

SUPREME COURT, APPELLATE DIVISION  
FIRST DEPARTMENT

**MARCH 24, 2015**

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Richter, Manzanet-Daniels, Kapnick, JJ.

14488      Tower Insurance Company of New                      Index 102185/10  
            York as subrogee of A&M  
            East Broadway LLC, et al.,  
            Plaintiffs-Respondents,

-against-

Hong Kong Supermarket, Inc.  
Defendant-Appellant,

PCK Realty, Inc.  
Defendant-Respondent.

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Ropers Majeski Kohn & Bentley, P.C., New York (Scott W. Bermack and Michelle Gordon of counsel), for appellant.

Law Office of Steven G. Fauth, LLC, New York (Steven G. Fauth of counsel), for Tower Insurance Company and Castlepoint Insurance Company, respondents.

David S. Kritzer & Associates, PC, Smithtown (David S. Kritzer of counsel), for PCK Realty, Inc., respondent.

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Order, Supreme Court, New York County (Lucy Billings, J.), entered July 3, 2013, which denied as untimely the motion of defendant Hong Kong Supermarket, Inc. (Hong Kong) for summary judgment dismissing the complaint as against it, unanimously reversed, on the law and the facts, without costs, and the matter remanded for a determination of the motion on the merits.

The motion court granted Hong Kong's request for an extension of the summary judgment deadline in a closely related consolidated action, but determined that Hong Kong's summary judgment motion in this action was untimely. Under the specific circumstances of this case, the court should have found that good cause existed to review Hong Kong's motion for summary judgment on the merits (see CPLR 3212[a]).

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

ENTERED: MARCH 24, 2015

  
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Renwick, J.P., Saxe, Moskowitz, DeGrasse, Richter, JJ.

13565      The Dorothy G. Bender Foundation,      Index 601375/09  
            Inc., et al.,  
            Plaintiffs-Respondents,

-against-

Joseph P. Carroll, et al.,  
Defendants-Appellants.

- - - - -

Hon. Joseph P. Carroll,  
Counterclaim Third-Party  
Plaintiff-Appellant,

-against-

Morton A. Bender, et al.,  
Counterclaim Defendants-Respondents,

The Dorothy G. Bender Foundation, Inc.,  
Third-Party Defendant-Respondent.

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Schlam Stone & Dolan LLP, New York (Michael C. Marcus of  
counsel), for appellants.

Cooter, Mangold, Deckelbaum & Karas, LLP, Corning (Dale A. Cooter  
of counsel), for respondents.

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Order and Judgment (one paper), Supreme Court, New York  
County (Shirley Werner Kornreich, J.), entered September 16,  
2013, which, to the extent appealed from as limited by the  
briefs, after a nonjury trial, awarded plaintiffs judgment on  
their causes of action for replevin and declaratory relief,  
declared that plaintiffs are the sole and true owners of all  
right, title and interest in and to the subject artwork, and that

defendants do not have any right, title, or interest in or to the subject artwork, dismissed defendants' counterclaim for declaratory relief, and directed defendants to permit plaintiffs or their agents to retrieve and take possession of the subject artwork, unanimously affirmed, without costs.

In this action for replevin and declaratory relief, plaintiffs, acting separately and with mutual ignorance of the other's involvement, both entered into partnerships with nonparty Salander-O'Reilly Galleries, LLC (SOG) to purchase two Arshile Gorky paintings, Pirate I and Pirate II. After SOG purchased the paintings, defendant Carroll, an art dealer, entered into an agreement to exchange his artwork for Pirate II; however, the agreement he entered into was with The Seven Salander Children Group (The Group), not with SOG. After SOG's owner and operator, Lawrence Salander, was convicted of grand larceny and incarcerated, plaintiffs settled their claims against each other and brought this action against defendants seeking the return of Pirate II and a declaration that they are the true owners of the work.

The court properly determined that plaintiffs, not defendants, own Pirate II. The court properly rejected defendants' claim that plaintiffs, who were partners with SOG, were bound by The Group's sale of Pirate II to Carroll under New

York Partnership Law. Without any evidence that SOG conveyed title to The Group, Carroll could not have received good title from The Group, which, defendants concede, was a nonexistent entity. In any event, the sham conveyance was not in the ordinary course of the partnership's business (see Partnership Law § 20[1]), nor did Salander or SOG have apparent authority to bind plaintiffs (see *Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]).

The court also properly rejected defendants' claim that Carroll was a "buyer in the ordinary course of business" under UCC 2-403(2). The record supports the trial court's conclusion that Carroll had purportedly acquired the artwork in a grossly undervalued transaction in which he made insufficient inquiry as to Salander or SOG's authority to sell the work, despite behavior on Salander's part that marked a departure from their normal course of dealings, and that, by going forward with the transaction despite these red flags, Carroll did not observe the reasonable commercial standards of the art trade (see *Davis v Carroll*, 937 F Supp 2d 390, 436 [SD NY 2013]).

Contrary to defendants' argument, plaintiff McEnroe was not estopped from claiming ownership of the artwork. After McEnroe learned of Carroll's claim to *Pirate II*, he attempted to find a solution by proposing that he give up his share of *Pirate II* in

exchange for SOG's share of Pirate I. However, McEnroe was, at that time, unaware of plaintiff Bender's claim to a share of Pirate I. Carroll presented no evidence that McEnroe intended Carroll to rely on his statement that he had relinquished any claim to Pirate II, or that Carroll had relied upon that statement or that he suffered a prejudicial change in his position (*see generally BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 853 [1st Dept 1985]).

Defendants waived their current argument that plaintiffs do not have standing to maintain this action, and, in any event, plaintiffs do not lack standing.

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

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

ENTERED: MARCH 24, 2015

  
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Sweeny, J.P., Andrias, Saxe, DeGrasse, Gische, JJ.

13840            In re Platinum Pleasures of NY,            Index 100371/13  
                  Inc.,  
                  Petitioner,

-against-

New York State Liquor Authority,  
Respondent.

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Albert J. Pirro, Jr., White Plains, for petitioner.

Jacqueline P. Flug, Albany (Mark D. Frering of counsel), for  
respondent.

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Determination of respondent, dated February 15, 2013,  
cancelling petitioner's on-premises liquor license and imposing a  
\$1,000 bond forfeiture, upon a finding of violations of the  
Alcoholic Beverage Control Law and the Rules of the State Liquor  
Authority (9 NYCRR 53.1), modified, on the facts, to vacate the  
penalty of cancellation and remand the matter to respondent for  
the imposition of a lesser penalty, and the proceeding brought  
pursuant to CPLR article 78 (transferred to this Court by order  
of the Supreme Court, New York County [Doris Ling-Cohan, J.],  
entered March 13, 2013), otherwise disposed of by confirming the  
remainder of the determination, without costs.

Substantial evidence supports respondent's findings that  
petitioner violated the Alcoholic Beverage Control Law and the  
Rules of the State Liquor Authority (9 NYCRR 53.1) (*see Matter of*

*Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). With respect to rule 36.1(d) (9 NYCRR 53.1[d]), failing to operate a "bona fide premises," petitioner argues that the language "in the judgment of the Authority" in the rule deprives the licensee of due process by presupposing guilt. However, necessarily implicit in the rule is that the agency will exercise its judgment rationally and in good faith (see *Matter of Ray v Haveliwala*, 107 AD2d 316, 319 [3d Dept 1985]). Moreover, the determination that petitioner's premises were not "bona fide" was made after an administrative hearing at which petitioner was afforded due process.

Substantial evidence supports the findings that petitioner violated Alcoholic Beverage Control (ABC) Law § 110(4) and rule 36.1(b) (9 NYCRR 53.1[b]) by failing to disclose loans from a corporate affiliate used to fund renovations to the premises and that it violated rule 36.1(b) by misrepresenting its ability to open and operate, notwithstanding petitioner's showing that its failings were the result of negligence or ignorance of the law, rather than willfulness or an intent to deceive (see *Matter of Taverna El Pulpo v New York State Liq. Auth.*, 103 AD2d 701, 703 [1st Dept 1984]). Petitioner's argument that the misrepresentation in its original application is outside the applicable limitations period (see ABC Law § 118[2]) is

unpreserved and in any event without merit.

With respect to the determination that petitioner violated ABC Law § 99-d(1) by failing to obtain permission from respondent to effect a "substantial alteration" of the premises, the record shows that the renovations at issue cost over \$100,000 and included opening up a dressing room and converting it into a seating area.

Petitioner's argument that all the charges are barred by a prior determination of respondent based on petitioner's plea of no contest to a charge of failure to timely renew its license is unpreserved, since petitioner failed to raise it before respondent (*see Matter of Cipollaro v New York State Dept. of Motor Vehs.*, 101 AD3d 508 [1st Dept 2012]). Were we to consider the argument, we would reject it (*see Matter of Sherwyn Toppin Mktg. Consultants, Inc. v New York State Liq. Auth.*, 103 AD3d 648, 651 [2d Dept 2013], *lv denied* 21 NY3d 858 [2013]).

In the absence of a finding of willfulness or an intent to deceive in connection with the foregoing violations, the violations do not warrant cancellation of petitioner's license (*see e.g. Matter of Farina v State Liq. Auth.*, 20 NY2d 484, 493 [1967]; *Matter of La Trieste Rest. & Cabaret v New York State Liq. Auth.*, 228 AD2d 172 [1st Dept 1996]; *Matter of Vicky's Grocery v New York State Liq. Auth.*, 213 AD2d 206 [1st Dept

1995]). Accordingly, we remand the matter to respondent for the imposition of an appropriate lesser penalty.

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

DEGRASSE, J. (dissenting in part)

The majority and I agree that substantial evidence supports respondent's determination that petitioner violated Alcoholic Beverage Control Law (ABC Law) § 99-d(1) and § 110(4), as well as Rules of the State Liquor Authority (9 NYCRR) § 53.1. I disagree, however, with the majority's finding that the penalty of cancellation imposed by respondent is excessive. As noted by the Court of Appeals, "[T]he role of the courts in reviewing the penalty imposed by an administrative agency is extremely limited" (*Matter of 17 Cameron St. Rest. Corp. v New York State Liq. Auth.*, 48 NY2d 509, 512 [1979]). Where the finding of guilt has been confirmed, the test is whether the punishment imposed is "so disproportionate to the offense, in light of all of the circumstances, as to be shocking to one's sense of fairness" (*id.* [internal quotation marks omitted]). That test has not been met in this case.

Respondent sustained eight separate charges following a revocation hearing. Three of the sustained charges involved the submission of false material statements or the suppression of information in connection with petitioner's original application and renewal application. The record does not support the majority's conclusion, on the basis of a purported lack of willfulness on petitioner's part, that the penalty of

cancellation was unwarranted. Petitioner's argument regarding its purported lack of willfulness is based on the assertion that it was unaware of its duty to disclose its financial obligations, place its license in safekeeping with respondent and otherwise comply with the ABC Law and respondent's rules. The majority apparently accepts this argument in reaching its conclusion. I reach a different conclusion because the common-law maxim that ignorance of the law is no excuse applies in the context of article 78 proceedings (see *Matter of Obiora v New York State Div. of Hous. & Community Renewal*, 77 AD3d 755, 756 [2d Dept 2010] [landlord's ignorance of the law held insufficient to show that a rent overcharge was not willful]; *Matter of Rubin v Tax Appeals Trib. of State of N.Y.*, 29 AD3d 1089, 1091-1092 [3d Dept 2006] [ignorance of the law held insufficient as a basis for the abatement of penalties]). *Matter of Farina v State Liq. Auth.* (20 NY2d 484 [1967]), which the majority cites, is distinguishable because it involved an annulment of a determination on the distinct ground that it "was arbitrary and capricious, being based upon conclusory reasons, unsupported by factual considerations" (*id.* at 493). *Matter of La Trieste Rest. & Cabaret v New York State Liq. Auth.* (228 AD2d 172 [1st Dept 1996]) and *Matter of Vicky's Grocery v New York State Liq. Auth.* (213 AD2d 206 [1st Dept 1995]), which the majority also cites,

are inapt because they do not implicate the purported ignorance of the law excuse proffered by petitioner in this proceeding.

