SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

AUGUST 20, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

10173 Leonel Antonio Pinto, Index 6172/07
Plaintiff-Respondent,

-against-

Andrew Gormally, et al.,
Defendants,

1432 Doris Street, LLC, etc.,
Defendant-Appellant.

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Gannon, Rosenfarb, Balletti & Drossman, New York (Lisa L. Gokhulsingh of counsel), for appellant.

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Wilma Guzman, J.), entered December 19, 2012, upon a jury verdict, insofar as appealed from as limited by the briefs, awarding plaintiff the principal amount of $753,587.39 against defendant 1432 Doris Street, LLC (the owner), unanimously modified, on the law, to the extent of reducing the verdict for past medical expenses to $46,953, and otherwise affirmed, without costs.[1]

[1] This order is in accord with the trial court's decision, entered May 7, 2013, after oral argument of this appeal, that

Plaintiff, a laborer and employee of defendant S.P.G. Properties, LLC (SPG), was injured when, while carrying boxes of ceramic tiles from the sidewalk to the basement of the owner's building, he slipped and fell on the stairs, resulting in a box of tiles crushing his hand. The trial evidence established that it was raining throughout the day of the accident and the day before. The evidence also established that the stairs were wet and muddy from the workers tracking in water and dirt on their shoes. The court explained to the jury that it took judicial notice from an earlier decision that plaintiff began his work day at 8:00 a.m. and worked until his accident around 3:30 p.m. Before the accident, plaintiff had informed his supervisor at SPG of the condition of the stairs and the supervisor placed a carpet for the workers to wipe off their footwear. Although plaintiff and his co-workers used the carpet, it was not successful in removing the mud and water from their shoes.

At the close of plaintiff's case and again at the close of evidence, the owner moved for a directed verdict, arguing that there was a lack of evidence that it had notice of the condition of the stairs upon which plaintiff slipped. The trial court

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granted defendant's motion to set aside the verdict only to the extent of reducing the award for past medical expenses to $46,953 and otherwise denied the motion (*Pinto v Gormally, et al.*, [Bronx Co. Index No. 6172/2007, Guzman, J.]).

denied the motion, concluding that there was a question of fact for the jury as to whether the owner had notice.

A court may grant a directed verdict where, "upon the evidence presented, there is no rational process by which the fact trier could base a finding in favor of the nonmoving party" (*Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Here, the evidence adduced at trial shows that the trial court properly denied defendant's motion for a directed verdict and permitted the case to go before the jury. Indeed, in deciding the motion, the court reasoned that the parties had presented sufficient evidence for the jury to make a finding as to whether defendant had actual or constructive notice of the condition and that, based on the evidence presented, the jury would resolve any issues of witness credibility. Regarding the issue of credibility, the court pointed out the questionable nature of the testimony of defendant's principal, Andrew Gormally, in which he claimed to not recall many details from the date of the accident - namely, whether it was raining that day, whether he was present on the block that day or whether there was water and mud on the stairs. The court noted, however, that the evidence established that Gormally's office was located in the premises and his vehicle was present at the site on the date of the accident. Further, the court noted, plaintiff recalled seeing Gormally

every half hour to every two hours throughout the day.

As to the jury's damage award, we find that the awards for past and future pain and suffering do not deviate "materially from what would be reasonable compensation" (CPLR 5501). In doing so, we consider "not only the type of injury and level of pain, but also the period of time for which that pain is being calculated" (*Garcia v Queens Surface Corp.*, 271 AD2d 277 [1st Dept 2000]). We also accord the trial court's decision great weight, as that court had the benefit of observing the witnesses, their demeanor and their impact on the jury *(Reed v City of New York*, 304 AD2d 1 [1st Dept 2003], *lv denied* 100 NY2d 503 [2003]).

With regard to the award for past medical expenses,[2] however, the jury's award of $60,000 was in excess of the total amount of bills plaintiff offered into evidence. Therefore, we reduce this award to conform to the evidence.

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

ENTERED: AUGUST 20, 2013

Margaret Soval
DEPUTY CLERK

[2] Defendant does not contest the jury's award for future medical expenses.

Friedman, J.P., Sweeny, Acosta, Renwick, Manzanet-Daniels, JJ.

8972 Nelson Lebron, Index 308490/08
Plaintiff-Respondent,

-against-

SML Veteran Leather, LLC,
Defendant-Appellant.

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Law Offices of Edward M. Eustace, White Plains (Christopher M. Yapchanyk of counsel), for appellant.

Okun, Oddo & Babat, P.C., New York (Darren Seilback of counsel), for respondent.

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Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered April 4, 2012, which denied defendant's motion for summary judgment dismissing the complaint, reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

In construing a statute of another state, we are bound to follow the construction which the courts of that state have given it, particularly where, as here, the highest court of that state has interpreted the statute (McKinney's Cons Laws of NY, Book 1, Statutes § 261).

The New Jersey Workers' Compensation Act provides the exclusive remedy for recovery of damages as a result of an accidental injury which is sustained during the course of

employment (*see Tomeo v Thomas Whitesell Constr. Co., Inc.*, 176 NJ 366, 823 A2d 769 [2003]), unless there was conduct on the part of the employer that amounts to an "intentional wrong" (NJ Stat Ann § 34:15-8).

The seminal case in defining the term "intentional wrong" is *Millison v E.I. DuPont de Nemours & Co.* (101 NJ 161, 501 A2d 505 [1985]). There, defendant corporation, through some of its corporate officers and medical staff, engaged in purposeful deception and the concealment of health risks involving asbestos exposure. This deception included, inter alia, concealment of diseases already developed in employees, by means of conducting medical exams and fraudulently advising employees that they were disease free. Focusing on the type of employer conduct that would be "so egregious as to constitute an 'intentional wrong'" and thus take a case out of the exclusivity provisions of the statute (*Millison*, 101 NJ at 177, 501 A2d at 514), the New Jersey Supreme Court undertook an extensive analysis of the statute's purpose and legislative intent. In order to satisfy the intentional wrong standard, two related components are required: (1) there must be a "substantial certainty" that the employer's conduct will cause injury or death; (2) such conduct must be viewed in the context of industry reality, i.e., whether the injury may "fairly be viewed as a fact of life of industrial

employment, or is it rather plainly beyond anything the legislature could have contemplated as entitling the employee to recover *only* under the Compensation Act" (*Millison*, 101 NY at 179, 501 A2d at 514).

The court warned that "the dividing line between negligent or reckless conduct on the one hand and intentional wrong on the other must be drawn with caution, so that the statutory framework of the Act is not circumvented simply because a known risk later blossoms into reality." (*Millison*, 101 NJ at 178, 501 A2d at 514).

Applying the two-prong test to the facts in *Millison*, the court determined that the count of the complaint seeking damages for plaintiffs' initial work-related occupational diseases must be dismissed as precluded by the Workers' Compensation Act. Although acknowledging that defendants knowing exposure of plaintiffs to asbestos was a deliberate risk to their health, the court held "the mere knowledge and appreciation of a risk - even the strong probability of a risk - will come up short of the 'substantial certainty' needed to find an intentional wrong resulting in avoidance of the exclusive-remedy bar of the compensation statute." (*Millison*, 101 NJ at 179, 501 A2d at 514-515). However, plaintiffs' cause of action for aggravation of their initial occupational diseases constituted a valid claim,

since defendants fraudulently concealed their medical conditions, thus preventing them from obtaining early treatment. The key factor in this regard was the employer's active, intentional and fraudulent misleading of the employees and conduct in concealing from them diseases already developed. This type of conduct is "not one of the risks an employee should have to assume" and is thus beyond that contemplated by the statute (*Millison*, 101 NJ at 182, 501 A2d at 516).

The New Jersey Supreme Court again revisited the question of "intentional wrong" in *Laidlow v Hariton Machinery Co.* (170 NJ 602, 790 A2d 884 [2002]). *Laidlow* involved a plaintiff-employee whose fingers were partially amputated by a rolling mill machine whose safety guard had been inactivated. The defendant-employer admittedly disabled the safety guard by tying it up with a wire because its use slowed down production. For approximately 13 years, the plaintiff and a number of other employees operated the machine in this condition and had, during that time, experienced several incidents where the rollers caught and ripped off their gloves. They escaped injury because they were fortunately able to extricate their hands from the gloves before being pulled into the machine. Each of these incidents was reported to defendant's supervisors with requests to have the guard activated. In fact, on three separate occasions just prior to the underlying

incident, the plaintiff asked his supervisor to restore the guard to no avail.

The guard was, however, activated and placed in the proper position whenever OSHA inspectors came to the plant. On those occasions, the plaintiff's supervisor would instruct employees to release the wire holding up the safety guard, but would again disable the guard after the inspectors left.

The New Jersey Supreme Court, recognizing "the need for a chary interpretation of the intentional wrong exception," re-affirmed the two-prong test of *Millison* (*Laidlow*, 170 NJ at 617, 790 A2d at 894). In making its analysis, a reviewing court must take into account all the facts and circumstances of the case (*Laidlow*, 170 NJ at 614, 790 A2d at 892). The court held that "removal of a safety guard can meet the intentional wrong standard" but that "such a determination requires a case-by-case analysis" (*Laidlow*, 170 NJ at 619, 790 A2d at 895-896).

Applying those principles in *Laidlow*, the court found that an issue of fact existed as to whether the defendant's actions met the intentional wrong exception. While no one fact standing alone is sufficient to support such a determination, the totality of the circumstances there - the defendant's admission the guard was removed to expedite processing of work and increase profits; the number of close calls involving the machine; the repeated

requests by employees to reactivate the guards, particularly those in close temporal proximity to the incident in question; and the employer's actions in "systematically deceiv[ing] OSHA into believing that the machine was guarded, inferentially at least, because it knew that operating the machine without the guard inevitably would cause injury and that OSHA would not allow such a dangerous condition to exist" - all combine to favor this conclusion. The court noted that the absence of prior accidents over a 13-year period "is simply a fact, like the close-calls, that may be considered in the substantial certainty analysis" (*Laidlow*, 170 NJ at 621, 622, 790 AD2d at 897). However, it took pains to emphasize that "our holding is not be understood as establishing a *per se* rule that an employer's conduct equates with an 'intentional wrong' . . . whenever that employer removes a guard or similar safety device from equipment or machinery, or commits some other OSHA violation. Rather, our disposition in such a case will be grounded in the totality of the facts contained in the record and the satisfaction of the standards established in *Millison* and explicated here" (*Laidlow*, 170 NJ at 622-623, 790 A2d at 898).

