

The litigation requirement appears to have developed from the common-interest privilege as it applies in the criminal context; several courts then applied that interpretation of the privilege directly to the civil context. For example, in *Parisi v Leppard* (172 Misc 2d 951, 955 [Sup Ct, Nassau County 1997]), a case involving the breakup of a medical practice, the court acknowledged the use of the privilege in criminal cases, where "a defendant and his counsel may expect that confidences will be kept in a joint meeting with a codefendant and the latter's attorney – if the purpose of the meeting is to share information

¹ We recently addressed a similar issue in *National Union Fire Ins. Co. of Pittsburgh, Pa. v TransCanada Energy USA, Inc.* (114 AD3d 595 [1st Dept 2014]). However, we recalled and vacated that decision, finding in the later decision (119 AD3d 492 [1st Dept 2014]) that we did not need to reach the issue because the documents at issue were not, in fact, privileged; rather, "counsel were primarily engaged in claims handling – an ordinary business activity for an insurance company" (*id.* at 493).

in furtherance of a common defense.” Based on its reading of the Court of Appeals’ description of the common-interest privilege in *People v Osorio* (75 NY2d 80 [1989]), the court stated that “the common interest extension does not cover a multiparty meeting where the subject is anything other than a common defense in a pending case” (*Parisi*, 172 Misc 2d at 955-956). Thus, the court opined that the privilege was “considerably narrower” than the attorney-client privilege from which it derives (*id.*).

While acknowledging that the “Court of Appeals had no reason to address the scope of the privilege in any context other than the one before it, i.e., a pending criminal matter” and that the common-interest privilege may apply in a similar fashion in the civil context, the court then concluded that the privilege was best applied only in cases that involved either pending or “potential litigation” (*id.* at 956). One year later, the *Parisi* court’s holding formed the basis of *Aetna Cas. & Sur. Co.* (176 Misc 2d at 611).² Recently, *Aetna’s* holding formed the basis of *Hyatt v State of Cal. Franchise Tax Bd.* (105 AD3d 186, 205 [2d Dept 2013]).

We find, however, that this line of cases does not adequately address the specific situation presented here: two

² This Court later affirmed that case on different grounds.

business entities, having signed a merger agreement without contemplating litigation, and having signed a confidentiality agreement, required the shared advice of counsel in order to accurately navigate the complex legal and regulatory process involved in completing the transaction. As BAC aptly asserts, imposing a litigation requirement in this scenario discourages parties with a shared legal interest, such as the signed merger agreement here, from seeking and sharing that advice, and would inevitably result instead in the onset of regulatory or private litigation because of the parties' lack of sound guidance from counsel. This outcome would make poor legal as well as poor business policy.

We are further guided by Delaware's approach to the common-interest privilege. Delaware has codified the common-interest privilege, extending the attorney-client privilege to certain communications by clients, their representatives or their lawyers to a lawyer "representing another in a matter of common interest" (Del. Uniform R. of Ev. 502[b]). Thus, Delaware recognizes that disclosure may be confidential even when made between lawyers representing different clients if those clients have a common interest - that is, an interest that is "so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers"

(*3Com Corp. v Diamond II Holdings, Inc.*, 2010 WL 2280734, *7, 2010 Del Ch LEXIS 126, *32 [May 31, 2010], quoting *Jedwab v MGM Grand Hotels, Inc.*, 1986 WL 3426, *2, 1986 Del Ch LEXIS 383, *5 [Del Ch. Mar. 20, 1986]). We believe that Delaware presents the better approach.

We need not decide whether there are any grounds for turning over the documents at issue here, or whether any particular document does or does not fall within the common-interest privilege. We remand for the motion court or its designated special referee or special master to conduct a review for the purpose of deciding which, if any, documents are subject to that privilege.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered October 16, 2013, which denied defendant BAC's motion to vacate the decision of the Special Referee, holding that documents relating to the pending merger between BAC and CFC are not protected from disclosure by the

common interest doctrine, should be unanimously reversed, on the law, without costs, the motion granted, and the matter remanded for further proceedings.

All concur.

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

ENTERED: DECEMBER 4, 2014


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