It should also be noted that the penalty of cancellation imposed here does not carry the most severe consequences permitted by law. Upon sustaining the charges following the revocation hearing, respondent could have revoked, cancelled or suspended petitioner's license (see 9 NYCRR 54.6 [a]; see also ABC Law § 17 [3]). "A licensee whose license has been revoked for cause must wait two years before applying for a new liquor license" (*Matter of Braden Food & Drink, Inc. v New York State Liq. Auth.*, 72 AD3d 956, 957 [2d Dept 2010], citing ABC Law § 126 [5][a]; [6]). However, where a license has been cancelled, the affected licensee may, theoretically, make an immediate application for a new license (72 AD3d at 957). I would confirm respondent's determination.

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

ENTERED: MARCH 24, 2015

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

14123 Thomas Phillips, Index 300459/10  
Plaintiff-Appellant, 84247/10

-against-

Powercrat Corporation, et al.,  
Defendants-Respondents.

- - - - -

Powercrat Corporation, et al.,  
Third-Party Plaintiffs-Respondents,

-against-

Modern Empire, Inc.,  
Third-Party Defendant.

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

Lewis Johs Avallone Aviles LLP, Islandia (Robert A. Lifson of counsel), for Powercrat Corporation and KMCP, LLC, respondents.

O'Connor Redd LLP, Port Chester (Amy L. Fenno of counsel), for Von Rohr Equipment Corp., respondent.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered on or about April 23, 2014, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for summary judgment against defendant KMCP, LLC on the issue of liability under Labor Law § 240(1), and granted so much of defendants Powercrat Corp. and KMCP's and Von Rohr Equipment Corp.'s motions as sought summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against them, unanimously

reversed, on the law, without costs, plaintiff's motion granted, and defendants' motions for summary judgment dismissing the Labor Law §§ 240(1) and 241(6) claims as against them denied.

Plaintiff was injured in a fall from an unsecured ladder while working in a warehouse, where his job was to "clean out, remove machines, break down structures . . . and ship them out." The work included removal of heavy machinery and shelves that ran from floor to ceiling across three second-floor walls, each 50 feet long and 8 feet high, and were bolted to the floors and walls. The breaking down and removing of the shelves required the use of impact wrenches and sawzalls to cut the bolts. Removed materials, including shelving, were heavy, and had to be loaded in cages, which were then lifted by a pallet jack, moved to the edge of the second floor, and lowered to the first floor with a forklift. The dismantling of the shelves was a sufficiently complex and difficult task to render the shelving a "structure" within the meaning of Labor Law §§ 240(1) and 241(6) (see *Kharie v South Shore Record Mgt., Inc.*, 118 AD3d 955 [2d Dept 2014]; *Pino v Robert Martin Co.*, 22 AD3d 549, 551-552 [2d Dept 2005]). Moreover, in dismantling the shelving, plaintiff was engaged in "demolition" for purposes of §§ 240(1) and 241(6) (see *Kharie*, 118 AD3d at 956; *Pino*, 22 AD3d at 552; *Medina v City of New York*, 87 AD3d 907 [1st Dept 2011]; Industrial Code [12

NYCRR] § 23-1.4[b][16]).

In opposition to plaintiff's prima facie showing, defendants failed to raise an issue of fact whether plaintiff was the sole cause of his accident (see *Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 n 8 [2003]). There is no evidence that plaintiff received any "immediate and active direction" not to use the ladder, as required to establish a recalcitrant worker defense (see *Balthazar v Full Circle Constr. Corp.*, 268 AD2d 96, 99 [1st Dept 2000]; *Hernandez v 151 Sullivan Tenant Corp.*, 307 AD2d 207 [1st Dept 2003]).

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

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

ENTERED: MARCH 24, 2015

  
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store employees, his intent was, at least in part, to overcome resistance to his retention of stolen merchandise (see generally *People v Gordon*, 23 NY3d 643, 649-651 [2014]).

We perceive no basis for reducing the sentence.

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

ENTERED: MARCH 24, 2015

  
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Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14583-

14584        In re Remy J.,

          A Person Alleged to  
          be a Juvenile Delinquent,  
          Appellant.

          - - - - -

          Presentment Agency

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

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

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Orders of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered on or about December 19, 2013, which adjudicated appellant a juvenile delinquent upon his admission that he committed acts that, if committed by an adult, would constitute the crimes of menacing in the third degree and criminal mischief in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly exercised its discretion in denying appellant's request to convert the juvenile delinquency proceeding into a person in need of supervision proceeding (see e.g. *Matter of Steven O.*, 89 AD3d 573 [1st Dept 2012]). A period of probation was the least restrictive dispositional alternative

consistent with appellant's needs and the community's need for protection, given the violent nature of the underlying incidents, as well as appellant's prior violent acts and general misbehavior at home and school, lack of remorse, truancy and drug use.

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

ENTERED: MARCH 24, 2015

  
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decedent's death.

We modify the order, however, because plaintiff may not maintain a cause of action against defendant for its discretionary decision to grant plaintiff housing on the sixteenth floor of the apartment building. It is well settled that defendant has broad discretion to set, among other things, the terms of occupancy of its apartments (see e.g. *Matter of Gutierrez v Rhea*, 105 AD3d 481, 486 [2013], lv denied 21 NY3d 861 [2013]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 24, 2015

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Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14586- Index 651375/13

14587 Robert Silverstein,  
Plaintiff-Appellant,

-against-

Imperium Partners Group, LLC, et al.,  
Defendants-Respondents.

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Creizman PLLC, New York (Eric M. Creizman of counsel), for  
appellant.

Yeskoo Hogan & Tamlyn, LLP, New York (Thomas T. Tamlyn of  
counsel), for Imperium Partners Group, LLC, Imperium GP, LLC,  
Imperium Advisers, LLC, Imperium Specialty Finance Fund, L.P.,  
and John C. Michaelson, respondents.

Locke Lord LLP, New York (Ira G. Greenberg of counsel), for  
WeiserMazars LLP, respondent.

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Orders, Supreme Court, New York County (Melvin L.  
Schweitzer, J.), entered January 29, 2014, and November 14, 2013,  
which granted defendants' respective motions to dismiss the  
complaint as against them, unanimously affirmed, with costs.

Plaintiff may not invalidate his release of all claims  
against defendant Imperium Specialty Finance Fund, L.P. and its  
"officers, managers, directors, agents and employees" (i.e.,  
defendants the Imperium entities and John Michaelson) on the  
ground that it was procured by fraud, since the same allegations  
of fraud were the subject of the release (see *Centro Empresarial  
Cempresa S.A. v America Movil, S.A.B. de C.V.*, 17 NY3d 269, 276

[2011]; *Kafa Investments, LLC v 2170-2178 Broadway LLC*, 114 AD3d 433 [1st Dept 2014], *lv denied* 24 NY3d 902 [2014]; *Aurateq Systems Intern., Inc v David Marvisi*, 119 AD3d 402 [1st Dept 2014]).

Plaintiff failed to state claims for aiding and abetting fraud (see *Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]), aiding and abetting breach of fiduciary duty (see *Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]), and tortious interference with contract (see *Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]) against WeiserMazars. Finally, plaintiff's allegations failed to support a claim for accountant malpractice.

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

ENTERED: MARCH 24, 2015

  
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Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14588- Index 305640/09  
14589 Joseph Mora, et al., 83710/12  
Plaintiffs-Respondents,

-against-

Sky Lift Distributor Corp.,  
Defendant,

1200 Fifth Associates, LLC, et al.,  
Defendants-Appellants,

Skylift Contractor Corp.,  
Defendant-Respondent.

[And a Third-Party Action]

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McGaw, Alventosa & Zajac, Jericho (Joseph Horowitz of counsel),  
for appellants.

Alexander J. Wulwick, New York, for Mora respondents.

Marks, O'Neill, O'Brien, Doherty & Kelly, P.C., Elmsford (David  
S. Henry of counsel), for Skylift Contractor Corp., respondent.

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Order, Supreme Court, Bronx County (Mary Ann Brigantti-  
Hughes, J.), entered on or about January 21, 2014, which, to the  
extent appealed from as limited by the briefs, denied defendants  
1200 Fifth Associates, LLC and The Chetrit Group, LLC's  
(collectively, 1200 Fifth) motion for summary judgment dismissing  
the Labor Law § 240(1) claim as against them, unanimously  
affirmed, without costs. Order, same court and Justice, entered  
on or about July 21, 2014, which, upon reargument, granted

defendant Skylift Contractor Corp.'s motion for summary judgment dismissing the complaint as against it, and granted plaintiffs' motion for summary judgment as against 1200 Fifth on the issue of liability under Labor Law § 240(1), unanimously affirmed, without costs.

Plaintiff Joseph Mora sustained injuries during the removal of a fan cowl cover from a cooling tower. Defendant 1200 Fifth had retained plaintiff's employer, nonparty Par Mechanical, to dismantle the old cooling tower on the roof of its building, install a new one, and dispose of the old one. Pursuant to purchase order, Par subcontracted with defendant Skylift to remove the old tower, rig the new one, and have the old tower "moved" for disposal. At the time of the accident, the cooling tower had been removed from the roof and placed on a flatbed truck. After a Par employee pushed the cover off the tower, the cover bounced off the flatbed and struck plaintiff.

The Labor Law § 200 and common-law negligence claims were correctly dismissed as against Skylift. While the purchase order is ambiguous as to whether Skylift was responsible for removing the fan cowl cover in disposing of the cooling tower, the record evidence shows that Skylift did not have "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano*

*& Son*, 54 NY2d 311, 317 [1981])). Skylift's vice president testified that it was "standard procedure" and "protocol" for Skylift to direct its customers to remove the fan cowl cover in "trim[ming]" a tower before Skylift performed its work, and plaintiff's foreman admitted that there was no disagreement between himself and Skylift about performing the task. Further, although the testimony of plaintiff and his foreman shows that Skylift asked the foreman to have the cover removed, to prevent it from hitting the traffic lights during transport, plaintiff and the other Par employees performed the task solely pursuant to their foreman's instructions. In opposition to Skylift's motion, 1200 Fifth failed to raise a triable issue of fact. We also find for the foregoing reasons that Skylift was not a statutory "agent" that had been delegated the supervision and control of the injury-producing work (*see id.* at 318; *Nascimento v Bridgehampton Constr. Corp.*, 86 AD3d 189, 192-193 [1st Dept 2011])).

The court correctly declined to dismiss the Labor Law § 240(1) claim as against 1200 Fifth and granted plaintiff's motion for summary judgment on the issue of 1200 Fifth's liability under that statute. Contrary to 1200 Fifth's contention, plaintiff's accident resulted from an elevation-related risk encompassed by the statute (*see Runner v New York Stock Exch., Inc.*, 13 NY3d

599, 603 [2009]). Moreover, the 250-pound fan cowl cover constituted "a load that required securing for the purposes of the undertaking" (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 268 [2001]). 1200 Fifth contends that it was no longer an "owner" under the statute at the time of the accident, because the enumerated activity, the removal of the tower from its roof, had been completed at the time, and the removal of the fan cowl cover constituted a separate phase of work. We conclude, however, that removal of the fan cowl cover was not a "separate phase easily distinguishable from other parts of the larger [] project" (*Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 881 [2003]; see also *Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013]).

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

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

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

ENTERED: MARCH 24, 2015

  
CLERK

Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14591-

Index 110337/10

14592 Alphonse Sicignano, et al.,  
Plaintiffs-Appellants,

-against-

New York City Transit Authority,  
Defendant-Respondent,

Metropolitan Transportation Authority,  
et al.,  
Defendants.

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Sullivan Papain Block McGrath & Cannavo, P.C., New York (Stephen C. Glasser of counsel), for appellants.

Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered April 30, 2014, after a jury trial, in favor of defendant New York City Transit Authority (defendant), unanimously affirmed, without costs. Appeal from order, same court and Justice, entered December 12, 2013, which denied plaintiffs' posttrial motion to set aside the verdict as against the weight of the evidence, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury's verdict – that defendant's violations of the Administrative Code of the City of New York were not reasonably connected to plaintiff firefighter's injury – was a fair

interpretation of the evidence (see *Lolik v Big V Supermarkets*, 86 NY2d 744, 746 [1995]). While defendant did not call an expert to rebut plaintiffs' expert's opinion as to causation, "the jury is entitled to accept, or reject, an expert's testimony in whole or in part" (*McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 207 [1st Dept 2004]). In addition, the jury was free to accept or reject plaintiff's account of the accident.