Defendant's removal of the safety screen from the hot leather stamping machine used by plaintiff was therefore only one factor to consider and is insufficient by itself to demonstrate

an intentional wrong under the meaning of section 34:15-8 (*id.*).

The dissent, in calling the conduct of this plaintiff's employer "remarkably similar" to that in *Laidlow* and *Mull v Zeta Consumer Prods*. (176 NJ 385, 823 A2d 782 [2003]), fails to distinguish the factual differences between both the employer's and employee's conduct in those cases and this one. For example, unlike *Laidlow* and *Mull,* in the present case there were no prior incidents or injuries caused by this machine; there is no evidence of deliberate deceit or fraudulent conduct on defendant's part; and there were no OSHA violations issued to defendant prior to this incident. Although plaintiff testified that he requested on a number of occasions that the safety guard be replaced, he and other employees continued to use the machine without incident. Significantly, the accident would not have occurred absent plaintiff's decision to retrieve a piece of stuck leather with his hand, rather than using a long-handled brush or long-handled screwdriver, which was the normal procedure to clear machine jams over the past 13 years that the machine had been in use. In fact, plaintiff testified at his deposition that he used such a long-handled screwdriver over the years to clear jams in the machine. Moreover, another employee who was working with plaintiff testified that, at the time of the incident, she had actually gone to retrieve the long-handled brush which all the

supervisors had used over the years to clear the jam that gave rise to plaintiff's injuries. Rather than wait for her to return with the brush, plaintiff inserted his hand into the machine to clear the jam, and in so doing sustained his injuries. Thus, there is an insufficient basis for finding that defendant knew that its conduct in not replacing the safety screens was "substantially certain" to result in plaintiff's injury (*Van Dunk v Reckson Assoc. Realty Corp.*, 210 NJ 449, 462, 45 A3d 965, 973 [2012]; *see Millison*, 101 NJ 161, 501 A2d 505), or that there was a "virtual certainty" of injury (*see Millison*, 101 NJ at 178, *501 A2d at 514*). The probability or knowledge that such injury "could" result, or even that an employer's action was reckless or grossly negligent, is not enough to invoke the statutory exception for intentional wrongdoing (*see Van Dunk*, 210 NJ at 470, 472, 45 A3d at 977-978, 979).

All concur except Acosta and Manzanet-Daniels, JJ. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

On this record, issues of fact exist regarding whether the conduct of plaintiff's employer in dismantling various safety features of a leather stamping machine was "substantially certain to result in injury" so as to exempt plaintiff from the exclusivity provisions of the New Jersey's Workers Compensation Law (*Mull v Zeta Consumer Prods.*, 176 NJ 385, 823 A2d 782 [2003]; *Laidlow v Hariton Mach. Co.*, 170 NJ 602, 623, 790 A2d 884, 898 [2002]). I would accordingly affirm the order appealed from.

On the date of the incident, in October 2007, plaintiff was stamping a piece of leather when the leather became stuck in the machine. When plaintiff attempted to extricate it, the top of the machine abruptly came down, severely burning his hand.[1] None of this would have occurred had the required safety mechanisms, including a safety guard which prevented insertion of a hand beyond a certain point, and a foot pedal which had to be depressed in order for the machine to operate, been in place.

The subject machine was purchased from a predecessor

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[1]Defendant complains that plaintiff inappropriately used his fingers to remove the leather, rather than another device such as a long screwdriver. This fact goes to comparative liability and does not preclude a finding of liability on defendant's part. The record also contains conflicting evidence as to whether defendant had the requisite hand tools prescribed by OSHA for removal of stuck pieces.

company, for which plaintiff and defendant's vice-president of marketing and sales previously worked, and was sold along with the business to defendant corporation. Defendant's vice-president testified that he never requested a manual for the subject machine because it was "similar to other machines we had." To his knowledge, no one had ever performed a risk analysis of the machine.

In 2006, defendant company moved from Long Island City to Elizabeth, New Jersey. The safety gate on the hot stamping machine was apparently inadvertently discarded during the move. Plaintiff testified that he asked the owner and the company mechanic "every day" to replace the safety gate, to no avail. The machine thus could be operated without the safety gate, in violation of OSHA regulations. At some time thereafter, in order to facilitate production on a special order, the foot pedal was taped down.[2] Thus, a worker could activate the machine simply by inserting the leather over a sensor, bypassing the need to also depress the foot pedal.

Defendant's vice-president testified that the machine lacked a drive mechanism that would have prevented the machine from

[2]Whether or not plaintiff himself taped the pedal down does not absolve defendant of liability. Defendant cannot delegate its duty to comply with OSHA and workplace regulations to an employee.

operating when the guard was missing. He was unaware it was contrary to OSHA regulations for the machine to operate without such a mechanism.

Defendant's vice-president testified that employees had been injured on the machines at the Long Island City facility, recalling an incident on one of the hot stamping machines. He did not know whether the incident had been reported to OSHA. He was not aware of any visits by OSHA to either the Long Island City or the Elizabeth facility. Defendant's general manager testified that at no point during her tenure at SML had anyone from OSHA inspected the factory.

Plaintiff's expert engineer, who examined the machine, opined within a reasonable degree of scientific certainty that defendant's disengagement of the safety features on the machine contributed to the injuries sustained by plaintiff. He opined that the machine lacked one or more methods of machine guarding, as well as interlock switches and sensors intended to shut down the machine upon opening of the guard (*see* 29 CFR 1910.212[a][1], and [a][4]).[3]

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[3]Defendant urges this court to disregard the affidavit of plaintiff's expert engineer because it was apparently submitted after the note of issue had been filed. We note that the CPLR provides that "where a party for good cause shown retains an expert an insufficient period of time before the commencement of trial to give appropriate notice thereof," the party shall not be

Defendant's actions suffice to raise a triable issue of fact as to whether its conduct was substantially certain to result in injury (*see* NJ Stat Ann § 34:15-8; *Laidlow v Hariton Mach. Co.*, 170 NJ 602, 623, 790 A2d 884, 898 [2002]; *Mull v Zeta Consumer Prods.*, 176 NJ 385, 823 A2d 782 [2003]). Indeed, the conduct of plaintiff's employer is remarkably similar to the conduct of the employers in *Laidlow* and *Mull*, two of the seminal cases concerning this exemption from the Workers Compensation Law. Both *Laidlow* and *Mull* concerned the dismantling of machine safety features; *Laidlow* involved the removal of a guard, and *Mull* the removal of safety interlock switches designed to arrest a machine and permit removal of jams. In each case, the New Jersey Supreme Court ruled that an employer's disengagement of critical safety mechanisms sufficed to show that the employer's conduct was substantially certain to result in injury. Indeed, a concurring justice in *Mull* opined that removal or disabling of critical safety features amounts to a "total breach of the social contract between employer and employee" (*Mull*, 176 NJ at 396, 823 A2d at 789).

The majority is of the view that the lack of prior incidents

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precluded from introducing the expert's testimony at trial solely on such ground, leaving the matter to the discretion of the trial court (*see* CPLR 3101[d][1]).

compels a decision in the employer's favor. However, the New Jersey Supreme Court has stated that in determining whether an employer's actions trigger the statutory exemption, a court is to examine the totality of the circumstances, giving no especial weight to any one particular factor. In *Laidlow*, the New Jersey Supreme Court explained:

> "The appreciation of danger can be obtained in a myriad of ways other than personal knowledge or previous injuries. Simply because people are not injured, maimed or killed every time they encounter a device or procedure is not solely determinative of the question of whether that procedure or device is dangerous and unsafe. If we were to accept the appellee's reasoning, it would be tantamount to giving every employer one free injury for every decision, procedure or device it intended to use, regardless of the knowledge or substantial certainty of the danger that the employer's decision entailed . . . It is not incumbent that a person be burned before one knows not to play with fire" (*Laidlow*, 170 NJ at 621, 790 A2d at 897 [citations omitted]).

Finally, defendant argues that it did not act with a culpable state of mind because the record shows that the safety guard was accidentally discarded during the company's move from Long Island City to New Jersey. This argument is wholly

unpersuasive. While disposal of the guard may have been inadvertent, the failure to replace it, despite plaintiff's daily pleas to do so, may certainly be viewed as conduct substantially certain to result in injury.

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

ENTERED: AUGUST 20, 2013

DEPUTY CLERK

Mazzarelli, J.P., Saxe, DeGrasse, Manzanet-Daniels, Clark, JJ.

9495 Ableco Finance LLC, Index 650618/09
Plaintiff-Appellant-Respondent,

-against-

John F. Hilson, et al.,
Defendants-Respondents-Appellants.

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Shapiro Forman Allen & Sava LLP, New York (Stuart L. Shapiro of counsel), for appellant-respondent.

Davis Polk & Wardwell, LLP, New York (Paul Spagnoletti of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered July 30, 2012, which denied plaintiff's motion for summary judgment, and granted defendants' motion for summary judgment dismissing plaintiff's credit card receivables claim, but denied it as to plaintiff's inventory claim, unanimously modified, on the law, to the extent of granting the motion as to the inventory claim, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint.

Plaintiff is in the business of making commercial loans. This action for legal malpractice stem from a $125 million loan that plaintiff made to BH S&B Holdings LLC (Bay Harbor) in August 2008. The loan was made to finance Bay Harbor's purchase of certain assets from the bankruptcy estate of S&B Industries, Inc.

(Steve & Barry's), a retail clothing chain. According to the controlling asset purchase agreement, Bay Harbor's desire was "to purchase substantially all the assets and to assume certain lease and other obligations of [Steve & Barry's] with the present intention of operating the Business as a going concern." Plaintiff retained defendants on August 14, 2008 and the loan closed on August 26, 2008. Without repaying the loan, Bay Harbor filed its own bankruptcy petition in November 2008.

