SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 3, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Andrias, DeGrasse, Richter, Clark, JJ.

9030 Wolfgang Doerr, Index 103840/10
Plaintiff-Respondent,

-against-

Daniel Goldsmith,
Defendant,

Julie Smith,
Defendant-Appellant.

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Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellant.

Gregory W. Bagen, Brewster, for respondent.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered September 8, 2011, which denied defendant Julie Smith's motion for summary judgment dismissing the complaint as against her, affirmed, without costs.

This accident occurred while plaintiff was riding his bicycle around the Central Park loop road. Plaintiff had passed the intersection where cars merge onto Seventh Avenue at the southernmost part of the loop, but he was not near one of the designated areas for pedestrians to cross into the interior of

the park. He observed defendant Smith on the left side of the loop and defendant Goldsmith, Smith's boyfriend, on the right side, roughly 30 to 50 yards ahead of him. Plaintiff testified that Goldsmith "was holding a dog in a manner that he was almost hugging the dog, so he had his arm around the chest and the neck of the dog" and that Smith was "slightly bending down and clapping her hands on her upper thighs." Interpreting Smith's actions to be a signal to the dog (which was hers) to come to her, plaintiff screamed out, "Watch your dog." Plaintiff then saw the dog in the middle of the road, but was unable to avoid colliding with it and being propelled off the bicycle. Defendants do not materially dispute plaintiff's recounting of the incident. Plaintiff seeks to recover against defendants on a theory of negligence. He does not claim that the dog's actions were a result of any vicious propensities of which defendants may have been aware.

Until very recently, the Court of Appeals had held that a person who is injured in an accident involving an animal can never have a claim for negligence against the animal's owner, but can only recover in strict liability on a showing that the owner knew of the animal's vicious propensities (*see Petrone v Fernandez*, 12 NY3d 546 [2009]; *Bard v Jahnke*, 6 NY3d 592 [2006]). In *Bard*, the plaintiff, who was doing carpentry work in a dairy

barn located on the defendant's farm, was injured when a bull charged him. The bull had been permitted by the defendant to roam the farm and to breed with cows that had not been impregnated through artificial insemination. The Court rejected the plaintiff's argument that the defendant was negligent in permitting a breeding bull, with a tendency to express its dominance through acts of aggression, to roam freely. In *Petrone*, the Court refused to entertain a negligence claim asserted by a mail carrier who was injured while running away from an unrestrained Rottweiler that had begun to chase her. The rule articulated in *Bard* and affirmed in *Petrone* is not without controversy. Indeed, Judge Pigott concurred in the holding in *Petrone* "on constraint" of *Bard* (12 NY3d at 551), and endorsed Judge Robert Smith's dissent in that earlier case (*id.* at 552). In Judge Smith's dissent in *Bard*, he stated that the holding that no negligence cause of action can ever lie in these cases "leaves New York with an archaic, rigid rule, contrary to fairness and common sense, that will probably be eroded by ad hoc exceptions" (6 NY3d at 599, R.S. Smith, J., dissenting).

Because of the *Bard/Petrone* rule, it had been virtually impossible for people injured by animals to recover if they could not establish the defendants' knowledge of the animals' vicious propensities. Indeed, even if the injury was not caused by

"vicious" behavior, no remedy existed. Thus, in *Lista v Newton* (41 AD3d 1280 [4th Dept 2007]), the Fourth Department refused to entertain a negligence claim where the plaintiff's ladder was knocked down when the defendant's horse ran into a fence the plaintiff was installing. In *Hastings v Sauve* (94 AD3d 1171 [3d Dept 2012]), the plaintiff's car struck a cow that had wandered onto the highway from an adjacent farm owned by the defendant, and the Third Department rejected her negligence claim. And in *Egan v Hom* (74 AD3d 1133 [2d Dept 2010]), the Second Department awarded the defendant summary judgment dismissing the negligence claim that was based on the plaintiff's having become entangled in the chain of a dog that was running around on the defendant's property.

Recently, however, the Court of Appeals revisited *Bard* and *Petrone* when it decided an appeal of *Hastings* (94 AD3d 1171). In reversing the grant of summary judgment to the defendants, the Court recognized that an accident caused by an animal's "aggressive or threatening behavior" is "fundamentally distinct" from one caused by an animal owner's negligence in permitting the animal from wandering off the property where it was kept (21 NY3d 122, 125 [2013]). The Court stated that the consequence of a blanket rule against negligence claims in cases where animals displayed no vicious propensities "would be to immunize

defendants who take little or no care to keep their livestock out of the roadway or off of other people's property" (*id.*).