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

ENTERED: MARCH 24, 2015



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Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14593 Philip C. Masiello, Index 104521/07  
Plaintiff-Respondent, 591028/07

-against-

21 East 79th Street Corporation, et al.,  
Defendants-Respondents,

Pelham Plumbing & Heating Corp.,  
Defendant.

- - - - -

23 East 79th Street Corp.,  
Third-Party Plaintiff-Respondent,

-against-

Fine-Line Restoration, Inc.,  
Third-Party Defendant-Appellant.

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Cullen and Dykman LLP, New York (Margaret Mazlin of counsel), for appellant.

Michael S. Murphy, Astoria, for Philip C. Masiello, respondent.

Flynn, Gibbons & Dowd, New York (Lawrence Doris of counsel), for 21 East 79th Street Corporation, 23 East 79th Street Corp. and Brown Harris Stevens Residential Management, LLC, respondents.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered July 17, 2013, which, insofar as appealed from as limited by the briefs, upon reargument, denied third-party defendant's (Fine-Line Restoration, Inc.) motion for summary judgment dismissing the third-party complaint and the complaint, unanimously modified, on the law, to grant the motion as to the Labor Law § 241(6) claim except to the extent it is predicated

upon alleged violations of Industrial Code (12 NYCRR) § 23-1.21(b)(4)(ii) and (e)(3) and as to the cause of action for common-law indemnification and contribution to the extent that cause of action is asserted in the third-party complaint, and otherwise affirmed, without costs.

The third-party complaint, while vague, plainly alleges a cause of action for contractual indemnification. To the extent it asserts a claim for common-law indemnification and contribution, that claim must be dismissed because third-party plaintiff (23 East 79th) admits that plaintiff has not sustained a grave injury (see *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363 [2005]).

Contrary to Fine-Line's contention that there exists no contract containing an indemnification clause, 23 East 79th produced during discovery, and submitted with its opposition to Fine-Line's motion, a copy of a contract containing an indemnification provision, signed by Fine-Line's president before plaintiff's accident. That no indemnification provision was included among portions of a contract that 23 East 79th subsequently disclosed, at most, raises an issue of fact whether Fine-Line agreed in writing to indemnify 23 East 79th.

The motion court correctly declined to dismiss the Labor Law § 240(1) claim, since the ladder was not secured properly to

insure that it would remain steady (see *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]). The court correctly declined to dismiss the Labor Law § 241(6) claim insofar as it is predicated on alleged violations of Industrial Code (12 NYCRR) § 23-1.21(b)(4)(ii) and (e)(3) (see *Hart v Turner Constr. Co.*, 30 AD3d 213 [1st Dept 2006]). However, plaintiff has abandoned the § 241(6) claim insofar as it was predicated on alleged violations of other Industrial Code provisions.

The court correctly declined to dismiss the Labor Law § 200 and common-law negligence claims. The deposition testimony relied on by Fine-Line constitutes prima facie evidence that 23 East 79th did not exercise supervisory control over plaintiff's work (see *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876 [1993]). In opposition, plaintiff failed to raise a triable issue of fact as to 23 East 79th's supervisory control. However, issues of fact remain whether 23 East 79th or its agent created or had actual or constructive notice of the alleged dip in the floor on which the ladder was placed, particularly since the floor and plywood underneath had just been replaced as part of the renovation (see *Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011]).

23 East 79th's contention that Fine-Line's counsel must be

disqualified because of a conflict of interest that does not involve 23 East 79th is without merit (see *Rowe v De Jesus*, 106 AD2d 284 [1st Dept 1984]).

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

ENTERED: MARCH 24, 2015

  
CLERK

Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14594 Metropolitan Plaza WP, LLC, Index 115519/09  
formerly known as Ridgemour  
Meyer Properties, LLC, et al.,  
Plaintiffs-Appellants,

-against-

Goetz Fitzpatrick, LLP, et al.,  
Defendants-Respondents.

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Andrew L. Bluestone, New York, for appellants.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Thomas A. Leghorn of counsel), for respondents.

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Judgment, Supreme Court, New York County (Louis B. York, J.), entered January 17, 2014, dismissing the complaint, unanimously affirmed, without costs.

The motion court correctly gave collateral estoppel effect to the rulings of the bankruptcy court in a prior proceeding finding deceit and other misconduct by plaintiffs, as well as defendants, and dismissed the complaint pursuant to the doctrine

of in pari delicto (see *Kirschner v KPMG LLP*, 15 NY3d 446, 464 [2010]).

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

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

ENTERED: MARCH 24, 2015

  
CLERK



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

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

ENTERED: MARCH 24, 2015

  
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teacher at least once a week for two months, despite her continually communicating to him that she did not want him to do this. The unwanted contact escalated in a later encounter in which he grabbed her, held her aloft in the air, kissed her repeatedly on the cheek, and then kissed her on the lips and forced his tongue into her mouth.

Petitioner's argument that the actions set forth in specifications 2 and 4 do not constitute misconduct was not articulated in the petition, and is thus unpreserved (see *Jennings v Walcott*, 110 AD3d 538, 539 [1st Dept 2013]; *Matter of Cherry v Horn*, 66 AD3d 556, 557 [1st Dept 2009]). Even were we to consider the argument, we would find it to be unavailing. Although the acts set forth in specification 4 - calling the other teacher at her home to apologize and repeatedly asking to meet in person - might not, standing alone, constitute misconduct, the hearing officer reasonably found that, in the aftermath of the assaultive behavior in the copy room, this was unwelcome contact constituting sexual harassment, in violation of the rules and policies of the Department of Education (see e.g. *Matter of Gongora v New York City Dept. of Educ.*, 98 AD3d 888, 890 [1st Dept 2012]; cf. *Matter of Polayes v City of New York*, 118 AD3d 425 [1st Dept 2014] [teacher's conduct was objectively innocuous, did not violate any rule or policy, and did not insult

or offend anyone])). We further note that petitioner insisted on attempting to contact the teacher, even though she told him several times that she did not want to meet with him and wanted no further contact. Moreover, the hearing officer reasonably found under these circumstances that the acts alleged in specification 2 - that petitioner asked to embrace the teacher, and also told her to keep things between themselves - also constituted misconduct in violation of the sexual harassment policies.

Due to the egregious nature of the misconduct at issue, and the hearing officer's conclusion that petitioner did not credibly display remorse or an appreciation for the seriousness of his actions, we find that the penalty of termination was appropriate despite petitioner's twenty year satisfactory employment history (see *Gongora* at 890; *Matter of Douglas v New York City Bd./Dept. of Educ.*, 87 AD3d 856, 857 [1st Dept 2011]).

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

ENTERED: MARCH 24, 2015

  
CLERK



Defendants' failure to plead the affirmative defense of waiver in their answer did not preclude them from asserting such defense for the first time on summary judgment, since "[t]here is no prohibition against moving for summary judgment based on an unpleaded defense where the opposing party is not taken by surprise and does not suffer prejudice as a result" (*Arteaga v City of New York*, 101 AD3d 454, 454 [1st Dept 2012]; see *Brill & Meisel v Brown*, 113 AD3d 435, 435 [1st Dept 2014]).

The motion court erred in granting defendants' motion for summary judgment on plaintiff's first cause of action, for breach of Section 4.1 of the parties' property management agreement, which provided for a monthly management fee based on the greater of 5% of defendants' monthly gross income or \$5,000. During the five years that it provided property management services to defendants, plaintiff paid itself from defendants' operating account \$5,000, rather than the greater of 5% or \$5,000. Upon discovery of the error, plaintiff billed defendants for approximately \$203,000 in "underpaid" management fees.

When defendants did not pay, plaintiff commenced the instant action. On the motion for summary judgment, defendants argued, and the motion court found, that plaintiff waived its right to receive the underpaid management fees, based on its course of conduct in paying itself the monthly flat fee of \$5,000. This

was error.

Although the management agreement contained a provision that any waivers must be in writing, "a contracting party may orally waive enforcement of a contract term notwithstanding a provision to the contrary in the agreement. Such waiver may be evinced by words or conduct, including partial performance" (*Bank Leumi Trust Co. of N.Y. v Block 3102 Corp.*, 180 AD2d 588, 590 [1st Dept 1992], *lv denied* 80 NY2d 754 [1992] [internal citation omitted]). However, waiver "is an intentional relinquishment of a known right and should not be lightly presumed" (*Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966, 968 [1988]). Plaintiff's former chief financial officer stated in his affidavit that at the outset of the management agreement, he had set up an automatic payment for a recurring monthly charge of plaintiff's management fee, and that it was not until he was in the process of preparing a final accounting and reconciliation of the account, that he first realized the mistake. It is well settled that mere silence or oversight does not constitute clear manifestation of an intent to relinquish a known right (see *Courtney-Clarke v Rizzoli Intl. Publs.*, 251 AD2d 13 [1st Dept 1998]). Nor does mistake, negligence, or thoughtlessness (see *EchoStar Satellite L.L.C. v ESPN, Inc.*, 79 AD3d 614, 617 [1st Dept 2010]; *Byer v City of New York*, 50 AD2d 771 [1st Dept 1975]). At the very least, under the

circumstances of this case, the issue of whether plaintiff intended to forgo its right to payment of management fees based on 5% of defendants' gross income, is a question of fact (see *Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y.*, 61 NY2d 442, 446 [1984]).

However, the motion court properly dismissed that part of plaintiff's third cause of action, for account stated, based on the underpaid management fees, on the ground that defendants did not assent to the account (see *Interman Indus. Prods. v R.S.M. Electron Power*, 37 NY2d 151, 153 [1975]). We find defendants' statement - made three months after receipt of plaintiff's invoice - that "[t]his claim, as you can imagine, is a surprise to [us] so your final accounting and any further information you can provide to support this claim are necessary to fully evaluate this matter," insufficient to constitute assent (see *Herrick, Feinstein v Stamm*, 297 AD2d 477 [1st Dept 2002]).

Although both parties moved for summary judgment on defendants' first counterclaim, for breach of contract, neither established their burden by competent evidence that there was no factual issue barring the grant of summary judgment in its favor (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). They presented conflicting evidence of whether plaintiff breached Section 3.1 of the management agreement to

make good faith efforts to collect rent, and Section 3.11 to commence litigation against a tenant in arrears. Thus, on this record, the issue of whether plaintiff has acted in good faith is a question of fact to be determined by a jury (see e.g. *HRH Constr. Corp. v Forest Elec. Corp.*, 299 AD2d 282 [1st Dept 2002]).

Plaintiff was entitled to summary judgment on defendants' fifth counterclaim, for conversion, based on defendants' failure to specifically identify the interest allegedly converted (see *Manufacturers Hanover Trust Co. v Chemical Bank*, 160 AD2d 113, 124-125 [1st Dept 1990], *lv denied* 77 NY2d 803 [1991]). Plaintiff's submission of the bank statements from the operating account established that such account was a non-interest bearing account.

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: MARCH 24, 2015

  
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(see CPLR 2001), and defendant otherwise failed to establish a triable issue regarding plaintiff's standing.

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

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

ENTERED: MARCH 24, 2015

  
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CLERK

Mazzarelli, J.P., Friedman, Sweeny, Gische, Kapnick, JJ.

14600        In re James Amoroso,  
[M-65]                Petitioner,

Index 309307/09

-against-

Hon. Norma Ruiz, etc., et al.,  
Respondents.

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Ian Anderson, Kew Gardens, for petitioner.

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

The Stuttman Law Group, P.C., White Plains (Dennis Murphy of counsel), for Westchester Medical Center, respondent.

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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: MARCH 24, 2015

  
CLERK



Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14602-		Index 101992/09
14603-		590446/09
14604-	Ivan Dorador, Plaintiff-Respondent,	590297/10

-against-

Trump Palace Condominium,  
Defendant-Appellant.

[And a Third-Party Action]

Trump Palace Condominium,  
Second Third-Party Plaintiff-Appellant,

-against-

R&J Company, LLC, et al.,  
Second Third-Party Defendants.

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Lester Schwab Katz & Dwyer, LLP, New York (John Sandercock of counsel), for appellant.