Plaintiff alleges, with respect to the credit card receivables claim, that defendants committed legal malpractice by failing to advise it that, after the closing, the cash proceeds of credit card sales of Bay Harbor's inventory would be deposited in a Steve & Barry's bank account on which plaintiff had no lien. Under the inventory claim, plaintiff alleges that defendants failed to adequately advise it that its first priority security interest on Bay Harbor's assets was collateralized by only a portion of the Steve & Barry's inventory as opposed to the entire inventory. Plaintiff alleges that it would not have made the loan had defendants provided it with proper legal advice that it was not acquiring a first priority lien on the entire Steve & Barry's inventory.

The credit card receivables claim was properly dismissed because the record establishes that before making the loan

plaintiff knew that agreements creating its liens on the bank accounts would not be negotiated and executed until after the closing. The inventory claim should have also be dismissed on the basis of information plaintiff indisputably possessed prior to the August 26, 2008 closing.

Defendants deposed Kevin Genda, plaintiff's vice chair who was in charge of all of its lending activities. After negotiating the loan's basic terms, Genda, on behalf of plaintiff, retained defendants on or about August 14, 2008. Ten days earlier, Bay Harbor and Steve & Barry's had entered into an asset purchase agreement (APA). Under the terms of the APA, the Steve & Barry's inventory purchased by Bay Harbor excluded inventory that constituted GOB (going out of business) inventory. The APA defined "GOB Assets" as "all owned Merchandise and Furniture and Equipment located at Store Closing Locations" as opposed to locations at which Bay Harbor intended to assume the Steve & Barry's lease obligations and operate the business as a going concern. According to a term sheet that was transmitted on August 15, 2008 by Paul Lusardi, plaintiff's senior vice president, the collateral for the loan was to consist of "a perfected first priority security interest in all existing and future assets of Borrower." The term sheet lists Newco (Bay Harbor) as the only "Borrower."

The record also contains an August 14, 2008 email to Lusardi from Nate Land, a member of plaintiff's deal making team. Attached to the email is a press release about the bankruptcy court's approval of the APA. The press release reads, in part: "The assets to be acquired include but are not limited to . . . all Steve & Barry's merchandise, *with the exclusion of any product located at stores not purchased by* [Bay Harbor] [emphasis added] . . ." The foregoing documentary evidence refutes plaintiff's pivotal claim that it made the loan on August 26, 2008 without knowing that it was not getting a first priority lien on the entire Steve & Barry's inventory.

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

ENTERED: AUGUST 20, 2013

Margaret Sowah
DEPUTY CLERK

DeGrasse, J.P., Freedman, Richter, Manzanet-Daniels, JJ.

10545 [M-2997] In re Robert T. Johnson, etc., Petitioner,

-against-

Hon. Robert A. Sackett, etc., et al., Respondents.

Ind. 2094/11

Robert T. Johnson, District Attorney, Bronx (Lindsey Ramistella of counsel), for petitioner.

The Bronx Defenders, Bronx (Jenny Eisenberg of counsel), for Howard Rascoe, respondent.

Petition pursuant to CPLR article 78 for a writ of prohibition to prohibit, respondent Robert A. Sackett, a Justice of the Supreme Court, Bronx County, from enforcing an order of the same court issued on May 13, 2013, precluding the People from calling the complainant to testify with respect to the robbery charges in a trial in a criminal action entitled *People v Howard Rascoe* (Indictment No. 2094/2011), unanimously granted, without costs or disbursements, and the respondent Justice is prohibited from enforcing the order of preclusion dated May 13, 2013.

Petitioner seeks a writ of prohibition to prevent respondent Justice from enforcing a pretrial order precluding the People from calling the complainant to testify about the robbery in the

impending criminal trial against respondent Rascoe.[1] The complainant and Rascoe have known each other for several years. The People allege that Rascoe assaulted and robbed the complainant, and as a result of Rascoe's conduct, the complainant suffered injuries to his right eye and face. A few days after the alleged assault, the complainant sought treatment at Lincoln Hospital. The medical records from that visit indicate that the complainant was using three different psychotropic medications, and the complainant subsequently apprised the prosecutor that he took these medications to treat his bipolar disorder. The complainant stated that he had never been hospitalized for mental illness.

In a subsequent interview, the complainant advised the prosecutor that he has auditory and visual hallucinations, which are controlled by medication, but would neither give the prosecutor a HIPAA authorization nor disclose where he received psychiatric treatment. Because of the complainant's refusal, the People do not have the complainant's psychiatric records nor any information, besides the Lincoln Hospital records, about where

[1] The respondent Justice, who is represented by the Attorney General, has not filed separate papers in opposition to the writ, but rather submitted transcripts of the relevant proceedings in the trial court. Respondent Rascoe, the defendant on trial, opposes granting of the writ.

the complainant has been treated. When the case was sent out for trial,[2] the respondent Justice directed the People to produce the complainant and the court asked the complainant if he would sign the necessary consent forms for the defense to obtain his psychiatric records. When the complainant refused to provide the requested information about the location of his treatment or consent to the release of his records, the court issued an order precluding the complainant from testifying with respect to the robbery.

An article 78 proceeding seeking relief in the nature of a writ of prohibition is an extraordinary remedy and is available to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction (*Matter of Pirro v Angiolillo*, 89 NY2d 351, 355 [1996]; *Matter of Holtzman v Goldman*, 71 NY2d 564, 569 [1988]). "The writ does not lie as a means of seeking a collateral review of an error of law, no matter how egregious that error might be . . . but only where the

[2] The calendar part judge had denied a defense motion to compel the prosecution to obtain the complainant's records, noting that the determination of whether a remedy was required for the lack of records would be based on "how things play out at trial."

very jurisdiction and power of the court are in issue" (*Matter of Brown v Blumenfeld*, 103 AD3d 45, 55 [2d Dept 2012] [internal quotation marks omitted]). Here, the court had no authority to issue this preclusion order since the records were neither discoverable nor *Brady* material (*Brady v Maryland*, 373 US 83 [1963]). It is undisputed that the People did not have the complainant's records and did not know where he had been treated (*see People v Hayes*, 17 NY3d 46 [2011], *cert denied* - US -, 132 S Ct 844 [2011]; *People v Walloe*, 88 AD3d 544 [lst Dept 2011] [allegedly exculpatory tape was not *Brady* material because it never was in the People's possession or control], *lv denied* 18 NY3d 963 [2012]). The People had no affirmative duty to ascertain the extent of the complainant's psychiatric history or obtain his records (*see People v Collins*, 250 AD2d 379, 379 [lst Dept 1998], *lv denied* 92 NY2d 895 [1998], citing *People v Sealey*, 239 AD2d 864 [4th Dept 1997], *lv denied* 90 NY2d 910 [1997]). The People advised the defense of the information they had regarding the complainant's diagnosis and also apprised the defense of the complainant's statements regarding his hallucinations. Therefore, no claim can be made that the People concealed any information from the court or the defense.

It is well settled that neither the defendant nor the court has the "authority to compel pretrial discovery in criminal cases

that is unavailable pursuant to statute, and prohibition lies to prevent an attempt to do so" (*Matter of Farrell v LaBuda*, 94 AD3d 1195, 1197 [3d Dept 2012] [prohibition appropriate to prevent trial court from enforcing order directing prosecutor to perform latent fingerprint analysis by a specific date], *lv denied* 19 NY3d 808 [2012]; *see also Matter of Cosgrove v Ward*, 48 AD3d 1150 [4th Dept 2008] [prohibition warranted where court improperly precluded People from introducing certain evidence based on alleged insufficiency of the bill of particulars]).

People v Rensing (14 NY2d 210 [1964]), relied on by respondent Rascoe and by the trial court, can be easily distinguished. In that case, the trial court denied a motion to set aside the jury verdict even though a month after sentencing, the codefendant, who was a critical witness against the defendant, was certified as legally insane and committed to a state hospital (14 NY2d at 212). In ordering a new trial, the Court of Appeals noted that the codefendant had a long history of mental illness, which should have been put before the jury (*id.* at 213-214). The case neither involves a preclusion order nor does it hold that the complainant's records must be obtained prior to trial. Rather, it holds that the jury is entitled to know that there is something mentally wrong with the complainant, something the defendant in this case could establish based on the

information he already has.

People v Baier (73 AD2d 649 [2d Dept 1979]), cited by the trial court, also presents an entirely different situation from the one at issue here. In that case, a clinical psychologist was called by the People at trial to assist the jury in evaluating the complainant's credibility and mental illness (73 AD2d at 650). The court, however, would not allow the defense to use the voluminous mental health and hospital records that it had subpoenaed for the purpose of cross-examination (*id.*). That case involves preclusion of the use of records which the defense already had; not an order sanctioning the People for records that were never in their possession.

It appears that the trial court, in this case, concluded it had the authority to order preclusion as a remedy for a possible violation of the defendant's Confrontation Clause rights. In *People v Jenkins* (98 NY2d 280, 284 [2002]), the court held that "[p]reclusion of evidence is a severe sanction, not to be employed unless any potential prejudice arising from the failure to disclose cannot be cured by a lesser sanction." In this case, it is improper to determine, as the trial court did before the trial commenced, that preclusion is the only remedy. Although the complainant has to date refused to provide information about the location of his treatment, we do not know for certain whether

he will do so once the trial begins. The complainant already has provided information about his diagnosis and the defense knows the medications he was taking at the time of his admission to Lincoln Hospital. The defense has sufficient information to explore the issue on cross-examination (*see People v Blair*, 32 AD3d 613, 615 [3d Dept 2006]),[3] and the question of whether another remedy, such as an adverse inference instruction, would be appropriate cannot be resolved before trial. Rather, this issue must be decided at trial based on the responses the complainant actually gives during his testimony.