We recognize that the *Hastings* Court did not decide whether to apply the holding to dogs at that time. However, that should not be an impediment to denying summary judgment in this case. That is because this case is of an entirely different ilk than *Hastings*, *Bard and Petrone*. It is not about the particular actions of an animal that led to a person's injury. Rather, it is about the actions of a person that turned an animal into an instrumentality of harm. Here, the dog was in the control of defendants at all times in the split second before the accident occurred. Had Smith not called the dog, and Goldsmith not let it go, plaintiff would have ridden past them without incident.

Defendants' actions can be likened to those of two people who decide to toss a ball back and forth over a trafficked road without regard to a bicyclist who is about to ride into the ball's path. If the cyclist collided with the ball and was injured, certainly the people tossing the ball would be liable in negligence. Simply put, this case is different from the cases addressing the issue of injury claims arising out of animal

behavior, because it was defendants' actions, and not the dog's own instinctive, volitional behavior, that most proximately caused the accident.

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

ANDRIAS, J. (dissenting)

We reversed the order denying defendant Smith's motion for summary judgment dismissing the complaint on the ground that New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a domestic animal (*see* 105 AD3d 534 [1st Dept 2013]). Rather, the sole viable claim is for strict liability, and here there is no evidence that defendant had knowledge that her dog had a propensity to interfere with traffic (*see Petrone v Fernandez*, 12 NY3d 546, 550 [2009]; *Bard v Jahnke*, 6 NY3d 592, 599 [2006]).

Plaintiff moved for reargument or leave to appeal to the Court of Appeals on the ground that, subsequent to our decision, the Court of Appeals changed the law in *Hastings v Sauve* (21 NY3d 122 [2013]). The majority, upon the grant of reargument, would recall our prior order and affirm the order denying defendant Smith's motion for summary judgment. Because I believe that our original determination was in all respects correct, and that plaintiff has not demonstrated that we overlooked or misapprehended any applicable fact or principle of law, or that there had been a change in the law that is applicable to this case, reargument should not have been granted. Accordingly, I dissent.

In *Hastings*, the plaintiff was injured when the van she was

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Richard T. Andrias
Leland G. DeGrasse
Helen E. Freedman
Sallie Manzanet-Daniels, JJ.

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10210N-
10211N-
10212N
Index 652367/10

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AQ Asset Management LLC, etc., et al.,
Plaintiffs-Respondents,

-against-

Michael Levine, etc.,
Defendant-Respondent,

Habsburg Holdings Ltd., et al.,
Defendants-Appellants.

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Michael Levine, etc.,
Interpleader Counterclaimant-Respondent,

-against-

AQ Asset Management LLC, etc., et al.,
Interpleader Defendants,

Habsburg Holdings Ltd., et al.,
Interpleader Defendants-Appellants.

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Habsburg Holdings Ltd. et al.,
Fourth-Party Plaintiffs-Appellants,

-against-

Michael Levine, etc.,
Fourth-Party Defendant-Respondent.

[And a Fifth-Party Action]
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Habsburg Holdings Ltd. and Osvaldo Patrizzi appeal from the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about August 3, 2012, which (1) denied their motion for partial summary judgment (a) declaring their entitlement to payment from Michael Levine, as escrow agent, of the remaining cash proceeds of the sale of their shares in the Antiquorum entities to Artist House Holdings, Inc., and (b) declaring invalid the Stock/Sales Proceeds Distribution Agreement; and (2) denied preliminary injunctive relief to them (a) requiring Evan Zimmermann and Antiquorum S.A., or, alternatively, Levine, to pay into court $2 million previously disbursed by Levine from the escrow account; (b) enjoining AQ Asset Management LLC and Antiquorum, S.A. from disbursing any additional proceeds from the sale of certain inventory belonging to the entities; and (c) requiring Zimmermann to pay into court some $3.2 million paid to him by Artist House Holdings, Inc.; the order of the same court and Justice, entered on or about August 2, 2012, which granted the motion of Levine to quash a nonparty subpoena directed to Karastir LLC; the order of the same court and Justice entered on or about August 3, 2012, which granted the motion of AQ Asset Management LLC, Antiquorum, S.A., Antiquorum USA, Inc., and Zimmermann to quash a nonparty subpoena directed to TD Bank; and the order of the same court and Justice, entered August 17, 2012, which granted

Levine's motion pursuant to CPLR 8501 to require sellers to post $75,000 as security for costs.