Pollack, Pollack, Isaac & DeCicco, LLP (Beth S. Gereg of counsel), for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered May 1, 2014, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) claim and denied defendant/second third-party plaintiff's (Trump) cross motion for summary judgment dismissing that claim, unanimously affirmed, without costs. Order, same court and Justice, entered April 30, 2014, which, to the extent appealed from as limited by the

briefs, upon reargument, granted second third-party defendants' motion to stay the second third-party action as against second third-party defendant R&J Company, LLC pending resolution of a proceeding in the bankruptcy court, and granted plaintiff's cross motion to sever the second third-party action from the main action, unanimously affirmed, without costs. Order, same court and Justice, entered April 30, 2014, which, to the extent appealed from as limited by the briefs, stayed Trump's motion for summary judgment on its contractual indemnification claim against R&J, unanimously affirmed, without costs.

Upon a review of the factors set forth in *Soto v J. Crew Inc.* (21 NY3d 562, 568 [2013]), the motion court correctly found that plaintiff, at the time of his accident, was engaged in a "cleaning" activity under Labor Law § 240(1). Plaintiff's application of masking tape to windows in preparation for stripping and relacquering of the brass on the facade of Trump's building is not the type of task that is performed on a relatively frequent and recurring basis as part of ordinary maintenance (see *Soto*, 21 NY3d at 568). Further, plaintiff's work on a scaffold six to seven feet above the sidewalk involved a significant elevation risk (*id.*; see generally *Aurienma v Biltmore Theatre, LLC*, 82 AD3d 1, 9 [1st Dept 2011]).

The motion court properly stayed the second third-party

action and Trump's motion against R&J, the nondebtor codefendant in the second third-party action. R&J, as the alleged indemnitee of its codefendant, is united in interest with its codefendant, the discharged debtor. Accordingly, the bankruptcy court's discharge injunction should extend to R&J (*see generally In re St. Vincent's Catholic Medical Centers of New York*, 2014 WL 3545581, \*7-9, 2014 US Dist LEXIS 97808, \*17-25 [SD NY, July 16, 2014, Nos. 14-cv-3293(PKC), 10-11963(CGM)]).

The motion court providently exercised its discretion in severing the second third-party action from plaintiff's action to avoid prejudice to plaintiff by further delay of his trial-ready action (*see* CPLR 603).

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

ENTERED: MARCH 24, 2015

  
CLERK



and interest due on a property located at 244 Lenox Avenue. The tax foreclosure action resulted in a final judgment, entered on February 23, 2011. Almost four months after entry of judgment, plaintiffs purchased a note from defendant mortgagee Wells Fargo Bank NA related to the property. After the owner of the property defaulted under the note, plaintiffs commenced this action, seeking, inter alia, to foreclose on the property, to invalidate the judgment issued in the tax foreclosure action, and to reverse a transfer by the City to defendant Neighborhood Restore.

The record shows that the City commenced the tax foreclosure action at least one year from the date of the initial tax assessment (see Administrative Code of the City of New York § 11-404), and followed the other applicable procedures for commencing the action (Administrative Code § 11-405[d]). The City also adhered to the statutory notice requirements (Administrative Code § 11-406[c]), and was under no obligation to provide plaintiffs with notice, since they did not follow the statutory procedure entitling them to such notice (Administrative Code § 11-406[c]). Plaintiffs have presented no other basis to challenge the procedural propriety of the tax foreclosure action or the judgment. Because any interest they may have had in the property was subordinate to the City's tax lien (Administrative Code § 11-301), plaintiffs are bound by the tax foreclosure proceeding and

the judgment.

Plaintiffs also fail to present a basis for reversing the transfer of the property to Neighborhood Restore. The deed clearly indicates that Neighborhood Restore was designated a qualified third party by the Department of Housing Preservation & Development. Moreover, the City's transfer of the property occurred within the requisite statutory period (Administrative Code § 11-412.1[c]), following approval by the City Council (Administrative Code § 11-412.2).

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

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

ENTERED: MARCH 24, 2015

  
CLERK



claim for contractual indemnification against third-party defendant, and upon reargument, reinstated said claim, unananimously affirmed, without costs.

The motion court correctly determined that the lease agreement, as altered by its sixth and seventh smendments, clearly and unambiguously expanded the definition of an "Owner" to be indemnified by third-party defendant to include New York Hotel Management Company.

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

ENTERED: MARCH 24, 2015

  
CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14609 In re Rodney W.,  
Petitioner-Respondent,

-against-

Josephine F.,  
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

Steven N. Feinman, White Plains, for respondent.

Carol Kahn, New York, attorney for the child.

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about November 18, 2013, which denied respondent mother's motion to vacate an order of custody entered in favor of petitioner father upon the mother's default, unanimously affirmed, without costs.

The court properly denied the mother's motion to vacate, as the record supports the court's finding that the mother willfully defaulted at the consolidated hearing on the custody petition and the dispositional phase of the neglect petition (see Family Ct Act §§ 1042, 1055-b; see also *Matter of Rozelle Tyrone Lee P.*, 19 AD3d 237, 238 [1st Dept 2005], *lv dismissed* 5 NY3d 839 [2005]). The mother failed to explain in her motion papers why she stormed out of the courtroom and refused to participate in the proceedings (see *Rozelle*, 19 AD3d at 238).

Even if the court should have analyzed the motion to vacate pursuant to CPLR 5015(a), the mother failed to provide a reasonable excuse for her default and a meritorious defense to the custody petition (see *Matter of Azmara N.G. v Jessica Stephanie S.*, 110 AD3d 617, 618 [2013]). The record shows that the father has received training to care for the special-needs child and that the child is thriving in his care. By contrast, neglect findings have been entered against the mother with respect to all nine of her children, she failed to demonstrate any ability to care for the child's special needs, she failed to comply with court-ordered services, she has been disruptive and disrespectful in court proceedings, and she failed to cooperate with and has threatened several attorneys assigned to her.

The mother failed to preserve her due process arguments, and we decline to consider them. As an alternative holding, we reject her arguments on the merits, as her own misconduct toward

her attorneys resulted in their being relieved as counsel, and she effectively exhausted her right to assigned counsel (see *People v Lineberger*, 282 AD2d 369, 370 [1st Dept 2001]).

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

ENTERED: MARCH 24, 2015

  
CLERK



of law as to whether the expenses billed by defendants Total Trial Solutions, LLC (TTS) and Cinetrial Solutions, LLC (CTS), providers of litigation support services, were authorized and were reasonable, since issues of fact exist whether defendant Jacoby & Meyers's guidelines for the provision of litigation support services were followed and whether TTS and CTS provided services in excess of what had been deemed necessary.

The record does not permit summary dismissal of the complaint on the ground of unclean hands since, in addition to the above-cited issues of fact as to the following of the guidelines for litigation support services, issues of fact exist as to which individual or individuals at Jacoby & Meyers were responsible for litigating the case and for reviewing and approving the litigation support services.

As to the breach of fiduciary duty claim based on a conflict of interest, the retainer agreement clearly disclosed that attorneys had a financial interest in TTS and CTS, and advised plaintiff to seek an independent attorney's opinion on the issue of case expenses if she felt the need (*see generally Halevi v Fisher*, 81 AD3d 504 [1st Dept 2011], *lv denied* 16 NY3d 711 [2011]). Plaintiff presented no evidence either that she had difficulty with English (indeed, her deposition testimony in English reflects no such difficulty) or that her injury rendered

her unable to understand the agreement she signed.

For the same reasons, plaintiff's contention that defendants committed fraud by omission by concealing their conflict of interest from her is unavailing. Nor does the retainer agreement's language of "potential" conflict of interest render the disclosure less clear.

As to the breach of fiduciary duty claim based on the alleged filing of an improper retaining lien, it has not been determined whether defendants were discharged for cause (see *Teichner v W & J Holsteins*, 64 NY2d 977 [1985]; *Eighteen Assoc. v Nanjim Leasing Corp.*, 297 AD2d 358 [2d Dept 2002]).

There is no evidence that defendants engaged in misconduct constituting a violation of Judiciary Law § 487 (see e.g. *Lifeline Funding, LLC v Ripka*, 114 AD3d 507, 508 [1st Dept 2014]).

We have considered the parties' remaining arguments in support of affirmative relief and find them unavailing.

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

ENTERED: MARCH 24, 2015

  
CLERK



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

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

ENTERED: MARCH 24, 2015

  
CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14613-

Index 653906/12

14614 MEG Holdings, LLC,  
Plaintiff-Respondent,

-against-

Sapphire Power Finance LLC,  
Defendant-Appellant,

U.S. Bank National Association,  
Nominal Defendant.

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

Arent Fox LLP, New York (Howard Graff and Courtney E. Topic of  
counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York  
County (Saliann Scarpulla, J.), entered August 6, 2014, to the  
extent appealed from as limited by the briefs, granting plaintiff  
summary judgment on its claim for the release of escrow funds,  
and dismissing defendant Sapphire Power Finance LLC's  
counterclaims for indemnification and breach of warranty,  
unanimously affirmed, with costs.

The indemnification clause in the Purchase and Sale  
Agreement (PSA) between plaintiff and defendant Sapphire Power  
Finance LLC does not reflect an "unmistakably clear" intent to  
indemnify interparty claims (see *Hooper Assoc. v AGS Computers*,  
74 NY2d 487, 492 [1989]; *Gotham Partners, L.P. v High Riv. Ltd.*

*Partnership*, 76 AD3d 203 [1st Dept 2010], *lv denied* 17 NY3d 713 [2011]).

The counterclaim for breach of warranty is barred by the waiver of remedies clause in the PSA which limits the parties' remedies to indemnification (except for fraud and intentional misrepresentation), specific performance, and other injunctive or equitable relief (see *Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 77 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]).

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

ENTERED: MARCH 24, 2015

  
CLERK



*New York State Thruway Auth.*, 81 NY2d 721, 723 [1992]). The June 8, 2009 service, by regular mail - an improper method of service - was not completed until it was received by the Attorney General's Office on June 12, 2009 (Court of Claims Act § 11[a][i]). After defendant rejected this claim, claimant served another one, again by regular mail, which was received on July 1, 2009. However, the statute of limitations had expired by the time of claimant's first service of the new claim (see CPLR 214; *Koerner v State of N.Y., Pilgrim Psychiatric Ctr.*, 62 NY2d 442 [1984]). Thus, the Court of Claims was without authority to extend claimant's time to serve the claim (*Roberts v City Univ. of N.Y.*, 41 AD3d 825 [2d Dept 2007]).

We reject claimant's contention that defendant waived its affirmative defenses to the time and manner of service by failing to plead them with particularity (see Court of Claims Act § 11[c]). The first affirmative defense alleges that claimant failed to timely serve the claim in accordance with the April 2009 order, which required conformity with Court of Claims Act §§ 10, 11 and 11-a; the ninth affirmative defense specifies the manner of service that was used, the manner of service that should have been used, and the statutory authority therefor. These defenses are pleaded with sufficient particularity (*cf. Sinacore v State of New York*, 176 Misc 2d 1, \*7 [Ct Cl 1998]

[non-compliance with statutory requirements not alleged]; *Fowles v State of New York*, 152 Misc 2d 837 [Ct Cl 1991] [mere "failure to comply with [statutory] requirements" alleged, without facts giving notice of which requirements]). Moreover, contrary to claimant's contention, the only claim to which defendant's answer could have been directed was the late one served on July 1, 2009.

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

ENTERED: MARCH 24, 2015

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

CLERK

Tom, J.P., DeGrasse, Manzanet-Daniels, Clark, JJ.

14616 & The People of the State of New York, Ind. 5777/02  
M-666 Respondent,

-against-

Cory Goodwin,  
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Eric C. Washer of counsel), for respondent.

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Order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered on or about April 16, 2012, which adjudicated defendant a level three sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law, art 6-C), unanimously affirmed, without costs.

Each of the point assessments at issue was supported by clear and convincing evidence. The assessment for being armed with a dangerous instrument was supported by evidence that the victim felt and saw an apparent firearm (see *People v Pettigrew*, 14 NY3d 406, 409 [2010]). The evidence supported an assessment for the victim being under the age of 17, regardless of any paperwork discrepancy as to whether she was 15 or 16.