In addition to determining whether a writ of prohibition is authorized to stop the implementation of the preclusion order, this Court also must consider whether to exercise its discretion to grant that remedy (*Matter of Pirro*, 89 NY2d at 359). In making such a decision, courts consider "the gravity of the harm that would result from the act to be prohibited and whether that harm can be adequately corrected through an appeal or other

[3] The papers submitted to this Court indicate that the defendant and the complainant knew each other before this incident, but do not indicate whether the defendant has any information about the complainant's behavior and mental health history based on their prior connection.

proceedings at law or in equity" (*id.*, citing *Matter of Rush v Mordue*, 68 NY2d 348, 354 [1986]; *see also Brown v Blumenfeld*, 103 AD3d at 65). Here, there are significant consequences if the court's ruling is allowed to stand because the complainant will be unable to testify about the events of the robbery. Moreover, a preclusion order is not appealable and absent granting of the writ, the prosecution has no remedy or any way to obtain appellate review (*see Matter of Brown v Schulman*, 244 AD2d 406 [2d Dept 1997], *lv denied* 91 NY2d 806 [1998]).

The defense suggests it would be a denial of due process to allow the case to proceed to trial without the records at issue here. This argument ignores the procedural posture in which this question arose. Here, the court imposed a remedy for nondisclosure of records it had no right to compel the People to produce in the first place. Although we recognize that defendant

has rights here, the court cannot create a remedy, unauthorized by statute or case law, in anticipation of what it believes will be a problem at trial.

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

ENTERED: AUGUST 20, 2013

DEPUTY CLERK

Friedman, J.P., Saxe, Moskowitz, DeGrasse, JJ.

9387 The Mount Sinai Hospital, Index 652035/11
Plaintiff-Respondent-Appellant,

-against-

The 1998 Alexander Karten Annuity Trust,
Defendant-Appellant-Respondent.

_____

Cyruli Shanks Hart & Zizmor LLP, New York (James E. Schwartz of counsel), for appellant-respondent.

Patterson Belknap Webb & Tyler LLP, New York (David Slarskey of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Eileen Bransten, J.), entered February 2, 2012, affirmed, without costs.

Opinion by Friedman, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David Friedman, J.P.
David B. Saxe
Karla Moskowitz
Leland G. DeGrasse, JJ.

9387
Index 652035/11

_____x

The Mount Sinai Hospital,
Plaintiff-Respondent-Appellant,

-against-

The 1998 Alexander Karten Annuity Trust,
Defendant-Appellant-Respondent.

_____x

Cross appeals from the order of the Supreme Court, New York County (Eileen Bransten, J.), entered February 2, 2012, which, to the extent appealed from, upon defendant's cross motion for partial summary judgment, declared that plaintiff is not liable to defendant for additional rent for the years 1999 through 2008, inclusive, and that plaintiff is liable to defendant for additional rent for the years 2009 and 2010, as invoiced by defendant on March 1, 2011.

Cyruli Shanks Hart & Zizmor LLP, New York (James E. Schwartz of counsel), for appellant-respondent.

Patterson Belknap Webb & Tyler LLP, New York (David Slarskey, Andrew L. Herz and Regina Y. Won of counsel), for respondent-appellant.

FRIEDMAN, J.P.

We hold that, under the circumstances of this commercial landlord-tenant dispute, it was a constructive condition precedent to the tenant's obligation to pay additional rent for a given year that the landlord submit an additional rent statement for that year within two years after it ended. Accordingly, the landlord, which failed to submit any additional rent statements for more than a decade and then suddenly submitted statements for the previous 12 years on March 1, 2011, is not entitled to collect additional rent for any but the last two of those years (2009 and 2010).

On or about September 15, 1997, the predecessor-in-interest of defendant The 1998 Alexander Karten Annuity Trust (the Karten Trust), as landlord, and plaintiff The Mount Sinai Hospital (Mount Sinai), as tenant, entered into a lease of the second floor of the five-story commercial building located at 309-327 East 94th Street in Manhattan. The lease's initial term was set to expire on April 30, 2013. Pursuant to Mount Sinai's exercise of an option under an extension agreement dated September 1, 2010, the term of the lease has been extended until April 30, 2014. Mount Sinai operates a dialysis center on the premises

demised by this lease.[1]

Article XLIX of the lease (entitled "Operating Costs") provides that the landlord is entitled to collect additional rent for each year of the tenancy after 1998.[2] The additional rent is to be based on the tenant's proportionate share (19.86%) of increases in the landlord's "Operating Costs" (as defined in the lease) for the year in question (the "Comparative Year") in comparison with the Operating Costs incurred in the "Base Operating Year" of 1998. Specifically, section 49.01 of the lease provides:

> "(a) Lessee shall pay to Lessor, as additional rent, without set-off or deduction, Lessee's proportionate share of any increase in 'Operating Costs' (as hereinafter defined [in section 49.02]) over the 'Base Operating Year' (as hereinafter defined).
>
> "(b) The 'Base Operating Year' shall be calendar year 1998.
>
> "(c) The term 'Comparative Year' shall mean each succeeding year following the Base Operating Year."

Section 49.03 of the lease specifies the procedures for billing additional rent. In particular, it requires the landlord

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[1]Mount Sinai also leases part of the ground floor of the same building under a separate lease agreement. Because no issues under the ground-floor lease are raised on this appeal, subsequent references to "the lease" in this opinion mean the second-floor lease only.

[2]No issues concerning the base rent under the lease have been raised on this appeal.

to submit to the tenant a statement of "Operating Expenses" (apparently, a misnomer for "Operating Costs") for 1998 (the Base Operating Year) "(*as soon as reasonably practicable*) following the expiration" (emphasis added) of that year. Similarly, the landlord is required to submit to the tenant a statement of "Operating Expenses" (*sic*) for each post-1998 Comparative Year "*as soon as reasonably practicable*" (emphasis added) following the expiration of that year. The tenant is required to pay the balance of additional rent owed, as shown on the Comparative Year statement, "within ten (10) days after receipt of such statement," subject to the tenant's right to dispute the correctness of the statement as provided elsewhere in the lease.[3] Section 49.05 provides in pertinent part: "If Lessee shall not so dispute [in writing] any item or items of any [additional rent]

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[3]Section 49.03 of the lease provides in pertinent part:

> "Lessor shall submit to Lessee (as soon as reasonably practicable) following the expiration of the Base Operating Year, a statement setting forth the Operating Expenses for the Base Operating Year. Following the expiration of each Comparative Year, Lessor shall submit to Lessee (as soon as reasonably practicable), a statement setting the Operating Expenses for such Comparative Year. If such statement shows that payment is due (hereinafter referred to as the 'Expense Payment') from Lessee to Lessor with respect to such Comparative Year, then . . . Lessee shall make payment thereof (or of the unpaid balance thereof) within ten (10) days after receipt of such statement . . . ."

statement . . . within thirty (30) days after such statement . . . has been rendered, Lessee shall be deemed to have approved such statement . . . .” Section 42.04 provides that the tenant’s payment of the amount of additional rent billed (without prejudice to its position) is “a condition precedent to its right to contest . . . [the] correctness” of an additional rent statement.[4]

While section 49.03 requires the landlord to submit an additional rent statement “as soon as reasonably practicable” after the expiration of each Comparative Year, the immediately following section of the lease provides the landlord with a two-year safe harbor for late billing. Section 49.04 of the lease provides:

> “The obligation of Lessee with respect to any additional rent pursuant to this Article shall survive the expiration or sooner termination of this lease, for a period of two (2) years. Any delay or failure of Lessor in billing Operating Costs for a period not to exceed two (2) years after the expiration of each Comparative Year, shall not constitute a waiver or in any way impair the continuing obligation of Lessee to

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[4]Section 42.04 of the lease provides in pertinent part:

> “If Lessee disputes the correctness of any such [additional rent] statement, Lessee shall, as a condition precedent to its right to contest such correctness, make payment of the additional rent billed, without prejudice to its position. If such dispute is finally determined in Lessee’s favor, Lessor shall refund to Lessee the amount overpaid.”

make such Expense Payments hereunder."

Notwithstanding the provisions of sections 49.03 and 49.04 of the lease, the landlord failed to submit to Mount Sinai any statement of Operating Costs for 1998 (the Base Operating Year) or for any subsequent Comparative Year until March 1, 2011 — a delay of more than 12 years in the case of the statement for the Base Operating Year. The only explanation the Karten Trust offers for this lapse is that it was an unintentional "slip up" attributable to the "the quality of the back office" (as counsel characterized it) that suddenly came to light in January 2011, when the organization replaced its controller. After this discovery, on or about March 1, 2011, the Karten Trust submitted to Mount Sinai statements of Operating Costs for the Base Operating Year and for the Comparative Years 1999 through 2010, along with an invoice for total additional rent for the 12 Comparative Years in the amount of $369,793.66.

Although Mount Sinai admittedly did not follow the procedures prescribed by sections 42.04 and 49.05 of the lease for disputing the "correctness" of an additional rent statement (i.e., disputing the statement in writing within 30 days and paying the amount billed without prejudice), it refused to pay the March 2011 invoice for 12 years of previously unbilled

additional rent.[5] The Karten Trust responded by serving Mount Sinai with a notice of default and a 30-day notice to cure, dated June 14, 2011. The following month, Mount Sinai commenced this declaratory judgment action, the complaint in which pleads that the Karten Trust "is barred by the terms of the Lease Agreement[] . . . and/or the doctrine of laches, estoppel, [or] waiver . . . from now collecting payment of all claimed Additional Rent dating back to 1998." Mount Sinai's complaint prays for "a judicial declaration of the Additional Rent, if any, that is due" under the lease. The Karten Trust answered and asserted a counterclaim to recover possession of the premises in the event Mount Sinai's alleged default remains uncured.

At the time it commenced this action, Mount Sinai also moved for a *Yellowstone* injunction tolling the expiration of the cure period under the notice of default.[6] The Karten Trust cross-moved for summary judgment holding Mount Sinai liable for the billed additional rent. At oral argument on the motion and cross motion, Mount Sinai argued that, on a search of the record, it

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[5]In its appellate brief, Mount Sinai states that it "did not formally dispute the correctness of the charges on this untimely and legally ineffective Statement, as it may have been obligated to do in response to a timely statement of Operating Costs under Section 49.05 of the Second-Floor Lease."

[6]No issues concerning the *Yellowstone* application (which was granted) are raised on this appeal.

should be granted summary judgment on the additional rent issue.