Law Offices of Michael A. Haskel, Mineola (Michael A. Haskel, Brandon M. Zlotnick and Leonard Gekhman of counsel), and Kerry Gotlib, New York, for appellants.

Reitler, Kailas & Rosenblatt LLC, New York (Leo G. Kailas and David Cole of counsel), for AQ Asset Management LLC, Antiquorum, S.A., Antiquorum USA, Inc., and Evan Zimmermann, respondents.

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for Michael Levine, respondent.

MAZZARELLI, J.P.,

Fifth-party defendant Simon Leo Verhoeven and defendant Osvaldo Patrizzi were principals in a group of entities (the Antiquorum entities) that primarily engaged in the business of selling and trading antique time pieces. The Antiquorum entities were plaintiff Antiquorum, S.A., a Swiss corporation (ASA), plaintiff Antiquorum USA, Inc., a Delaware corporation (AUSA), nonparty C2C Time, Inc. and nonparty Antiquorum Auctioneers (Hong Kong) Ltd. In or about 2005, Verhoeven (whose stake in the Antiquorum entities was held through defendant Habsburg Holdings Ltd. [Habsburg], a separate entity), and Patrizzi, decided to sell their interests in the Antiquorum entities. Plaintiff Evan Zimmermann introduced them to a Japanese company that agreed to purchase all of the assets of the Antiquorum entities. Zimmermann is an attorney who Patrizzi asserts was his friend as well as his personal attorney. He further claims that Zimmermann was a legal advisor to the Antiquorum entities for several years prior to the subject transaction, representing the entities in contract and litigation matters and filing trademark applications. Zimmermann contends that his role in bringing the buyer to the attention of Verhoeven and Patrizzi was strictly as a broker. Verhoeven and Patrizzi, on the other hand, contend that Zimmermann at all times acted as their legal counsel. While

there is some question over what Zimmermann's role was, there is no real dispute that defendant-interpleader-plaintiff-fourth party defendant fifth-party plaintiff Michael Levine, also an attorney, provided counsel to Habsburg and Patrizzi in structuring the deal and advising them how to proceed.

Levine prepared a share purchase agreement (SPA) which identified Habsburg and Patrizzi as the "Stockholders" in the Antiquorum entities. The SPA contemplated a sale of 100% of the stock of the Antiquorum entities. However, the parties later amended the agreement to reflect the sale of only half the shares in the Antiquorum entities and to change the identity of the buyer from Yokohama Information Technology Company Limited to Artist House Holdings, Inc. (AH). The amended agreement provided that "[o]n the Closing Date, the Stockholders shall deliver all stock certificates in their possession evidencing such stock ownership . . . to the Escrow Agent." Upon the transfer of the shares, AH was to "deliver to the Stockholders," by way of payment to the escrow agent, the deal's $30 million cash purchase component. The agreement further provided that "the Escrow Agent shall only release funds to such shareholders of the [various Antiquourum entities] as deliver its or his shares to the Escrow Agent." Levine was designated by the agreement as the escrow agent.

The SPA included a schedule setting forth the amount of stock held by each shareholder in the various entities. The schedule provided that Habsburg owned all 2,100 shares of ASA, and that, of the 49 shares making up AUSA, ASA held 25 and Patrizzi held 24. It further stated that C2C Time, Inc. was comprised of 100 shares, 35 of which were owned by Patrizzi, 35 by AUSA and 30 by ASA. Finally, the SPA represented that the fourth entity being sold, Antiquorum Auctioneers (Hong Kong) Ltd., was wholly owned by ASA.