Defendant's challenge to the assessment for a history of drug or alcohol abuse was expressly waived, and is without merit in any

event.

In addition, the record supports the court's alternative finding that even if defendant's point score was only at level two, a discretionary upward departure was warranted, because the risk assessment instrument did not adequately account for the seriousness of the underlying crime and defendant's overall criminal history.

**M-666 - People v Cory Goodwin**

Motion to strike brief denied.

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

ENTERED:

  
\_\_\_\_\_  
CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14617 In re Ramona A. A.,  
Petitioner-Respondent,

-against-

Juan M. N.,  
Respondent-Appellant.

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Andrew J. Baer, New York, for appellant.

Steven N. Feinman, White Plains, for respondent.

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Order of protection, Family Court, New York County (Diane Costanzo, Referee), entered on or about May 13, 2010, against respondent Juan M.N., after a fact-finding determination that he had committed the family offense of harassment in the second degree, unanimously affirmed, without costs.

Although the order of protection has expired, we address the merits of the appeal, since enduring consequences may flow from the adjudication that respondent has committed a family offense (see *Matter of Veronica P. v Radcliff A.*, \_\_ NY3d \_\_, 2015 Slip Op 01300 [2015]; *Matter of Marisela N. v Lacy M.S.*, 118 AD3d 449, 449 [1st Dept 2014]).

A fair preponderance of the evidence supports the Referee's finding that respondent committed the family offense of harassment in the second degree, warranting the issuance of a two-year order of protection against him (see Family Ct Act

§§ 812[1]; 832, 842; Penal Law § 240.26[1]). Petitioner, respondent's sister, testified that respondent, while living with her and her family, threatened to kill her on multiple occasions in 2009 and 2010, and told her that he was going to poison her family's food and set fire to the apartment (see *Matter of Tamara A. v Anthony Wayne S.*, 110 AD3d 560, 560-561 [1st Dept 2013]). Respondent's intent to harass, annoy or alarm petitioner may be inferred from his threats (see *McGuffog v Ginsberg*, 266 AD2d 136 [1st Dept 1999]).

The Referee properly ordered respondent to stay away from petitioner's home and her child, because respondent's threats involved the home and the entire family, including the child (see *Matter of Angela C. v Harris K.*, 102 AD3d 588, 590 [1st Dept 2013]; *Barbara E. v John E.*, 44 AD3d 426, 427 [1st Dept 2007]).

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

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

ENTERED: MARCH 24, 2015

  
CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14618      Jane Doe, an Infant by Her Mother      Index 350325/10  
            and Natural Guardian Julitte  
            Doe, et al.,  
            Plaintiffs-Appellants,

-against-

New York City Department of Education,  
Defendant-Respondent,

Bill Agosto,  
Defendant.

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Lynn Law Firm, LLP, Syracuse (Patricia A. Lynn-Ford of counsel),  
for appellants.

Zachary W. Carter, Corporation Counsel, New York (Dona B. Morris  
of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mitchell J. Danziger,  
J.), entered May 21, 2014, which granted defendant New York City  
Department of Education's (DOE) motion for summary judgment  
dismissing the complaint as against it with prejudice,  
unanimously affirmed, without costs.

It is undisputed that defendant Agosto, a substitute teacher  
at another school and the infant plaintiff's track coach, had  
unlawful sexual intercourse with the infant plaintiff at a motel  
after school hours. The court correctly dismissed the vicarious  
liability claim against DOE, because Agosto's conduct was not in  
furtherance of school business and was outside the scope of his

employment (see *Acosta-Rodriguez v City of New York*, 77 AD3d 503, 504 [1st Dept 2010]; see also *N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 251 [2002]).

The court correctly dismissed the negligent supervision claim, because the misconduct occurred after school hours and off school premises (see *Stephenson v City of New York*, 19 NY3d 1031, 1034 [2012]). Further, plaintiffs failed to present evidence sufficient to raise a triable issue of fact that school authorities had specific knowledge or notice of Agosto's misconduct or that his misconduct could reasonably have been anticipated (see *Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]). Agosto had no prior criminal record, and there were no prior complaints about him other than the plaintiff mother's alleged complaints about the end time of practices. Although there was evidence that Agosto drove the infant plaintiff and others home from school, in violation of a Chancellor regulation, this is insufficient to raise an issue of fact as to whether DOE had actual or constructive notice of sexual misconduct (see *Oswaldo D. v Rector Church Wardens*

*Vestrymen of Parish of Trinity Church of N.Y.*, 38 AD3d 480, 480-481 [1st Dept 2007]; see also *Brandy*, 15 NY3d at 302-303). For these reasons, the court also correctly dismissed plaintiffs' negligent hiring and retention claims (see *id.*).

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

ENTERED: MARCH 24, 2015

  
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CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14619 Adelina Reyes, Index 306261/10  
Plaintiff-Respondent,

-against-

New York City Transit Authority,  
Defendant-Appellant.

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Lawrence Heisler, Brooklyn (Timothy J. O'Shaughnessy of counsel),  
for appellant.

Jamie C. Rosenberg, New York, for respondent.

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Judgment, Supreme Court, Bronx County (Wilma Guzman, J.),  
entered November 13, 2013, upon a jury verdict, to the extent  
appealed from as limited by the briefs, awarding plaintiff the  
principal amount of \$750,000 for future pain and suffering,  
unanimously affirmed, without costs.

The award for future pain and suffering does not "deviate[]  
materially from what would be reasonable compensation" (CPLR  
5501[c]) (*see e.g. Smith v Manhattan & Bronx Surface Tr.  
Operating Auth.*, 58 AD3d 552 [1st Dept 2009]; *Urbina v 26 Ct. St.  
Assoc., LLC*, 46 AD3d 268 [1st Dept 2007]; *Calzado v New York City  
Tr. Auth.*, 304 AD2d 385 [1st Dept 2003]). The trial evidence  
established that plaintiff suffered damage to her left knee,  
including a laceration requiring 15 staples, a tear of the medial  
meniscus, and three bulging discs, and that she developed post-

traumatic arthritis in the left knee. Plaintiff underwent two years of physical therapy before resorting to arthroscopic surgery and, while her knee improved, she continued to experience pain, walked with a limp, and used a cane. Plaintiff's treating orthopedic surgeon testified that plaintiff would eventually need a total knee replacement, since the cartilage damage was severe and permanent. Moreover, plaintiff has difficulty standing and therefore, since the accident, has been unable to return to her work as a street vendor.

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

ENTERED: MARCH 24, 2015

  
CLERK



The charges were very serious, and defendant has not established prejudice, particularly since, had he proceeded to trial, his guilt would have been established by DNA evidence.

Each of defendant's remaining claims is forfeited by his guilty plea (see *People v Konieczny*, 2 NY3d 569, 575 [2004]; *People v Hansen*, 95 NY2d 227, 230-231 [2000]), as well as being foreclosed by his valid waiver of the right to appeal. As an alternative holding, we reject defendant's claims on the merits. The DNA indictment and its amendment to add the name of defendant once he was identified as the source of the DNA was proper (see *People v Martinez*, 52 AD3d 68 [1st Dept 2008], *lv denied* 11 NY3d 791 [2008]; see also *People v Ogunmekan*, 95 AD3d 701 [1st Dept 2012], *lv denied* 19 NY3d 999 [2012]), and defendant's statute of limitations argument is unavailing (see CPL 30.10[4][a][ii]).

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

ENTERED: MARCH 24, 2015

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

CLERK



elevator.

As Start was retained by plaintiff's employer, the lessor of the premises, pursuant to a maintenance contract denominated a "Lubrication Agreement," there are no issues as to control or maintenance of the elevator with respect to which evidence of post-accident repairs to the elevator would be material and necessary (see *Steinel v 131/93 Owners Corp.*, 240 AD2d 301 [1st Dept 1997]). Nor is there an issue as to the condition of the elevator and its lack of straps at the time of the accident, and no claim of design defect is asserted (see *id.*).

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

ENTERED: MARCH 24, 2015

  
CLERK

Tom, J.P., Renwick, DeGrasse, Manzanet-Daniels, Clark, JJ.

14622N &  
M-709           Transatlantic Reinsurance Company,           Index 151885/13  
                  Plaintiff-Appellant,

-against-

AIU Insurance Company,  
Defendant-Respondent,

American International Group, Inc.,  
Defendant.

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Crowell & Moring LLP, New York (Cliff Elgarten of counsel), for  
appellant.

Simpson Thacher & Bartlett LLP, New York (Mary Kay Vyskocil of  
counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner  
Kornreich, J.), entered March 7, 2014, which denied, without  
prejudice, plaintiff's motion to compel discovery from defendant,  
unanimously affirmed, with costs.

The motion court providently exercised its discretion by  
determining that, at this stage of the proceedings, plaintiff's  
discovery requests are overbroad and seek irrelevant information.  
We note that the court denied plaintiff's motion without  
prejudice. We see no need to substitute our own discretion in

this case (see *Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]).

**M-709 - *Transatlantic Reinsurance Company v  
AIU Insurance Company***

Motion for stay or adjournment denied.

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

ENTERED: MARCH 24, 2015

  
CLERK

Mazzarelli, J.P., Friedman, Saxe, Feinman, JJ.

12779            New Hampshire Insurance Company,            Index 653547/11  
                         Plaintiff-Appellant-Respondent,

-against-

Clearwater Insurance Company,  
Defendant-Respondent-Appellant.

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Sidley Austin LLP, New York (William M. Sneed of the Bar of the State of Illinois, admitted pro hac vice, of counsel), for appellant-respondent.

Crowell & Moring LLP, New York (Harry P. Cohen of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Ellen M. Coin, J.), entered November 1, 2013, modified, on the law, to deny plaintiff's motion for summary judgment insofar as it sought dismissal of the second, third and seventh affirmative defenses, and otherwise affirmed, with costs.

Opinion by Friedman J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.  
David Friedman  
David B. Saxe  
Paul G. Feinman, JJ.

12779  
Index 653547/11

x

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New Hampshire Insurance Company,  
Plaintiff-Appellant-Respondent,

-against-

Clearwater Insurance Company,  
Defendant-Respondent-Appellant.

x

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Cross appeals from the order of the Supreme Court,  
New York County (Ellen M. Coin, J.), entered  
November 1, 2013, which granted plaintiff's  
motion for summary judgment to the extent of  
dismissing defendant's second, third, and  
seventh affirmative defenses, and otherwise  
denied the motion.

Sidley Austin LLP, New York (William M. Sneed  
of the bar of the State of Illinois, admitted  
pro hac vice, and Alan J. Sorkowitz of  
counsel), for appellant-respondent.

Crowell & Moring LLP, New York (Harry P.  
Cohen and Brian J. O'Sullivan of counsel),  
for respondent-appellant.

FRIEDMAN, J.

Plaintiff New Hampshire Insurance Company (New Hampshire) has settled, along with several affiliated liability insurers under common corporate control (collectively, AIG), hundreds of millions of dollars of claims – most but not all of which are asbestos-related personal injury claims – with nonparty Kaiser Aluminum & Chemical Corporation (Kaiser), a common insured of the settling carriers. AIG's settlement agreement with Kaiser does not address the allocation of losses to particular claims, policies or carriers beyond providing that AIG may effect such an allocation "for its own purposes, in its own books and records," which AIG has done. That allocation ascribes 100% of the settlement amount to asbestos product liability claims within the coverage of Kaiser's New Hampshire excess policy (issued for the period from June 1973 to June 1976) and none of the amount to other settled claims – for bad faith, defense costs in addition to policy limits, and premises liability – that Kaiser had asserted against certain other AIG carriers, but not against New Hampshire.

New Hampshire has brought this action against defendant Clearwater Insurance Company (Clearwater), a reinsurer of the excess policy New Hampshire issued to Kaiser, seeking to require Clearwater to indemnify New Hampshire for the share prescribed by its reinsurance certificate of the portion of the Kaiser

settlement payments (which are being made over a 10-year period) that AIG has allocated to the New Hampshire policy. In its defense, Clearwater challenges AIG's allocation of 100% of the settled losses to asbestos products liability claims, contending that this allocation unreasonably results in the reinsured New Hampshire policy bearing part of the cost of settling the premises, bad faith and defense cost claims that Kaiser had not asserted against New Hampshire or that were not covered by the New Hampshire policy. Clearwater also asserts, as additional affirmative defenses, that New Hampshire (known as the ceding company, or "cedent," in reinsurance nomenclature; see *United States Fid. & Guar. Co. v American Re-Ins. Co.*, 20 NY3d 407, 418 [2013] [hereinafter, *USF & G*]) has breached its contractual notice, reporting and risk retention obligations under the terms of the reinsurance certificate.