In the order appealed from, Supreme Court granted Mount Sinai summary judgment holding that it was not liable for the first 10 years of additional rent for which it had been billed (1999 through 2008), but granted the Karten Trust summary judgment holding Mount Sinai liable for the last two years of additional rent (2009 and 2010). The court reasoned that "the provision of timely statements detailing annual operating costs is a condition precedent to Mount Sinai's [obligation to make] payment of those costs." In support of this view, the court opined that the two-year safe harbor for late billing provided by section 49.04 of the lease

> "implies that delays in billing of more than two years can be a waiver on the Trust's part. Section 49.04, by providing a two-year outer limit on what may be waived, therefore defines the outer bounds of the phrase [in section 49.03, set forth at footnote 3, *supra*] 'as soon as reasonably practicable.'"

Rejecting the Karten Trust's argument that Mount Sinai was precluded from objecting to the billed additional rent by its failure to follow the dispute procedures provided by the lease, the court held that "providing a statement of operating costs less than two years from the date those costs accrued is a condition precedent to Mount Sinai's obligation to contest the statement within 30 days" as provided by section 49.05. As to

the additional rent for 2009 and 2010, for which Mount Sinai was billed less than two years after the expiration of the years in question, the court held that Mount Sinai "waived its right to contest the amount of the operating costs from two years prior to March 1, 2011 by failing to object to the Statement within 30 days as required under § 49.05 of the Lease."

Now before us is the Karten Trust's appeal, and Mount appeal, from Supreme Court's disposition of the Karten Trust's summary judgment motion. We affirm.

At the outset, we must address the Karten Trust's argument that Mount Sinai is barred from raising an objection on any ground to any of the additional rent statements at issue by its admitted failure to promptly pay the additional rent for which it was billed, without prejudice pending resolution of the dispute, pursuant to section 42.04 of the lease (which the parties have dubbed the "pay-now-fight-later" clause).[7] If we were to accept this argument, it would be dispositive of both the appeal and the cross appeal. In our view, however, the argument is unavailing.

To be sure, section 42.04 provides that Mount Sinai's up-

[7]In arguing in this Court that Mount Sinai is bound by the additional rent statements, the Karten Trust apparently does not rely (as the motion court did) on Mount Sinai's failure to issue a formal, written dispute of the statements within 30 days after they were rendered, as required by section 49.05 of the lease.

front payment of the additional rent billed is "a condition precedent to its right to contest . . . [the] correctness" of an additional rent statement. Thus, if Mount Sinai were objecting to the additional rent statements on the ground that they inaccurately stated the building's Operating Costs for the years in question, then the failure to pay the billed additional rent pending resolution of the dispute would bar the objection. While Mount Sinai asserts that the accuracy of statements of Operating Costs issued in 2011 for periods as long ago as 1998 is questionable (and may be impossible to verify), the crux of its present objection is not that those statements are, in fact, inaccurate. Rather, Mount Sinai takes the position that the statements, whether accurate or not, are ineffectual because the underlying statement for the Base Operating Year, and the statements for the first 10 Comparative Years, were served far too late under the terms of the lease. Again, section 49.03 requires that all such statements be issued "as soon as reasonably practicable" after the end of the year in question, and section 49.04 requires that, in any event, a statement for a Comparative Year be issued within two years after the year's end.[8] The pay-now-fight-later clause, on the other hand,

[8]As more fully discussed below, while the statements for 2009 and 2010 were issued within two years after those years

applies, by its terms, only to disputes over the "correctness" of additional rent statements. To construe the word "correctness" in section 42.04 to include the concept of timeliness, or the concept of satisfaction of a condition precedent, would stretch the contractual language beyond its natural import (*see Schoonmaker v Hoyt*, 148 NY 425, 431 [1896] ["Contracts or statutes are to be read and understood according to the natural and obvious import of the language, without resorting to subtle and forced construction for the purpose of either limiting or extending their operation"]). Accordingly, to the extent Mount Sinai disputes the timeliness, not the "correctness," of the statements at issue, its objection is not barred by its failure to follow the pay-now-fight-later procedure of section 42.04.

We now turn to the primary issue raised by this appeal, namely, whether it is a condition precedent to Mount Sinai's obligation to pay additional rent for a given Comparative Year under the lease that the Karten Trust *timely* issue a statement of

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ended, Mount Sinai argues that those statements still should be treated as nullities because the statement of Operating Costs for the Base Operating Year (1998) used to derive the additional rent payable for all later years was issued 12 years late. It is Mount Sinai's position that the untimeliness of the statement for the Base Operating Year renders additional rent for any subsequent year uncollectible for the remainder of the term of the lease. We will address this argument at a subsequent point in this opinion.

Operating Costs for that Comparative Year. To answer this question, it is helpful to review the Court of Appeals' statement of the principles governing the operation of conditions precedent under New York law:

> "A condition precedent is 'an act or event, other than a lapse of time, which, unless the condition is excused, must occur before a duty to perform a promise in the agreement arises' (Calamari and Perillo, Contracts § 11-2, at 438 [3d ed]; *see*, Restatement [Second] of Contracts § 224; *see also, Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 112-113). Most conditions precedent describe acts or events which must occur before a party is obliged to perform a promise made pursuant to an existing contract, a situation to be distinguished conceptually from a condition precedent to the formation or existence of the contract itself . . . .
>
> "Conditions can be expressed or implied. Express conditions are those agreed to and imposed by the parties themselves. Implied or constructive conditions are those 'imposed by law to do justice' (Calamari and Perillo, Contracts § 11-8, at 444 [3d ed]). Express conditions must be literally performed, whereas constructive conditions, which ordinarily arise from language of promise, are subject to the precept that substantial compliance is sufficient. The importance of the distinction has been explained by Professor Williston:
>
> > 'Since an express condition . . . depends for its validity on the manifested intention of the parties, it has the same sanctity as the promise itself. Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must, nevertheless, generally enforce the will of the parties unless to do so will violate public policy. Where, however, the law itself has imposed the condition, in absence of or irrespective of

> the manifested intention of the parties, it can deal with its creation as it pleases, shaping the boundaries of the constructive condition in such a way as to do justice and avoid hardship'. (5 Williston, Contracts § 669, at 154 [3d ed].)"

Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co. (86 NY2d 685, 690-691 [1995]).

The lease in this case does not expressly provide that timely issuance of an Operating Costs statement is a condition precedent to Mount Sinai's obligation to pay additional rent for that year. While section 49.03 of the lease requires that the landlord, "[f]ollowing the expiration of each Comparative Year, . . . submit to Lessee (as soon as reasonably practicable), a statement [of Operating Costs]," there is no language in the lease that explicitly makes Mount Sinai's obligation to pay additional rent conditional on submission of the statement "as soon as reasonably practicable" after the end of the year.[9] This

[9]Certainly, Mount Sinai could not be expected to pay additional rent for a given Comparative Year before it received a statement of the landlord's Operating Costs for that year (or for the Base Operating Year). The question here, however, is whether Mount Sinai's obligation to pay additional rent can arise upon the *untimely* submission of a statement of Operating Costs. There are cases in which timely notice, although required by the contract, has been held not to be a condition precedent to the duty to perform of the recipient of the notice (*see Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 582-583 [1992] [the reinsured's compliance with a reinsurance contract's requirement of prompt notice to the reinsurer was not a condition precedent to the reinsurer's obligation]; *see also Red Ball Interior*

conclusion is not changed by the two-year safe harbor provision of section 49.04, which merely provides that the landlord's failure to bill for additional rent "for a period not to exceed two (2) years after the expiration of each Comparative Year, shall not constitute a waiver or in any way impair" the landlord's entitlement to such additional rent — saying nothing about the effect of a delay in billing of more than two years.[10] In this regard, it is noteworthy that section 42.04 (the pay-now-fight-later provision) expressly provides that the tenant's up-front payment of billed additional rent is "a condition precedent to its right to contest [the] correctness" of the landlord's statement of Operating Costs. Hence, it is clear that the parties knew how to create a condition precedent expressly when they consciously intended to do so.

It is not necessarily conclusive, however, that the parties did not make timely submission of a statement of Operating Costs

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Demolition Corp. v Palmadessa, 947 F Supp 116, 122-124 [SD NY 1996], *affd* 107 F3d 4 [2d Cir 1997] [the indemnitee's compliance with an indemnification agreement's requirement that the indemnitor be given notice "as soon as practicable" was not a condition precedent to the indemnitor's obligation]).

[10]Section 49.04 certainly allows the tenant to seek to prove a waiver or estoppel barring the collection of additional rent for a given year based on the landlord's delay in billing of more than two years. The safe harbor provision cannot be construed, however, to have been intended to extinguish such an entitlement, as a matter of law, based on a delay of that length.

an express condition precedent to Mount Sinai's obligation to pay additional rent. As the Court of Appeals recognized in *Oppenheimer & Co.*, in appropriate circumstances, constructive conditions precedent are "imposed by law to do justice" (86 NY2d at 690 [internal quotation marks omitted]). Indeed, in cases similar to this one, the landlord's timely compliance with the lease's notice requirement has been deemed to constitute a condition precedent to the tenant's obligation to pay additional rent, even though the lease did not contain language expressly conditioning the tenant's obligation to pay on the landlord's giving timely notice (*see Walton v Eastern Analytical Labs*, 246 AD2d 532 [2d Dept 1998]; *Winfield Capital Corp. v Mahopac Auto Glass*, 208 AD2d 715 [2d Dept 1994]; *but see Goldstein v City of New York*, 159 AD2d 313 [1st Dept 1990]).[11]

Of course, under New York law, "all contracts imply a covenant of good faith and fair dealing in the course of performance . . . encompass[ing] any promises which a reasonable person in the position of the promisee would be justified in understanding were included" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal quotation

[11]*Goldstein* was decided in the unique context of leasing to the City of New York; we do not regard that decision as controlling authority for cases arising from ordinary commercial landlord-tenant relationships.