Patrizzi and Zimmermann entered into a separate agreement which is at issue. That agreement, known as the Stock/Sales Proceeds Distribution Agreement (SPDA), was related to an arrangement which Patrizzi had entered into with Yokohama (and to which AH succeeded) pursuant to which, in exchange for consulting with the buyer after the SPA was performed, Patrizzi would become an owner of 50% of whichever entity acquired the Antiquorum entities. The SPDA further reflected the fact that inventory belonging to the Antiquorum entities was not subject to the SPA. Pursuant to the SPDA, Patrizzi agreed that the new shares earned by him for consulting would be transferred by him to a new entity that he would own equally with Zimmermann. Patrizzi also agreed to evenly share the proceeds from any inventory sales with Zimmermann. The SPDA was drafted by Levine. It contained an

express statement that Levine would be paid part of Zimmermann's share if the SPA went forward. Recognizing his role in advising Patrizzi with respect to the SPA and the SPDA, Levine included the following provision in the agreement:

> "It is hereby understood and agreed by the parties that Michael L. Levine, Esq. has drafted this Agreement, without compensation, as an accommodation to the parties and without representing either party in the negotiation or execution of this Agreement. The parties acknowledge that Michael Levine, Esq. has acted as counsel for both Zimmermann and Patrizzi in the past, and has a personal economic interest in a portion of the distribution of the Patrizzi Funds to Zimmermann. Patrizzi and Zimmermann each acknowledge that they have been advised by Michael L. Levine, Esq. that a conflict of interest exists, have fully considered the same, and have elected to have Michael L. Levine, Esq. draft this Agreement notwithstanding the same. Patrizzi and Zimmermann further specifically acknowledge and represent that neither of them have received any legal advice from, nor are relying upon any information provided by, Michael Levine, Esq., and have each consulted with (and been represented by) independent counsel."

The purchase by AH of the Antiquorum shares closed on or about January 16, 2006. Although AH tendered the full purchase price, Habsburg only tendered 1,268 of its shares in ASA, the remaining shares having been frozen by Swiss authorities in connection with a criminal investigation of Habsburg and Verhoeven. Shortly thereafter, Levine, as escrow agent, received

written instructions from Habsburg and Patrizzi about how to disburse the sale proceeds, and did so without objection from AH or any other party. The instructions included a directive that Levine retain a sum of money in escrow pending resolution of the legal questions surrounding the ASA shares that could not be tendered.

This action was commenced against Habsburg and Patrizzi and Levine, in his capacity as escrow agent, by AQ Asset Management LLC, (AQ) as assignee of AH, and by ASA, AUSA and Zimmermann. AH and Zimmermann had gained control over ASA and AUSA from Habsburg and Patrizzi at an ASA general shareholders meeting held in 2007, after the closing. Although AH held only 50% of the shares of ASA, it and Zimmermann relied on the SPDA's purported grant to Zimmermann of the right to vote half of the other 50% of the shares in that entity. Using this power, AH and its affiliates ousted all prior board members of ASA, including Verhoeven, and stripped Patrizzi of his role in ASA. They elected a new board, which included Zimmermann. In the complaint, ASA and AUSA alleged that Habsburg and Patrizzi wrongfully claimed to control the shares in those entities when entering into the SPA, and that any payment for the sale of those shares should have been made to ASA and AUSA, not to Habsburg and Patrizzi.

AQ claimed in the complaint that Habsburg failed to tender

all of the shares in the Antiquorum entities required by the SPA and sought reimbursement from Habsburg for the value of those shares. Zimmermann asserted a claim against Habsburg related to those shares in ASA that he expected to receive in connection with the SPDA. Finally, ASA, as an owner of AUSA, C2C Time, Inc. and Antiquourum Auctioneers (Hong Kong) Ltd., and AUSA, as an owner of C2C Time, Inc., sought to be paid for the value of its shares in those entities.

Levine answered the complaint, and asserted an interpleader counterclaim which named plaintiffs and defendants as interpleader defendants. Habsburg and Patrizzi then commenced a "fourth-party action" against Levine, claiming generally that he acted in bad faith in ignoring their instructions to pay them what they contended they were owed out of escrow. Patrizzi further claimed that, after ASA deposited $2 million into escrow, representing what Patrizzi stated were the proceeds of a sale of inventory, Levine paid the money back to ASA or paid it to Zimmermann, honoring Zimmermann's representation, disputed by Patrizzi, that the $2 million belonged to him under the SPDA. Habsburg and Patrizzi also asserted claims against plaintiffs in which they sought damages and equitable relief related to the various transactions. Specifically as against Zimmermann, Habsburg and Patrizzi asserted that he breached a duty of loyalty

to them by negotiating for himself, and Levine, shares in the new entity that acquired the Antiquorum entities, as well as a share in the inventory proceeds, and that he did so by interpreting agreements in a manner that benefited only himself, and that took advantage of Patrizzi's limited knowledge of English.