While discovery was in its early stages, and before any witnesses had been deposed, New Hampshire moved for summary judgment in its favor. Concerning the allocation issue, New Hampshire argued that Clearwater, as a reinsurer, was bound, as a matter of law, by New Hampshire's allocation of settled claims to the reinsured policy under general principles of the law of reinsurance. We agree with Supreme Court that this argument is unavailing. As more fully discussed below, even if the subject

reinsurance certificate, in spite of its lack of a clause expressly so providing, generally obligates Clearwater to “follow the settlements” made by New Hampshire with its insured – a question that we need not, and do not, decide on this appeal – the cedent’s allocation decisions are not “immune from scrutiny” (*USF & G*, 20 NY3d at 420). In particular, even where the “follow the settlements” doctrine applies, the reasonableness of a cedent’s decision not to attribute any portion of a settlement to settled claims that were not covered by the reinsured policy may, on a proper record, present an issue of fact (see *id.* at 414, 422-425 [finding that the reasonableness of the cedent’s attribution of none of the settlement amount to the insured’s bad faith claims, which were not covered by reinsurance, presented a triable issue]). Accordingly, given the undeveloped factual record of this case, Supreme Court properly denied New Hampshire summary judgment on the allocation issue. However, also in view of the undeveloped state of the record, the court erred in granting New Hampshire summary judgment dismissing Clearwater’s affirmative defenses alleging that New Hampshire breached its notice, reporting and risk retention obligations under the reinsurance certificate. We therefore modify the order under review to deny New Hampshire’s summary judgment motion in its entirety.

## Factual and Procedural Background

### The Subject Insurance Policy

The underlying insurance policy at issue in this dispute was issued by New Hampshire to Kaiser in 1973 and covered the three-year period from June 6, 1973 to June 6, 1976. The policy, designated as policy number 5173-0230 (hereinafter, the NH-Kaiser policy), afforded Kaiser high-level excess liability coverage, with an annual per-occurrence limit of \$50 million and an annual aggregate limit of liability of \$50 million for products liability losses. The NH-Kaiser policy attached in excess of specified underlying umbrella policies with an annual per-occurrence limit of \$50 million and an aggregate annual limit of \$50 million for products liability losses. Thus, the NH-Kaiser policy was not implicated until Kaiser's covered losses for a given year during the policy period exceeded \$50 million.

Although the NH-Kaiser policy apparently was the only one that New Hampshire issued to Kaiser, the record reflects that six other AIG-affiliated carriers issued Kaiser a total of 48 excess liability policies, at various levels of coverage, during the period from 1970 to 1985. The aggregate limits of Kaiser's 49 AIG policies (including the NH-Kaiser policy) totaled approximately \$575 million.

### The Subject Reinsurance Contract

New Hampshire ceded a portion of its risk under the NH-Kaiser policy to Clearwater (which was then known as Skandia) pursuant to a contract entitled "Casualty Facultative Reinsurance Certificate No. 0567," dated July 10, 1973 (hereinafter, the Clearwater-NH certificate).<sup>1</sup> The Clearwater-NH certificate originally provided that Clearwater would indemnify New Hampshire for a 4% pro rata share (up to \$2 million per year) of any liability under the NH-Kaiser policy. In 1974, an amendment to the Clearwater-NH certificate increased Clearwater's pro rata share of New Hampshire's liability under the NH-Kaiser policy to 8%, or up to \$4 million per year.

The Clearwater-NH certificate provides that Clearwater's "liability . . . shall follow [New Hampshire's] liability in accordance with the terms and conditions of the policy reinsured hereunder except with respect to those terms and/or conditions as may be inconsistent with the terms of this Certificate." It also

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<sup>1</sup>As the Court of Appeals has explained: "Reinsurance comes primarily in two forms: facultative and treaty reinsurance. Facultative reinsurance is policy-specific, meaning that all or a portion of a reinsured's risk under a specific contract of direct coverage will be indemnified by the reinsurer in the event of loss. In contrast, a carrier seeking to reduce potential financial losses from policies issued to a class of customers or an industry may purchase treaty reinsurance" (*Travelers Cas. & Sur. Co. v Certain Underwriters at Lloyd's of London*, 96 NY2d 583, 587 [2001]). Facultative reinsurance is the form of reinsurance at issue in this case.

contains a provision under which New Hampshire "warrants that it shall retain for its own account, subject to treaty reinsurance only, if any, the amount specified on the face of this Certificate." New Hampshire further agreed that it would "notify [Clearwater] promptly of any event or development which [New Hampshire] reasonably believes might result in a claim against [Clearwater]" and would "forward to [Clearwater] copies of such pleadings and reports of investigations as are pertinent to the claim" under the certificate. The Clearwater-NH certificate also gives Clearwater the right to associate with New Hampshire in the defense of any claim made against the reinsured policy.

#### The Claims Against Kaiser and Ensuing Coverage Litigation

Kaiser was first named as a defendant in asbestos-related personal injury actions in the late 1970s. Eventually, the asbestos-related claims against Kaiser numbered in the hundreds of thousands. The asbestos claims arose from Kaiser's sale of asbestos-containing products or from alleged asbestos exposure at Kaiser's manufacturing premises. Also relevant to this action are personal injury claims against Kaiser arising from alleged exposure to substances and conditions other than asbestos (including benzene, volatile coal tar pitch, and excessive noise) at Kaiser's manufacturing premises. The accumulation of these claims forced Kaiser into Chapter 11 bankruptcy proceedings in

2002.

In 2000, Kaiser commenced a declaratory judgment action in California state court (the asbestos products action) against certain of its insurers to resolve disputes over coverage for the asbestos products liability claims against it (asbestos products claims). Although New Hampshire was not originally named as a defendant in this action, it was impleaded by other insurers, and Kaiser amended its complaint in 2001 to name all of its insurers, including New Hampshire, as defendants. In the asbestos products action, Kaiser asserted, in addition to its claims for declaratory relief and breach of contract, claims for bad faith against certain insurers, including two AIG carriers, Lexington Insurance Company (Lexington) and Insurance Company of the State of Pennsylvania (ICOP), but not New Hampshire. Also, the court in the asbestos products action ruled that Kaiser's ICOP policy obligated the insurer to pay Kaiser's defense costs in addition to the limits of its policy (defense costs claims).

In 2001, Kaiser commenced a separate declaratory judgment action in California state court (the premises action) against certain of its insurers concerning coverage for personal injury claims based on exposure to substances or conditions at Kaiser's manufacturing premises (premises claims), including claims for workplace exposure to asbestos, silica, coal tar pitch volatiles,

and benzene, and claims for noise-induced hearing loss.

Lexington was the only AIG carrier named as a defendant in the premises action.

### The Kaiser Settlement

In 2006, Kaiser's total unliquidated liability for personal injury claims of all kinds was estimated to be as high as \$2.5 billion, while the aggregate limits of its remaining solvent insurance coverage then totaled approximately \$1.5 billion. The remaining aggregate limits of Kaiser's coverage from the AIG carriers were then approximately \$568 million.

In April 2006, Kaiser and the AIG carriers, including New Hampshire, resolved their coverage disputes by entering into a settlement agreement (the Kaiser settlement), which was approved by the bankruptcy court on May 9, 2006, and went into effect upon Kaiser's emergence from bankruptcy on September 16, 2006. The Kaiser settlement essentially requires Kaiser's seven AIG carriers, collectively, to pay a trust that had been created to liquidate claims against Kaiser up to the full amount of the AIG carriers' aggregate remaining policy limits as of 2006 – approximately \$568 million – on a quarterly basis over a period of 10 years.<sup>2</sup> In exchange, the AIG carriers received a full

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<sup>2</sup>The amount of each quarterly payment under the Kaiser settlement is 37.5% of the sum of the value of the claims

release of all claims under, or relating to, the policies issued to Kaiser, including: (1) asbestos products claims; (2) premises claims, whether for exposure to asbestos, silica, coal tar pitch volatiles, or benzene, or for noise-induced hearing loss; (3) the bad faith claims that had been asserted against Lexington and ICOP; and (4) the defense costs claims that had been asserted against ICOP.

As previously noted, the Kaiser settlement does not allocate the settlement amount to particular claims, policies or carriers. Rather, the Kaiser settlement provides that the "AIG Member Companies shall have the right to allocate the Settlement Amount, or any portions thereof, solely for its [sic] own purposes, in its own books and records, to the various types and classifications of claims under the Subject Policies released by [Kaiser]." AIG chose to allocate 100% of the settlements to asbestos products claims and 0% of the settlement payments to any of the other kinds of claims – including premises claims, bad faith claims and defense costs claims – that had been released.

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liquidated during that quarter by Kaiser's claim-liquidating trust and the trust's expenses for that quarter, subject to specified caps. Rollover provisions apply to the extent the specified percentage of the sum of the liquidation values and costs for a given quarter is greater or less than the cap. We note that 37.5% appears to approximate AIG's share of the solvent insurance available to Kaiser at the time the Kaiser settlement was agreed upon (\$568 million/\$1.5 billion).

The settlement payments were allocated to policies using "a ground-up, rising bathtub approach" (as described in the record by New Hampshire's administrator), under which

"payments [are] allocated on the basis of horizontal exhaustion, which means losses are allocated to the lowest layer of coverage first and, like a bathtub, fill from the bottom layer up. Under that approach, a given layer of coverage is not implicated until the layer beneath it is completely exhausted" (*North Riv. Ins. Co. v ACE Am. Reins. Co.*, 361 F3d 134, 138 n 6 [2d Cir 2004]).

#### The Instant Action

Pursuant to AIG's "bathtub" methodology, AIG projected, when it began making payments under the Kaiser settlement in 2006, that it would begin allocating payments to the NH-Kaiser policy in 2011. When AIG began billing Clearwater for its 8% share of the settlement payments allocated to the NH-Kaiser policy, Clearwater declined to pay, leading to this lawsuit, which New Hampshire commenced in December 2011.<sup>3</sup> In its answer, Clearwater

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<sup>3</sup>It appears from the record that, notwithstanding the 2006 projection that settlement payments would reach New Hampshire's level of coverage in 2011, AIG began billing Clearwater under the Clearwater-NH certificate (identifying the insurance policy and reinsurance certificate by numbers, but without reference to New Hampshire by name) in 2010. The parties have not explained this discrepancy to us. We note that, in 2010, an earlier action was commenced in Supreme Court, New York County, in connection with this dispute, under the caption *Insurance Co. of the State of Pa. v Clearwater Ins. Co.* (Index No. 652424/10), which action, the parties agree, was "resolved by an agreement dated May 27, 2011," which does not appear in the record and has not been described to us. In any event, we need not resolve the discrepancy between

asserted as its second and third affirmative defenses, respectively, that New Hampshire had failed to comply with its reporting and notice requirements under the Clearwater-NH certificate, and, as its seventh affirmative defense, that New Hampshire had "breached the retention warranty in the Facultative Certificate."

In February 2013, New Hampshire moved for summary judgment in its favor, thereby staying disclosure pursuant to CPLR 3214(b). At that time, although the parties had begun to exchange documents, discovery was "in its infancy," as Supreme Court recognized in its decision. No witnesses had been deposed, and there was pending before the court an undecided motion by Clearwater to compel production of about 18,000 pages of documents (which New Hampshire had agreed to produce but was withholding pending entry of an agreed-upon protective order) concerning New Hampshire's "assessment of the coverage litigation" and Kaiser's "assessment of the asbestos bodily injury litigation." In addition, when New Hampshire moved for summary judgment, it had not yet produced documents in response to Clearwater's December 2012 supplemental document request for, inter alia, documents "concerning New Hampshire's retention under

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the 2006 projection and the apparent date of the first billing under the Clearwater-NH certificate to decide this appeal.

[the Clearwater-NH certificate].”