marks omitted]). Beyond question, a reasonable tenant would have been justified in understanding that the landlord would submit an additional rent statement for a given year within a reasonable time after the expiration of that year. The difficulty of verifying the landlord's claimed operating costs naturally increases with the passage of time, and the tenant, for purposes of managing its own affairs, is entitled to deem accounts for a given year closed at some point.[12] What the parties to this lease would have considered a reasonable time for this purpose can be discerned from section 49.04, the safe harbor clause providing that the landlord's entitlement to additional rent will not be impaired by a delay in billing "not to exceed two (2) years after the expiration of each Comparative Year." Accordingly, under this lease, we find that it is a constructive condition precedent to Mount Sinai's obligation to pay additional rent for a given year that the Karten Trust submit a statement for such additional rent no more than two years after the expiration of that year. Since the Karten Trust served the

[12]The Karten Trust suggests that we should give short shrift to Mount Sinai's objection to the extremely late billing in this case because the total amount of additional rent at issue (approximately $370,000) is a relatively small sum for an institution of Mount Sinai's size. We reject this argument. The principles of the law of commercial contracts and leases are the same for all businesses and institutions, whatever their size.

additional rent statements on March 1, 2011, the constructive condition precedent to Mount Sinai's obligation to pay additional rent was satisfied only with respect to the years that expired within two years before that date (2009 and 2010).[13]

We reject the Karten Trust's argument that the condition should be deemed excused to avoid imposing a "forfeiture" on the landlord. While a court may excuse the non-occurrence of a condition precedent to avoid causing "disproportionate forfeiture" to the party that would otherwise lose a part of what it expected to receive (Restatement [Second] of Contracts § 229), "forfeiture" in that context means "'the denial of compensation that results when the obligee loses [its] right to the agreed exchange after [it] has relied substantially, as by preparation or performance on the expectation of that exchange'" (*Oppenheimer Co.*, 86 NY2d at 692 n 2, quoting Restatement [Second] of Contracts § 229, comment *b*). The Karten Trust makes no claim that, during the term of the lease, it did anything in actual

[13]Although substantial compliance generally suffices to satisfy a constructive condition precedent (*see Oppenheimer Co.*, 86 NY2d at 690), we deem the two-year safe harbor to be sufficiently generous to the landlord that the period need not be further extended by application of the doctrine of substantial compliance. In this regard, we note that the two-year safe harbor itself liberally extends the time for submitting an additional rent statement under section 49.03, which requires that the statement for a given year be issued "as soon as reasonably practicable" after the end of that year.

reliance on the receipt of additional rent. To the contrary, the landlord, by its own admission, seems to have entirely forgotten about the additional rent provisions of this lease until 2011.[14] Further, the satisfaction of the condition in question (timely submission of additional rent statements) was a matter entirely within the control of the Karten Trust itself — to avoid the risk of forfeiture, it need only have submitted timely statements, under the liberal standard afforded by the lease's safe harbor provision (*see* Restatement [Second] of Contracts § 227[1] [in determining whether an event is a condition of an obligor's duty, the preference for "reduc(ing) the obligee's risk of forfeiture" does not apply where "the event is within the obligee's control or the circumstances indicate that he has assumed the risk"]; *National Fuel Gas Distrib. Corp. v Hartford Fire Ins. Co.*, 28 AD3d 1169, 1170 [4th Dept 2006]). We perceive no unfairness in deeming the landlord to have assumed the risk of its own failure to bring about events that were entirely (and easily) under its control.

On its cross appeal, Mount Sinai argues that the 12-year

[14]Of course, the Karten Trust and its predecessor-in-interest owned and operated the building regardless of Mount Sinai's lease. Thus, even if the Karten Trust had not lost sight of the lease's additional rent provisions, the costs of operating the building would not have been incurred in reliance on the expectation of receiving additional rent.

delay (from the end of 1998 to March 1, 2011) in submitting the statement of Operating Costs for the Base Operating Year should bar the Karten Trust from collecting additional rent for the remainder of the term of the lease. It is Mount Sinai's position that the landlord's obligation under section 49.03 of the lease to submit a statement of Operating Costs "as soon as reasonably practicable" after the end of the Base Operating Year should function as a condition precedent to the tenant's obligation to pay additional rent for each subsequent Comparative Year of the lease's term.[15] Thus, according to Mount Sinai, it should not have to pay additional rent for 2009 or 2010, even though the additional rent statements for each of those years was submitted less than two years after the year ended. In this regard, Mount Sinai points out that the same requirement of submission "as soon as reasonably practicable" after the end of the year applies to both the Base Operating Year statement and the statement for each Comparative Year. Accordingly, contends Mount Sinai, if timely issuance of the Comparative Year statement is a condition precedent to the obligation to pay additional rent for that particular Comparative Year, then timely issuance of the Base

[15]Again, additional rent under this lease is the tenant's pro rata share of the difference between the Operating Costs in the Base Operating Year (1998) and the Operating Costs in each subsequent Comparative Year.

Operating Year statement should be a condition precedent to the obligation to pay additional rent for all subsequent years.

Notwithstanding the epic 12-year delay in submitting the statement of Operating Costs for the Base Operating Year, we decline to foreclose the Karten Trust from collecting additional rent for the remainder of the term of the lease. As previously discussed, the condition precedent that we are applying to Mount Sinai's obligation to pay additional rent for each Comparative Year is a constructive condition precedent — not a requirement that was "agreed to and imposed by the parties themselves" (*Oppenheimer & Co.*, 86 NY2d at 690 [internal quotation marks omitted]) but one that has been "imposed by law to do justice" (*id.* [internal quotation marks omitted]).

> "Where . . . the law itself has imposed the condition, in absence of or irrespective of the manifested intention of the parties, it can deal with its creation as it pleases, shaping the boundaries of the constructive condition in such a way as to do justice and avoid hardship" (*id.* at 691 [internal quotation marks omitted]; *see also* 13 Richard A. Lord, Williston on Contracts § 38:12 at 423 [4th ed 2000]).

Given the flexibility the law affords us in the creation and shaping of a constructive condition, our treatment of the timeliness requirement for a Comparative Year statement as a condition precedent to the tenant's obligation to pay additional rent for that year does not compel us to treat the timeliness

requirement for the Base Operating Year statement as a condition precedent to the tenant's obligation to pay additional rent for the remainder of the lease term. In our view, foreclosing the landlord from collecting additional rent for the entire remaining term of the lease would be too harsh a consequence here, even given the default that occurred in this case. Accordingly, the additional rent statements for 2009 and 2010 are not untimely under the lease, and because Mount Sinai has not followed the procedures of sections 42.04 and 49.05 of the lease for disputing the correctness of those statements, it is precluded from contesting them.

In view of the foregoing, we need not reach the remaining issues discussed by the parties.

Accordingly, the order of the Supreme Court, New York County (Eileen Bransten, J.), entered February 2, 2012, which, to the extent appealed from, upon defendant's cross motion for partial summary judgment, declared that plaintiff is not liable to defendant for additional rent for the years 1999 through 2008, inclusive, and that plaintiff is liable to defendant for

additional rent for the years 2009 and 2010, as invoiced by defendant on March 1, 2011, should be affirmed, without costs.

All concur.

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

ENTERED: AUGUST 20, 2013

DEPUTY CLERK

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

10542N In re James Holmes, Index 30037/13
Petitioner-Respondent,

-against-

Jana Winter,
Respondent-Appellant.

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The Reporters Committee for Freedom of the Press plus 42 News Organizations,
Amici Curiae.

_____

Hogan Lovells US LLP, Washington, DC (Christopher T. Handman of the bars of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), for appellant.

Arshack, Hajek & Lehrman, PLLC, New York (Daniel N. Arshack of counsel), for respondent.

Levine Sullivan Koch & Schulz, LLP, New York (Katherine M. Bolger of counsel), for amici curiae.

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Order, Supreme Court, New York County (Larry Stephen, J.), entered on or about March 7, 2013, affirmed, without costs. The Clerk is directed to unseal the record.

Opinion by Clark, J. All concur except Acosta and Saxe, JJ. who dissent in an Opinion by Saxe J.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
David B. Saxe
Helen E. Freedman
Darcel D. Clark, JJ.

10542N
Index 3003713

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In re James Holmes,
Petitioner-Respondent,

-against-

Jana Winter,
Respondent-Appellant.

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The Reporters Committee for Freedom of the Press plus 42 News Organizations,
Amici Curiae.

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Respondent appeals from the order of the Supreme Court, New York County (Larry Stephen, J.), entered on or about March 7, 2013, which compelled her to testify before the District Court of Arapahoe County, Colorado, in a criminal proceeding against petitioner.

Hogan Lovells US LLP, Washington, DC (Christopher T. Handman of the bars of the District of Columbia and the State of Maryland, admitted pro hac vice, of counsel), and Hogan Lovells US LLP, New York (Dori Ann Hanswirth, Theresa M. House, Nathaniel S. Boyer and Benjamin A. Fleming of counsel), for appellant.

Arshack, Hajek & Lehrman, PLLC, New York (Daniel N. Arshack of counsel), for respondent.

Levine Sullivan Koch & Schulz, LLP, New York (Katherine M. Bolger of counsel), for amici curiae.

CLARK, J.

In this appeal, the question presented is whether the Supreme Court erred in its determination to enforce a subpoena under the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10) when the witness's testimony potentially involves the assertion of privilege provided by Civil Rights Law § 79-h(b). We find that the Supreme Court acted properly in directing respondent to appear in the Colorado District Court. Accordingly, the inquiry into admissibility and privilege remains the province of the demanding State rather than the sending State.

As a threshold matter, we find that this appeal is not rendered moot by the fact that respondent appeared in the Colorado District Court because it "presents an issue of substantial public interest that is likely to recur and evade review" (*Branic Intl. Realty Corp. v Pitt*, 106 AD3d 178, 182 [1st Dept 2013]; *see Coleman v Daines*, 19 NY3d 1087, 1090 [2012]; *Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]).