Finally, Levine commenced a fifth-party action against Patrizzi and Verhoeven and two others. The pleading was based on the allegation that Patrizzi and Verhoeven committed fraud by having represented to Levine, after the January 2006 closing, that Patrizzi owned, and was entitled to payment for, 273 shares in ASA. Levine asserted that Patrizzi had divested himself of any shares in ASA five years earlier.

This appeal brings up for review four separate orders arising out of four separate motions. The first motion was brought by Habsburg and Patrizzi by order to show cause in which they sought partial summary judgment directing Levine to disburse to them from escrow all amounts due and owing to them under the SPA. The motion further sought a declaration in Patrizzi's favor that the SPDA was null and void. In addition, the motion asked for a preliminary injunction requiring Zimmermann and/or ASA and/or Levine to pay into court the $2 million allegedly representing inventory proceeds; compelling Levine and Zimmermann to turn over to Habsburg and Patrizzi all files relating to the

escrow account and their representation of Habsburg, Patrizzi, ASA and AH; preventing ASA and AQ from disposing, transferring or encumbering any of the ASA inventory; and directing Zimmermann to pay into court the sum of approximately $3.2 million that Habsburg and Patrizzi allege was wrongfully paid to him by AH shortly after the closing.

In arguing that Levine was wrong to give credence to any claim on the escrowed monies other than their own, Habsburg and Patrizzi noted that the only parties to the agreement who were entitled to be paid the sales proceeds were themselves, as the "Stockholders" in the entities being sold. They asserted that no other person or entity delivered stock into escrow, so no other person or entity is entitled to payment for the shares that were tendered. In opposition, plaintiffs and Levine asserted that many of the shares which Habsburg and Patrizzi placed in escrow were not actually owned by them. The shares in question were either ASA shares, or shares of the other entities which were owned by ASA. Plaintiffs and Levine described a series of transactions between Habsburg and Patrizzi, and ultimately ASA, with regard to a minority share of ASA stock. Initially, they contended, Habsburg owned 80% of ASA and Patrizzi owned the remaining 20%. However, through a series of purchases and other transactions, Habsburg ended up with 87% of the shares, Patrizzi

with 0%, and ASA with 13% of the company in treasury shares. Thus, they contend, neither Habsburg or Patrizzi ever had the right to "sell" those treasury shares. According to plaintiffs and Levine, ASA was entitled to payment for those 13% of the total shares, not Habsburg and not Patrizzi. Plaintiffs and Levine further argued that Habsburg lost its right to sell any of the ASA shares owned by it when it transferred them to Levine, because it lost those shares as the result of a capital call which took place in January 2008, after the closing of the sale to AH.

Zimmermann submitted an affidavit denying that he ever served as counsel to Habsburg or Patrizzi in connection with the sale to AH and stating that he acted strictly as a broker. He further asserted that the $2 million that had been placed in escrow, and which Habsburg and Patrizzi claim represented inventory proceeds, was transferred to Levine in error and had nothing to do with inventory. He disclaimed any entitlement to that money. Zimmermann further stated that Habsburg and Patrizzi's request for an injunction against alienation of inventory was moot, since no more inventory existed. Indeed, Zimmermann suggested that Habsburg and Patrizzi sold all of the inventory while they were still in control of the Antiquorum entities. Finally, Zimmermann represented that any monies which

he received from AH after the closing were in no way paid to him improperly, since they merely compensated him for his success in his capacity as a broker.

Levine also submitted an affidavit in opposition to the motion. He reiterated that Zimmermann had nothing to do with the drafting of the SPDA, and he further disputed the facts underlying Patrizzi's position that he was duped into signing that document and that the true economic impact of the document was concealed from him. Levine further asserted that Patrizzi was fully aware that Zimmermann was exercising his purported rights to vote shares in ASA and did not voice any objection. Finally, Levine stated that, notwithstanding any real or perceived conflict of interest on his or Zimmerman's part in connection with the sale of Habsburg's and Patrizzi's interests in the Antiquorum entities, no real harm inured to Habsburg and Patrizzi because they were represented by independent counsel. In reply, Patrizzi acknowledged that he had negotiated to sell his shares in ASA, but stated that the transactions were never consummated.