In the order appealed from, Supreme Court granted New Hampshire’s motion only to the extent of dismissing Clearwater’s second, third and seventh affirmative defenses, and otherwise denied the motion. New Hampshire has appealed and Clearwater has cross-appealed, each party challenging the portion of Supreme Court’s order by which it is aggrieved. For the reasons, discussed below, we modify to deny New Hampshire’s summary judgment motion in its entirety.<sup>4</sup>

#### Discussion

We turn first to the question, raised by New Hampshire’s appeal, of whether, contrary to Supreme Court’s determination, New Hampshire was entitled to summary judgment holding Clearwater, as reinsurer of the NH-Kaiser policy, bound by New Hampshire’s allocation to the NH-Kaiser policy of amounts paid under the Kaiser settlement. Again, the Kaiser settlement left entirely to the discretion of AIG (of which New Hampshire is a subsidiary) the allocation of the losses paid pursuant to the settlement among Kaiser’s various AIG carriers and policies, “solely for [AIG’s] own purposes, in its own books and records.”

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<sup>4</sup>Supreme Court’s reasoning and additional pertinent facts are set forth in the course of our discussion of the legal issues, which follows.

In its exercise of that prerogative, AIG has allocated all amounts paid under the Kaiser settlement to asbestos products claims for which Kaiser had sought coverage under the NH-Kaiser policy and none to other settled claims (premises claims, bad faith claims, and defense costs claims) that Kaiser had not raised against New Hampshire before settling. As previously noted, although our reasoning differs in certain respects from that of Supreme Court, we affirm the denial of summary judgment to New Hampshire on this issue.

In addressing the allocation issue, Supreme Court first held that Clearwater is collaterally estopped to deny that the Clearwater-NH certificate imposes on it, as reinsurer, a duty to “follow the settlements” made by New Hampshire, its cedent, with New Hampshire’s insured. At this point, an explanation of the “follow the settlements” doctrine is in order.<sup>5</sup> Where it

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<sup>5</sup>The “follow the settlements” doctrine is sometimes referred to as “follow the fortunes.” Here, we follow the Court of Appeals’ most recent decision on this subject in using the term “follow the settlements” (see *USF & G*, 20 NY3d at 418). We note that some scholars take the position that these two phrases refer to two different and distinct doctrines. Under this view, “following the fortunes” refers to the duty of a treaty reinsurer (which, unlike a facultative reinsurer, agrees to reinsure policies to be issued in the future) to accept the cedent’s underwriting judgments, while “following the settlements” refers to the duty of a reinsurer (whether facultative or treaty) to defer to the cedent’s settlement determinations (see Graydon S. Staring & Dean Hansell, *Law of Reinsurance* § 2:10, § 18:1 [2014] [hereinafter Staring]; *Reinsurance: Indemnifying Insurers for*

applies, the “follow the settlements” doctrine “ordinarily bars challenge by a reinsurer to the decision of [the cedent] to settle a case for a particular amount” (*USF & G*, 20 NY3d at 418). Specifically, under this doctrine,

“a reinsurer is required to indemnify for payments reasonably within the terms of the original policy, even if technically not covered by it. A reinsurer cannot second guess the good faith liability determinations made by its reinsured . . . . The rationale behind this doctrine is two-fold: first, it meets the goal of maximizing coverage and settlement and second, it streamlines the reimbursement process and reduces litigation . . .” (*Travelers*, 96 NY2d at 596 [citation and internal quotation marks omitted]).

Stated otherwise, as “an exception to the general rule that contract interpretation is subject to de novo review” (*North Riv. Ins. Co. v CIGNA Reins. Co.*, 52 F3d 1194, 1206 [3d Cir 1995]),

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*Insurance Losses*, in *Reinsurance*, at 26 [Robert W. Strain rev ed 1997] [hereinafter, Strain] [“there is a historical basis for the view that following fortunes focuses more on underwriting and actual coverage of the reinsured, and following settlements focuses more on the reinsured’s process of settling the claims of its insured”]). Under the view that each phrase refers to a different doctrine, “following the settlements” is the doctrine relevant to this case. It has been noted that, nonetheless, “the vast majority of case law and commentators use the two terms interchangeably to refer to what is actually the ‘follow the settlements’ doctrine” (John S. Diaconis & Douglas W. Hammond, *Reinsurance Law* § 3:2 n 3 [2014] [hereinafter, Diaconis]; see also *USF & G*, 20 NY3d at 418; Barry R. Ostrager & Mary Kay Vyskocil, *Modern Reinsurance Law and Practice* § 9:01[a], at 217 [3d ed 2014] [hereinafter Ostrager]). Accordingly, although some of the decisions cited below use the phrase “follow the fortunes,” it is clear from the context that the courts are discussing the reinsurer’s obligation to defer to the cedent’s reasonable, good-faith settlements.

the “follow the settlements” doctrine “insulates a reinsured’s liability determinations from challenge by a reinsurer unless they are fraudulent, in bad faith, or the payments are clearly beyond the scope of the original policy or in excess of the reinsurer’s agreed-to exposure” (*Allstate Ins. Co. v American Home Assur. Co.*, 43 AD3d 113, 121 [1st Dept 2007], *lv denied* 10 NY3d 711 [2008] [internal quotation marks and brackets omitted]; *see also North Riv. Ins. Co. v ACE Am. Reins. Co.*, 361 F3d at 141 [noting that “the typical follow-the-settlement requirements” are that the settlement be “in good faith, reasonable, and within the applicable policies”]; *National Union Fire Ins. Co. of Pittsburgh, Pa. v American Re-Ins. Co.*, 441 F Supp 2d 646, 650-651 [SD NY 2006] [a reinsurer must indemnify the cedent for a settlement if the claim is “at least arguably within the scope of the insurance coverage that was reinsured”] [internal quotation marks omitted]; Staring § 18:9; Ostrager §§ 9:01[a], 9:01[c], 9:03[a], 9:03[b][2], 9:03[c]; Diaconis § 3:2; Strain at 27 [under the “following the settlements” doctrine, the reinsurer “can . . . contest the claim only by showing that the settlement was manifestly outside the coverage or in bad faith or the result of negligent and unbusinesslike practice”]).

The basis for Supreme Court’s collateral estoppel finding against Clearwater on the question of whether it had a duty to

“follow the settlements” was a Massachusetts state trial court decision captioned *Lexington Ins. Co. v Clearwater Ins. Co.* (28 Mass L Rptr 519 [Mass Super 2011]). *Lexington* construed a provision of a reinsurance certificate issued by Clearwater (when known as Skandia) to another AIG carrier (Lexington) as a “follow the settlements” clause.<sup>6</sup> The Clearwater-NH certificate contains a provision substantially identical to the certificate provision at issue in *Lexington*, and Supreme Court held that this sufficed to collaterally estop Clearwater from relitigating the meaning of the relevant contractual language.

In view of its finding that Clearwater has a duty under the Clearwater-NH certificate to “follow the settlements,” Supreme Court held that New Hampshire’s decisions concerning the allocation of settlement payments among its policies are entitled to “deference” (citing *USF & G*, 20 NY3d at 419). Nonetheless, recognizing that, even under the “follow the settlements” doctrine, “a cedent’s allocations decisions . . . are not immune from scrutiny” (citing *id.* at 420), the court denied New Hampshire summary judgment on the ground that the existing record raises a triable issue concerning the reasonableness of New

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<sup>6</sup>The insured under the policy reinsured by the certificate at issue in *Lexington* was a company known as Dresser Industries, not Kaiser.

Hampshire's allocation. In this regard, the court noted that discovery had still been "in its infancy" when stayed by New Hampshire's summary judgment motion.

Initially, contrary to Supreme Court's view, the Massachusetts decision does not give rise to collateral estoppel barring Clearwater from denying that a duty to "follow the settlements" arises from the same language in the Clearwater-NH certificate. "[T]he doctrine of collateral estoppel does not operate to bar relitigation of a pure question of law" (*Sterling Natl. Bank v Eastern Shipping Worldwide, Inc.*, 35 AD3d 222, 223 [1st Dept 2006], citing *American Home Assur. Co. v International Ins. Co.*, 90 NY2d 433 [1997]). The interpretation of an unambiguous contract is a question of law for the court (*Sterling Natl. Bank*, 35 AD3d at 223; *Taussig v Clipper Group, L.P.*, 13 AD3d 166, 167 [1st Dept 2004], *lv denied* 4 NY3d 707 [2005]), as is the determination of whether contractual language is ambiguous (see *Kass v Kass*, 91 NY2d 554, 566 [1998]; *Banco Espirito Santo, S.A. v Concessionaria Do Rodoanel Oeste S.A.*, 100 AD3d 100, 107 [1st Dept 2012]). Accordingly, the Massachusetts court's construction of the relevant language of the reinsurance certificate in that case is not binding on Clearwater in this action concerning a different certificate issued to a different cedent with respect to an underlying policy covering a different

insured.

The language of the Clearwater-NH certificate that Supreme Court, following *Lexington*, construed as a "follow the settlements" clause is as follows (with references to "Skandia" replaced by references to "Clearwater"):

"1. [CLEARWATER'S] LIABILITY: [Clearwater's] liability under this Casualty Facultative Reinsurance Certificate ('Certificate') shall follow the ceding Company's ('Company') liability in accordance with the terms and conditions of the policy reinsured hereunder except with respect to those terms and/or conditions as may be inconsistent with the terms of this Certificate."

We respectfully disagree with the view of the *Lexington* court (which Supreme Court incorrectly believed to be binding on Clearwater in this action) that the above-quoted paragraph 1 of the Clearwater-NH certificate constitutes a "follow the settlements" clause. The provision contains no reference to the cedent's voluntary handling of claims – absent are the words "settlement," "compromise," "payment," "allowance," and "adjustment," as well as any permutations of the foregoing and any words to similar effect. This contrasts with "follow the settlements" clauses, which, as one would expect, employ language referring in some way to the cedent's claims-handling decisions (see e.g. *USF & G*, 20 NY3d at 418 ["follow the settlements" clause provided: "'All claims in which this reinsurance is

involved, when allowed by the (cedent), shall be binding upon the Reinsurers, which shall be bound to pay or allow, as the case may be, their proportion of such loss'" [emphasis added]; *Excess Ins. Co. Ltd. v Factory Mut. Ins. Co.*, 3 NY3d 577, 580 [2004] ["follow the settlements" clause provided: "'Reinsurers agree to follow the settlements of the Reassured in all respects'" [emphasis added]; Staring § 18:6 [giving examples of language used in "follow the settlements" clauses]). No such provision appears in the Clearwater-NH certificate.

Rather than a "follow the settlements" clause, paragraph 1 of the Clearwater-NH certificate constitutes a "following form" clause. The purpose of a "following form" clause is "to achieve concurrency between the reinsured contract and the policy of reinsurance, thereby assuring the ceding company, that by purchasing reinsurance, it has covered the same risks by reinsurance that it has undertaken on behalf of the original insured under its own policy" (*Aetna Cas. & Sur. Co. v Home Ins. Co.*, 882 F Supp 1328, 1345 [SD NY, 1995]). Accordingly, "[a] 'following form' clause in a policy of reinsurance incorporates by reference all the terms and conditions of the reinsured policy, except to the extent that the reinsurance contract by its own terms specifically defines the scope of coverage differently" (*id.*, quoted in Staring § 12:5). This is precisely the effect of

paragraph 1 of the Clearwater-NH certificate, which, to reiterate, provides that “[Clearwater’s] liability . . . shall follow [New Hampshire’s] liability in accordance with the terms and conditions of the policy reinsured hereunder” (see e.g. *Unigard Sec. Ins. Co., Inc. v North Riv. Ins. Co.*, 4 F3d 1049, 1055 [2d Cir 1993] [identifying as a “Follow the Form Clause” a provision in a reinsurance certificate to the effect that the reinsurer’s liability “shall follow that of (the cedent) and, except as otherwise provided by this Certificate, shall be subject in all respects to all the terms and conditions of (the cedent’s) policy”]). The authors of one treatise on reinsurance law caution that “a ‘follow the form’ clause should not be confused with a ‘follow the fortunes’ clause or a ‘follow the settlements’ clause” (Ostrager § 2:03[a] at 73).