As to the merits, the Supreme Court properly directed respondent to testify in the criminal proceeding against petitioner. When seeking to compel a witness to testify in a criminal proceeding in another state, a petitioner bears the burden of securing a certificate from the out-of-state judge,

presenting that certificate to a New York judge, showing that the witness's testimony is "material and necessary," and showing that such compulsion would not cause undue hardship to the witness (CPL 640.10[2]; *Matter of Tran v Kwok Bun Lee*, 29 AD3d 88, 92 [1st Dept 2006]; *State of New Jersey v Bardoff*, 92 AD2d 890 [2d Dept 1983]). Petitioner furnished the court with a certificate issued, pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases (CPL 640.10), by the Araphoe County District Court Judge, and demonstrated that respondent's testimony was "material and necessary" (*Matter of Tran*, 29 AD3d at 92; CPL 640.10[2]), and that she would not suffer undue hardship because petitioner would pay the costs of her travel and accommodations (*see Tran*, 29 AD3d at 93-94).

Respondent's reliance upon Civil Rights Law § 79-h(b) is unavailing. The narrow issue before the Supreme Court was whether respondent should be compelled to testify, and privilege and admissibility are irrelevant for this determination (*see Matter of Codey [Capital Cities, Am. Broadcasting Corp.]*, 82 NY2d 521, 528-530 [1993]; *Matter of Magrino*, 226 AD2d 218 [1st Dept 1996]). Respondent is entitled to assert whatever privileges she deems appropriate before the Colorado District Court. Compelling respondent to testify is distinguishable from compelling her to divulge the identity of her sources.

In *Matter of Codey (Capital Cities, Am. Broadcasting Corp.)* (82 NY2d 521 [1993]), the Court of Appeals held that the "privileged status of . . . evidence is not a proper factor for consideration under CPL 640.10(2)" (*id.* at 524). Notwithstanding the holding in *Codey*, the dissent asserts that there are countervailing public policy implications that favor protecting the identity of an investigative reporter's confidential sources. In addition, the dissent reasons that an "undue hardship" is presented when an investigative reporter relies upon confidential sources for her livelihood and is compelled to divulge the identity of her sources.

The dissent's position conflates the separate and distinct concept of "privilege" with public policy and undue hardship. Privilege "pertains to the disclosability and admissibility of otherwise probative and useful evidence" (*id.* at 529). An undue hardship may pertain to "any familial, monetary, or job-related hardships" that result from being compelled to appear (*Tran*, 29 AD3d at 93). Nevertheless, undue hardship does not involve an analysis of the potential consequences if respondent exercises privilege in the demanding State. Again, the assertion of privilege remains irrelevant to the determination of whether a respondent should be compelled to testify pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State

in Criminal Cases (*see Matter of Codey*, 82 NY2d at 528-530; *Matter of Magrino*, 226 AD2d at 218). Thus, if this Court were to resolve questions of privilege under the lens of public policy or undue hardship, it would frustrate the purpose of the reciprocal statutory scheme (*id.*).

The Court in *Codey* held that "[i]t would be inefficient and inconsistent with the over-all purpose and design of this reciprocal statutory scheme to permit the sending State's courts to resolve questions of privilege on a CPL 640.10(2) application" (*Matter of Codey*, 82 NY2d at 529). "Further, evidentiary questions such as privilege are best resolved in the State--and in the proceeding--in which the evidence is to be used" (*id.* at 530).

We note that New York's Shield Law (Civil Rights Law § 79h-[b]) continues to represent a strong public policy and the long history of vigilantly safeguarding freedom of the press (*see O'Neill v Oakgrove Constr.*, 71 NY2d 521, 528-529 [1988]; *Matter of Knight-Ridder Broadcasting v Greenberg*, 70 NY2d 151, 155-157 [1987]). The dissent argues that respondent's appearance was ordered to identify law enforcement personnel, which requires the disclosure of her confidential sources. However, the facts presented on this record do not establish with absolute certainty that the Colorado District Court will require the disclosure of

confidential sources. As such, it calls into question whether this matter truly embodies a conflict between evidence privileged under New York law and evidence that is unprotected in the demanding State. It is not certain that respondent will forfeit privilege protections under the law of the demanding State. Given this uncertainty, we do not find countervailing public policy concerns that justify "the refusal of relief under CPL 640.10 even if the 'material and necessary' test set forth in the statute is satisfied" (*Matter of Codey*, 82 NY2d at 530 n 3). Moreover, even if respondent asserts privilege under the New York Shield Law, privilege is irrelevant to this Court's determination since admissibility and privilege remain within the purview of the demanding State rather than the sending State (*id.* at 530).

We find that the Supreme Court improperly sealed the record. "Generally, this Court has been reluctant to allow the sealing of court records even where both sides to the litigation have asked for such sealing" (*Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 28 AD3d 322 [1st Dept 2006] [internal citations omitted]; *see Liapakis v Sullivan*, 290 AD2d 393, 394 [1st Dept 2002]; *Matter of Hofmann*, 284 AD2d 92 [1st Dept 2001]; *Matter of Brownstone*, 191 AD2d 167, 168 [1st Dept 1993]). This Court has consistently held that "[t]he presumption of the benefit of public access to court proceedings takes precedence, and sealing

of court papers is permitted only to serve compelling objectives, such as when the need for secrecy outweighs the public's right to access" (*Matter of East 51st St. Crane Collapse Litig.*, 106 AD3d 473 [1st Dept 2013] [internal quotation marks omitted]; *Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191-192 [1st Dept 2010]). The requisite court rule, 22 NYCRR 216.1(a), states as follows: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof." Here, the court did not specify the grounds for sealing the record, nor did it issue a "finding of good cause." Accordingly, in keeping with the strong public interest of openness in court proceedings, we direct that the record be unsealed (*see Schulte Roth & Zabel, LLP v Kassover*, 80 AD3d 500, 502 [1st Dept 2011] *lv denied* 17 NY3d 702 [2011]; *Gryphon Dom. VI, LLC*, 28 AD3d at 323-326).

Respondent's references to matters dehors the record have not been considered (*see Vick v Albert*, 47 AD3d 482, 484 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]), with the exception of her reference to Colorado's official court documents, judicial notice of which is appropriate (*see Assured Guar. [UK] Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 80 AD3d 293, 303 [1st Dept 2010],

affd 18 NY3d 341 [2011]).

Accordingly, the order of the Supreme Court, New York County (Larry Stephen, J.), entered on or about March 7, 2013, which compelled respondent to testify before the District Court of Arapahoe County, Colorado, in a criminal proceeding against petitioner, should be affirmed, without costs. The Clerk is directed to unseal the record.

All concur except Acosta and Saxe, JJ. who dissent in an Opinion by Saxe, J.

SAXE, J. (dissenting)

The motion court was wrong to grant the CPL 640.10 petition and issue a subpoena requiring respondent to appear before the Arapahoe County District Court in Colorado. New York's public policy, as reflected in this state's Shield Law (Civil Rights Law § 79-h[b]), is violated when a court of this state directs a reporter to appear in another state, where the purpose of requiring her appearance is to obtain from her the identity of her confidential sources, and where there is a substantial possibility that the demanding court will issue such a directive. I therefore dissent from this Court's affirmance of that order.

Petitioner James Holmes is currently being charged in the District Court of Arapahoe County, Colorado, with 166 felony charges, including 24 counts of first degree murder (*see People of the State of Colorado v Holmes*, case No. 2012-CR-1522 [Dist Ct, Arapahoe County, Colorado]), arising out of the shooting massacre at a movie theater in Aurora, Colorado, during a midnight showing of Batman, The Dark Knight Rises, on July 20, 2012. Petitioner obtained from the District Court, on July 23, 2012, an order limiting pretrial publicity, which directed the parties and law enforcement officials to refrain from disseminating any information that would have a substantial likelihood of prejudicing the criminal proceeding. That same

day, Colorado law enforcement officials executed a search warrant pursuant to which the Aurora police department seized a package that petitioner had sent to his psychiatrist before the shooting.

On July 25, 2012, FoxNews.com published an article, written by respondent Jana Winter, revealing details about the contents of the seized package. The article was entitled "Exclusive: Movie massacre suspect sent chilling notebook to psychiatrist before attack." According to the article, the reporter had two law enforcement sources. One of them reportedly told her that petitioner mailed a notebook "'full of details about how he was going to kill people' to a University of Colorado psychiatrist before the attack." That source reportedly said that "[t]here were drawings of what he was going to do in it -- drawings and illustrations of the massacre." The article also reported that the spiral-bound notebook had drawings of "gun-wielding stick figures blowing away other stick figures." Both of respondent's sources reportedly indicated that the intended recipient of Holmes's notebook was a professor who treated patients at a psychiatry outpatient facility.

Later that same day, July 25, 2012, petitioner moved the District Court for an order enforcing compliance with the pretrial publicity order, citing the leak of information by the two unnamed law enforcement officials mentioned in respondent's

article. The District Court granted petitioner's motion, directed the District Attorney and law enforcement agencies to immediately comply with the pretrial publicity order, and, again, prohibited them from disseminating information. The District Court also granted petitioner's motion to seal the package, and directed the prosecution to destroy any copies.

On October 2, 2012, petitioner moved the District Court for sanctions to be imposed upon Colorado law enforcement officials for violating the pretrial publicity order "by leaking privileged and confidential information to the media concerning the contents of a package that [petitioner] sent to his treating psychiatrist." The District Court conducted an evidentiary hearing to determine petitoner's motion for sanctions, at which 14 law enforcement officials testified that they either partially viewed the contents of the notebook inside the package that petitioner sent to his psychiatrist, or they heard conversations about its contents. None of the law enforcement witnesses admitted to providing information about the notebook's contents to the media.

On January 17, 2013, petitioner moved the District Court for a certificate to compel respondent to testify and "produce to the Court her notes from her conversations with sources mentioned in her article," pursuant to Colorado's enactment of the Uniform Act

to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings (Colo Rev Stat § 16-9-201 *et seq*.). Petitioner argued that respondent was the only person who could identify the two law enforcement agents who violated the pretrial publicity order by leaking information about the notebook's contents to the media, and, thereafter, committed perjury by denying as much. On January 18, 2013, the District Court granted petitioner's motion and issued a certificate compelling respondent "to spend three days in travel and testimony in the" criminal proceeding. The certificate explained that petitioner's "counsel has used all available means to determine which law enforcement agent may have violated [the pretrial publicity order]. As none of these efforts have revealed the source of the information in [respondent]'s article, [respondent] has become a material and necessary witness in this case." The court also reasoned that the alleged violation of the pretrial publicity order "is a serious issue" because the information about "the package contents has received significant public attention that has implicated [petitioner]'s constitutional rights to a fair trial, to a fair and impartial jury, and to due process."