The second motion at issue was brought by Levine in connection with the fourth-party action commenced against him by Habsburg and Patrizzi. Levine sought an order requiring Habsburg and Patrizzi to post a bond securing his costs pursuant to CPLR

8501(b). He argued that security was necessary because Habsburg and Patrizzi both resided in foreign jurisdictions. Further, pursuant to CPLR 8503, he sought security in excess of the mandatory $500, in the amount of $75,000. He argued that this amount was appropriate because Habsburg and Patrizzi had engaged in frivolous litigation against him, for which he would be entitled to fees under the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130.1-1. He further relied on the attorneys' fees provision in the SPA.

The final two motions arose out of Habsburg's and Patrizzi's service of nonparty subpoenas on two banks, TD Bank and Karastir LLC. The TD Bank subpoena sought records of transactions in Zimmermann's escrow account, to identify payments made and/or received by Zimmermann in connection with the transaction. The subpoena to Karastir sought records regarding an allegedly improper transfer to Karastir of some $900,000 from the monies held by Levine. AQ and Zimmermann moved to quash the TD Bank subpoena. Levine moved to quash the Karastir subpoena. They moved on the grounds that the subpoenas were premature, discovery was stayed and the subpoenas were overbroad. Habsburg and Patrizzi argued in opposition that they had a right to take nonparty discovery and that movants lacked standing to quash subpoenas directed to nonparties seeking documents of nonparties.

Supreme Court denied the motion for partial summary judgment. The court found that issues of fact precluded summary judgment on the claim for the remaining purchase price. With regard to the SPDA, the court found that issues of fact existed regarding Zimmermann's role in the transaction and whether Patrizzi consulted with independent counsel in a manner that relieved Zimmermann of any duty of impartiality towards Patrizzi. The court ordered the provision of various books and records to Habsburg and Patrizzi, but otherwise denied them any preliminary injunctive relief.

In a separate order, the court granted Levine's motion pursuant to CPLR 8501 and 8503 and required Habsburg and Patrizzi to either pay into court, or file a surety bond in the amount of, $75,000, to secure costs and fees Levine claimed he would be awarded in connection with the fourth-party claims. Finally, in two separate orders, the court quashed the subpoenas on TD Bank and Karastir.

In arguing that they are entitled to the money still in Levine's escrow, Habsburg and Patrizzi focus on the plain language of the SPA. The SPA, they point out, identifies them as the only "Stockholders," and provides quite simply that the "Stockholders" are to transfer 50% of the stock in the Antiquorum entities to AH, and that in exchange AH is to pay $30 million

cash to the Stockholders. AQ, ASA and AUSA argue in opposition that this interpretation ignores other language in the SPA, specifically section 13.4.2.B. which provides, in relevant part:

> "Escrow Agent shall next pay any remaining funds in such manner as is reflected on the written Disbursement Instruction executed by each Stockholder and delivered to Escrow Agent; provided, however, that the Escrow Agent shall only release funds to such shareholders of the Company as deliver its or his shares to the Escrow Agent or the Transfer Agent when the same are actually delivered in accordance with the provisions of this Stock Purchase Agreement."

AQ, ASA and AUSA contend that this language indicates that only the actual shareholders in the entities that were sold are entitled to payment. Because they claim that there is a question whether Habsburg and Patrizzi actually owned any shares in ASA at the time of the sale, they assert that Habsburg and Patrizzi should not have been awarded summary judgment.

"It is well settled that our role in interpreting a contract is to ascertain the intention of the parties at the time they entered into the contract" (*Evans v Famous Music Corp.*, 1 NY3d 452, 458 [2004]). Further, in interpreting any agreement, it is "important to read the document as a whole to ensure that excessive emphasis is not placed upon particular words or phrases" (*South Rd. Assoc, LLC v International Bus. Machs. Corp.*, 4 NY3d 272, 277 [2005]). The parties to the SPA were Habsburg

and Patrizzi, as sellers, and AH, as buyer. Notably, none of the Antiquorum entities themselves were parties. The SPA reflects that it was the intention of the parties that Habsburg and Patrizzi, as the "Stockholders" of the Antiquourum entities, would effectuate the transfer to AH of 50% of the shares constituting those entities, and that AH would pay them consideration. The SPA was unconcerned with who technically owned the entities. Rather, it recognized that Habsburg and Patrizzi controlled the entities and that the instrument had the sole purpose of compensating them for relinquishing shares in the entities to AH.