The absence from the Clearwater-NH certificate of a “follow the settlements” clause raises the question of whether a duty of the reinsurer to “follow the settlements” may be implied in a reinsurance contract that lacks such a provision. This question, which apparently has not yet been addressed by a New York state appellate court, has received different answers from the courts of other jurisdictions that have addressed it, and “[t]here is no judicial consensus on this issue” (7 Business and Commercial

Litigation in the Federal Courts § 80:16 [3d ed]).<sup>7</sup> We need not resolve this question to decide this appeal, since, even if Clearwater is obligated to “follow the settlements,” the reasonableness of New Hampshire’s allocation to the NH-Kaiser policy of payments under the Kaiser settlement cannot be determined as a matter of law on this record, as Supreme Court correctly concluded.<sup>8</sup>

In *USF & G*, the Court of Appeals observed that “to say that

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<sup>7</sup>The case law addressing whether the “follow the settlements” doctrine may be implied in a contract for reinsurance in the absence of an express contractual provision to that effect is collected in David J. Marchitelli, Annotation, *Application of Follow the Fortunes Doctrine, Imposing Legal Duty on Reinsurer to Pay its Share of Settlement Made by Reinsured with Original Parties*, 85 ALR 6th 531, §§ 4-7 (see also Ostrager § 9:01[b], at 221-224; Diaconis § 3:3; 7 New Appleman on Insurance § 74.02[3] [Law Library ed 2014]). We note that certain scholars in the field have argued that, in the absence of a contractual provision expressly incorporating it, the “follow the settlements” doctrine should not be implied in a contract of reinsurance (see Staring § 18:2, § 20:6 [“In the absence of a following settlements clause, . . . the reinsured has the burden of proving that the loss was specifically caused by a risk covered in the reinsurance contract”]; Strain at 26 [“Without any special provision in the agreement, the reinsured who voluntarily settles a claim . . . would have to present evidence to its reinsurer that the claim was covered by its direct policy” and, “(i)f the claim were disputed and compromised, . . . that the compromise was beneficial and the amount reasonable”]; William Hoffman, *On the Use and Abuse of Custom and Usage in Reinsurance Contracts*, 33 Tort & Ins L J 1, 60-71 [1997]).

<sup>8</sup>Since Clearwater does not seek summary judgment in its favor, we need not consider whether the record establishes as a matter of law that the allocation was unreasonable or otherwise not binding on Clearwater.

a cedent's allocation decisions are entitled to deference [under the 'follow the settlements' doctrine] is not to say that they are immune from scrutiny" (20 NY3d at 420). The Court went on to hold that "objective reasonableness should ordinarily determine the validity of an allocation" (*id.*), meaning that "[t]he reinsured's allocation must be one that the parties to the settlement of the underlying insurance claims might reasonably have arrived at in arm's length negotiations if the reinsurance did not exist" (*id.*). Applying this standard to the facts of *USF & G*, the Court held that a triable issue existed as to the reasonableness of the cedent's decision to allocate none of the subject settlement to the insured's claims against it for bad faith refusal to defend, to which reinsurance was not applicable (*id.* at 422-425). The Court reached this conclusion based on evidence in the record from which "it could be found that [the cedent] faced a significant risk of an adverse verdict on the bad faith claims" (*id.* at 422) and from which "it could be found that [the cedent], in allocating the settlement, assigned inflated values to claims other than the bad faith claims - i.e., to claims that were covered in part by reinsurance" (*id.* at 424). The Court also found that there was "evidence from which a factfinder could conclude that the \$200,000 value assigned by [the cedent] to the claims . . . by claimants with lung cancer

was unreasonably high," possibly resulting in less serious "claims falling below the reinsurers' \$100,000 retention amount [being] undervalued" (*id.* at 425), which would have had the effect of increasing the reinsurers' ultimate liability.

Aside from the fact that *USF & G* was decided on a much more fully developed record than exists here, the allocation issue in the instant case largely parallels the allocation issue in *USF & G*. Clearwater, the reinsurer, challenges the decision of New Hampshire, the cedent – a decision that New Hampshire made unilaterally, without the insured's participation, under the terms of the Kaiser settlement – to allocate 100% of the payments made under the settlement to asbestos products claims covered by the NH-Kaiser policy, and none of those payments to other categories of claims (premises claims, bad faith claims, and defense cost claims) that, although released in the settlement, Kaiser had asserted only against other AIG carriers, not New Hampshire, before the settlement was made. On this undeveloped record, we have no way of telling whether or not it was reasonable to allocate no portion of the settlement to claims that were not asserted against New Hampshire or were not even covered by its policy. It may be that the allocation could be justified on the ground that the claims given no allocation were highly unlikely to prevail, or so small in value relative to the

asbestos products claims as to be immaterial, but we simply have no basis to make such a determination on this record.<sup>9</sup> As Supreme Court observed, "New Hampshire has failed to come forth with affidavit proof sufficient to establish that the allocation of the settlement did not unduly burden Clearwater with amounts attributable to policies of other AIG carriers." Further, even if New Hampshire had submitted admissible evidence sufficient to make out a prima facie case as to allocation (which it did not), Supreme Court correctly recognized that, as of the time New Hampshire moved, Clearwater had not had an adequate opportunity to explore the justification of the allocation through discovery. Accordingly, even assuming that Clearwater has a duty to "follow the settlements" under the Clearwater-NH certificate, the denial of the portion of New Hampshire's summary judgment motion addressed to the allocation issue was correct.<sup>10</sup>

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<sup>9</sup>The cases on which New Hampshire relies in arguing that it is entitled to summary judgment on the allocation issue are generally inapposite in that they were decided on fully developed evidentiary records and, in some cases, after trial. Nor do the cases cited by New Hampshire – aside from *USF & G*, which actually supports Clearwater's position – deal with a cedent's determination to allocate 100% of a settlement to a single category of claims covered by the reinsurer and 0% to other categories of claims that were released by the settlement but would not have implicated the reinsurance.

<sup>10</sup>In denying New Hampshire summary judgment on the allocation issue, Supreme Court placed considerable weight on an internal AIG memorandum requesting authority to enter into the

New Hampshire argues that, in denying it summary judgment on the allocation issue, Supreme Court unjustifiably disregarded copious case law approving New Hampshire's "bathtub" method of claims allocation as "reinsurance-blind and reinsurance-neutral." As Supreme Court correctly recognized, however, this argument misconceives the nature of Clearwater's objection to the allocation. The point was aptly expressed by Supreme Court as follows: "Clearwater does not dispute the bathtub method of allocation, but rather the nature of the claims to which the settlement was allocated." We also agree with Clearwater's restatement of the same point: "[T]he question is not what methodology AIG uses to fill its bathtub, but, rather, what AIG is *pouring into* its bathtub as an initial matter."

Since the record does not establish that the allocation of the Kaiser settlement passes muster even under the forgiving standard that applies under the "follow the settlements"

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Kaiser settlement. The court found significant the memorandum's highlighting of two benefits to AIG of the contemplated settlement: (1) the release of premises claims that, "if not resolved, would not be subject to aggregate limits"; and (2) the resolution of claims for defense costs in addition to limits under certain policies other than the NH-Kaiser policy, which "avoids payment of additional defense costs by treating all policies as ultimate net loss policies." In our view, since New Hampshire did not even make out a prima facie case for judgment in its favor on the issue of the reasonableness of the allocation, it is not necessary to consider this memorandum to affirm the denial of summary judgment.

doctrine, it follows that New Hampshire is not entitled to summary judgment on the allocation issue in the event the “follow the settlements” doctrine is ultimately held not to apply. New Hampshire does not argue that it has established, on the present record, that the allocation of the Kaiser settlement resulted in New Hampshire paying only for claims that were actually covered by the NH-Kaiser policy, which is the standard New Hampshire would have to meet if the “follow the settlement” doctrine does not apply. As previously stated, we leave the issues of whether the “follow the settlements” doctrine applies – and, if not, whether it is possible for New Hampshire to prevail in this action – to be resolved in future proceedings.

We now turn to Clearwater’s cross appeal, which challenges Supreme Court’s order insofar as it granted New Hampshire summary judgment dismissing Clearwater’s second and third affirmative defenses, based on New Hampshire’s alleged failure to meet the reporting and notice requirements under the Clearwater-NH certificate, and Clearwater’s seventh affirmative defense, alleging that New Hampshire failed to abide by its \$2 million retention warranty under the Clearwater-NH certificate. For the reasons discussed below, we hold that Supreme Court erred in granting New Hampshire summary judgment dismissing these defenses.

Clearwater's affirmative defenses alleging that New Hampshire did not meet the loss notice and reporting requirements under the Clearwater-NH certificate should not have been dismissed, as issues of fact exist as to whether New Hampshire met those requirements.<sup>11</sup> The requirements are intertwined and exist to ensure that a reinsured appraises the reinsurer of potential liabilities in order to enable the reinsurer to set reserves and to potentially associate in the defense and control of the underlying claims (see *Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 4 F3d 1049, 1065 [2d Cir 1993]). Here, at the very least, issues of fact exist concerning the sufficiency of New Hampshire's reporting and notice. New Hampshire's reliance on a notice of loss it provided to Clearwater in 1997 is misplaced. While the 1997 notice informed Clearwater of the claims against Kaiser, it concluded by advising Clearwater that New Hampshire did not believe that its excess layer, and correspondingly, Clearwater's reinsurance thereof, would be implicated. Discovery

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<sup>11</sup>Paragraph 3(a) of the Clearwater-NH certificate provides: "The Company [New Hampshire] agrees that it will promptly investigate and will settle or defend all claims under the policy reinsured hereunder and that it will notify [Clearwater] promptly of any event or development which the Company reasonably believes might result in a claim against [Clearwater]. The Company further agrees to forward to [Clearwater] copies of such pleadings and reports of investigations as are pertinent to the claim and/or as may be requested by [Clearwater]."

should continue to determine what New Hampshire knew of the mounting losses and when it knew, or reasonably expected, the losses to penetrate its excess layer of coverage. Although New Hampshire contends that Clearwater knew of the mounting losses through collateral sources, this cannot, as a matter of law, meet New Hampshire's reporting or notice obligations under the Clearwater-NH certificate (see e.g. *Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 43 [1st Dept 2002]).

In the event New Hampshire's notice to Clearwater of the Kaiser losses is determined to have been late, a triable issue also exists as to whether Clearwater was prejudiced by such late notice. Clearwater claims that it was prejudiced because New Hampshire's allegedly late notice resulted in disadvantageous commutation agreements between Clearwater and its own reinsurers, or retrocessionaires (see *Insurance Co. of the State of Pa. v Argonaut Ins. Co.*, 2013 WL 4005109, \*12 n 13, 2013 US Dist LEXIS 110597, \*39 n 13 [SD NY, Aug. 6, 2013, No. 12-Civ-6494(DLC)]). Since New Hampshire's summary judgment motion was premature, given that it was made when discovery was still "in its infancy" (as Supreme Court noted in discussing the allocation issue), Clearwater's submissions in opposition to the motion sufficiently raised the issue of whether it had been prejudiced by the alleged late notice.

The court also erred in granting New Hampshire summary judgment dismissing Clearwater's seventh affirmative defense, which raised the issue of whether New Hampshire had retained \$2 million of risk under the NH-Kaiser policy as required by New Hampshire's retention warranty in the Clearwater-NH certificate.<sup>12</sup> While New Hampshire submitted an affidavit by an administrator asserting in conclusory fashion that New Hampshire had complied with the retention warranty, Clearwater is entitled to test this claim through further discovery. In any event, an issue of fact was raised by evidence Clearwater submitted suggesting that New Hampshire had pooled the retention with other AIG companies.

Accordingly, the order of the Supreme Court, New York County (Ellen M. Coin, J.), entered November 1, 2013, which granted plaintiff's motion for summary judgment to the extent of dismissing defendant's second, third, and seventh affirmative defenses, and otherwise denied the motion, should be modified, on the law, to deny the motion insofar as it sought dismissal of the

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<sup>12</sup>Paragraph 2 of the Clearwater-NH certificate provides: "The Company [New Hampshire] warrants that it shall retain for its own account, subject to treaty reinsurance only, if any, the amount specified on the face of this Certificate [\$2 million]."

second, third and seventh affirmative defenses, and otherwise affirmed, with costs.

All concur.

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

ENTERED: MARCH 24, 2015

  
CLERK