Petitioner then proceeded with the second part of the procedure dictated by the Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings: he

commenced this special proceeding pursuant to CPL 640.10(2) seeking a subpoena ordering respondent to appear before the District Court of Arapahoe County, Colorado, "as a material witness to give testimony concerning the intentional violation of [the pretrial publicity order]" and "to produce to that court, her notes from her conversations with the two law enforcement sources mentioned in her article." The motion court, rejecting as irrelevant respondent's claim that the information sought from her was privileged, granted the petition.

I do not dispute the propriety of the Arapahoe County District Court's issuance of the necessary certificate pursuant to the Uniform Act to Secure the Attendance of Witnesses from Without the State in Criminal Cases, because its task was limited to finding that respondent's testimony was "material and necessary" to petitioner's defense in the criminal prosecution against him (*see* CPL 640.10[2]). However, the determination in this state required the motion court to not only confirm the materiality and necessity of the requested evidence, but also to determine that respondent would not suffer "undue hardship" (*id.*). The motion court's analysis on that point was based entirely on issues of travel costs and accommodations; it did not consider respondent's assertion that she relies upon confidential sources for her livelihood, and that her sources would not speak

to her if she divulged their identities. This aspect of her argument was treated as part and parcel of the privilege issue, which, the motion court found, was not within its purview to consider, citing *Matter of Codey* (*Capital Cities, Am. Broadcasting Corp.*) (82 NY2d 521 [1993]).

Similarly, the majority regards the issue before this Court as limited to materiality, relevance, and the hardship of the trip, and asserts that privilege is irrelevant for this determination, relying on *Matter of Codey* (*id.*). It reasons that respondent is entitled to assert the privileges provided by the Shield Law when she appears before the Colorado District Court, and distinguishes compelling respondent to testify from compelling her to divulge the identity of her sources. This approach ignores both the practical reality of respondent's position, and the importance of our state's public policy in favor of protecting the identity of investigative reporters' confidential sources.

It should be acknowledged at the outset that the central reason respondent's presence was sought, and was ordered, was to identify the law enforcement personnel who disclosed the notebook and its contents to respondent -- that is, respondent's confidential sources. This fact is crucial here, and it creates a crucial distinction with *Matter of Codey*.

Importantly, in *Matter of Codey*, the evidence sought through CPL 640.10(2) was *not* the identity of a confidential source. The respondent's news stories considered there concerned an alleged point-shaving scheme, which were based on information gleaned from confidential sources; the broadcast included excerpts of an interview with an unidentified player whose anonymity was preserved in the broadcast. However, that unidentified player then agreed to come forward and to cooperate with the Mercer County, New Jersey, Grand Jury investigation. The player acknowledged that he had been interviewed by respondent's reporter, but said he was unable to recall all of the information that he had related during the 30-minute videotaped exchange. Accordingly, the New Jersey Grand Jury sought the videotaped outtakes and reporter's interview notes, which became the subject of the special proceeding in this state (82 NY2d at 524). There is no indication in the decision that the Mercer County Grand Jury was seeking information revealing the identities of any other confidential sources for the respondent's news stories, beyond the athlete whose identity they knew.

Despite the apparently definitive statements by the Court of Appeals in *Matter of Codey* that "the privileged status of the evidence is not a proper factor for consideration under CPL

640.10(2)" (82 NY2d at 524), that "the Appellate Division's decision to consider the privileged nature of the evidence sought in the New Jersey proceeding was error" (*id.* at 528), and that nothing in the language of CPL 640.10(2) justified an inquiry into whether the evidence sought might be privileged (*id.* at 528-530), the Court, importantly, then made a point of announcing that it was *not* then deciding the question of whether, in another case, "a strong public policy of this State, even one embodied in an evidentiary privilege, might justify the refusal of relief under CPL 640.10 even if the 'material and necessary' test set forth in the statute is satisfied" (*id.* at 530 n 3). It is this pronouncement that the majority ignores and which forms the basis of our disagreement.

The provisions of New York's Shield Law (Civil Rights Law § 79-h[b]) reflect just such a strong public policy. The provision is entitled "Exemption of professional journalists and newscasters from contempt," and it specifically creates an "[a]bsolute protection" for "the identity of the source" of any published news. The Court of Appeals recognized the paramount importance of the protection of journalists' confidential sources in *Matter of Knight-Ridder Broadcasting v Greenberg* (70 NY2d 151, 155-156 [1987]), explaining that the Legislature's grant of absolute protection reflected a determination of public policy of

this state.

In a case with many similarities to the matter before us, *Matter of Beach v Shanley* (62 NY2d 241 [1984]), a grand jury was seeking to determine whether the contents of a sealed report had been disclosed to the reporter by a grand juror or a public official or public employee in violation of Penal Law § 215.70. (*id.* at 247). The Court of Appeals quashed the grand jury subpoena that sought the testimony of the reporter as to the identity of the person who had leaked a grand jury report, explaining that New York's Shield Law "precludes any body from having a reporter held in contempt, fined, or imprisoned for refusing to disclose news or the identity of a source, regardless of whether the information is highly relevant to a governmental inquiry" (*id.* at 251). New York's Shield Law applied to protect the identity of reporters' confidential sources, "even when the act of divulging the information [to the reporter] was itself criminal conduct" (*id.* at 252).

A comparable situation is presented here. In both cases, the focus of the inquiry for which the reporter's testimony was material and necessary was the identity of a person who leaked confidential information. The Court of Appeals' reliance on the important public policy behind the absolute privilege that covers the identity of confidential sources is as applicable here as it

was in *Beach*, and the majority fails to mention, let alone distinguish, this applicable precedent.

The majority says respondent may only raise the claim of journalists' privilege and the protection of confidential sources in the Colorado District Court. However, unlike New York, Colorado does not recognize an absolute privilege for journalists' confidential sources. Rather, its statute provides only for a qualified privilege (*see* Colo Rev Stat § 13-90-119). A journalist's privilege in Colorado may be overcome if the person requesting information can prove the following by a preponderance of the evidence:

> "(a) That the news information is directly relevant to a substantial issue involved in the proceedings; (b) That the news information cannot be obtained by any other reasonable means; and (c) That a strong interest of the party seeking to subpoena the newsperson outweighs the interests under the [F]irst [A]mendment to the United States [C]onstitution of such newsperson in not responding to a subpoena and of the general public in receiving news information" (*id.* at § 13-90-119[3]).

So, although respondent may be entitled to raise the claim of privilege when she appears before the Colorado District Court, pursuant to the subpoena being affirmed by this Court, that court is extremely unlikely to allow her to protect her confidential sources. The applicable standard under the Colorado statute is limited, and the Colorado District Court has already determined,

when it granted petitioner's motion for a certificate to compel respondent to testify, *that it considers respondent's identification of her confidential sources to be important, relevant and necessary for the protection of petitioner's constitutional trial rights*. Having already determined this, the Colorado court is unlikely to conclude that what it views as petitioner's strong interest in protecting his constitutional rights is outweighed by respondent's interests "under the [F]irst [A]mendment to the United States [C]onstitution . . . in not responding to a subpoena and of the general public in receiving news information" (Colo Rev Stat § 13-90-119[3][c]).

In emphasizing that the facts presented "do not establish with absolute certainty that the Colorado District Court will require the disclosure of confidential sources," the majority fails to acknowledge the *near* certainty that the Colorado court will reject respondent's privilege claim and compel her to provide the identities of her confidential sources, leaving her to face either a contempt order and incarceration, or the loss of her reputation as a journalist. At that point, it will be too late for this Court to address whether respondent is protected by our Shield Law.

The majority also asserts that "[c]ompelling respondent to testify is distinguishable from compelling her to divulge the

identity of her sources." While that assertion may be true in general, the distinction is not applicable here. The *only* information petitioner seeks from respondent, the *only* reason she has been compelled to appear and testify, is so that she can disclose the identities of her confidential informants.

I conclude that New York's expressed public policy in favor of providing absolute protection for reporters, so that they are not required to disclose the identity of their sources, is paramount here, and requires the rejection of petitioner's application. Even if we assume that there might be some situations in which that protection should be permitted to give way to a petitioner's right to a fair trial, this is not such a case. The identity of respondent's confidential sources is likely to be irrelevant to petitioner's defense at trial, because given the number of police department employees who knew about petitioner's notebook, it is quite likely that respondent's sources are not the ones the prosecutor will call to testify regarding the notebook. Even if a confidential source turned out to be a prosecution witness, and petitioner could use that individual's violation of the court's gag order to impeach his or her credibility, impeachment of a witness regarding the notebook and its contents is at best a secondary issue in the murder prosecution. The public policy of protecting a reporter's

confidential sources and preventing her from being held in contempt and jailed for failure to disclose the information, should not be ignored merely so that petitioner is provided with grounds for impeaching the credibility of two individuals who might be called to testify regarding a secondary piece of evidence, particularly since the contents of the notebook speak for themselves.

This is exactly the type of case contemplated by the third footnote in *Matter of Codey*, where "a strong public policy of this State, . . . embodied in an evidentiary privilege, . . . justif[ies] the refusal of relief under CPL 640.10 even [though] the 'material and necessary' test set forth in the statute is satisfied" (82 NY2d at 530 n 3). Public policy requires the denial of petitioner's application for a subpoena.

I must add that, in my view, respondent also established that undue hardship would result by requiring her testimony in the Colorado matter, which provides an additional justification for denying petitioner's application. Respondent asserts, without challenge, that she relies upon confidential sources for her livelihood, and that her sources would not speak to her if she divulged the identity of a confidential source. The hardship to respondent if she is compelled to testify is far more than three days of travel, a hotel stay, and missing work; it is

nothing short of undermining her career, the very means of her livelihood. Nothing in CPL 640.10(2) limits the concept of "undue hardship" to the unpleasantness or cost of travel; here, the probable result of incarceration or the loss of her livelihood is far more of a "hardship" than those minor considerations.

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

ENTERED: AUGUST 20, 2013

DEPUTY CLERK