Plaintiffs and Levine question whether Habsburg and Patrizzi had the right to transfer shares in ASA in the first place, because of the machinations they claim resulted in each of them losing any ownership interest in that entity. However, this ignores the overarching goal of the transaction and places too great an emphasis on the provision that "the Escrow Agent shall only release funds to such shareholders of the [Antiquourum entities]." In emphasizing that the "Stockholders" of the entities were Habsburg and Patrizzi, the SPA indicated that the legal niceties of who owned the shares in the entities was secondary to the fact that Habsburg and Patrizzi controlled the shares at the time of the transaction.

Further, there can be no question that AH received the benefit of its bargain. After all, in stripping Habsburg of any remaining interest in ASA, which Levine cites as the basis for depriving Habsburg of any of the remaining monies in escrow, AH voted the shares that it received under the SPA. Further, Levine's emphasis on Habsburg's failure to answer a capital call in 2008, which he contends divested it of any interest in ASA, is irrelevant. That is because the SPA plainly states that, upon tender of the 50% of shares "all obligations of the Stockholders shall be deemed discharged in full." At bottom, Levine, AQ, ASA and AUSA seek to enforce their own interpretation of an agreement to which they were not parties (except for Levine in his limited role as escrow agent), which was fully consummated, and which was carried out as intended. To permit the unraveling of the transaction would be to ignore the plain language of the SPA and also the notion that parties are free to contract as they wish and that courts should enforce those contracts as written (*see Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695 [1995]). Accordingly, we grant partial summary judgment to Habsburg and Patrizzi on their claim related to the remaining cash proceeds.

Turning to the SPDA, Patrizzi asserts that he should have been granted partial summary judgment invalidating it because it

violated the Code of Professional Responsibility DR 5-104 (22 NYCRR 1200.23), the relevant rule at the time, which limited an attorney's ability to enter into a business transaction with his or her client. He also argues that the SPDA is not supported by consideration. Zimmermann counters that DR 5-104 is irrelevant, because he was not Patrizzi's lawyer with regard to the sale of the Antiquorum entities.

Indeed, nowhere does the SPA refer to Zimmermann as Patrizzi's counsel or otherwise indicate that he was. Further, the correspondence between Zimmermann and Patrizzi concerning the transaction is inconclusive as to whether Zimmermann was advising Patrizzi or acting as his business partner. Likewise, it is impossible to conclude from this record that, as Patrizzi claims, Zimmermann had the special duty of an attorney based on his *former* representation of Patrizzi in unrelated matters. *Matter of Ioannou* (89 AD3d 245 [1st Dept 2011]), which Patrizzi cites, is inapposite. This Court stressed in that decision that whether DR-5-104 can be invoked based on an attorney's former representation of a client "will necessarily be a highly fact-specific inquiry" (89 AD3d at 250). In that matter, we held that

> "the circumstances rendered it imperative for respondent to comply with DR 5-104 (a) in entering into a transaction with this particular former client, given, among other things, the former client's relative lack of sophistication in business matters, the personal nature of the former professional relationship, the importance to the former client of the matter in which respondent represented him, and the fact that the former client had sought respondent's advice on a matter related to the former representation only about two weeks before respondent proposed the transaction" (*id.*).

Here, there are insufficient facts upon which to definitively decide, one way or the other, whether Zimmermann had an ethical duty as a lawyer to Patrizzi.

Patrizzi's argument that Zimmermann is not entitled to recover under the SPDA because his position in this litigation, if adopted, would render Patrizzi's proceeds from the sale of the Antiquorum entities far less than he anticipated when Zimmermann brought the deal to his attention, is academic, because, as discussed above, we have rejected Zimmermann's position. Further, there is no question that Zimmermann's work in fashioning the transaction in a manner whereby Patrizzi would retain an interest in the Antiquorum entities, as well as the inventory, constituted adequate consideration for the SPDA.

We further find that Patrizzi was not entitled to summary judgment invalidating Levine's claim to monies due him under the

SPDA. This is primarily due to the disclaimer contained in that document, pursuant to which the parties acknowledged that Levine had represented both Patrizzi and Zimmermann in the past, and that Levine had an economic interest in their business relationship. The disclaimer satisfies DR 5-104, insofar as it puts forth the conflict in writing, advises the parties to seek independent counsel, and obtains a written waiver of the conflict. *Schlanger v Flaton* (218 AD2d 597 [1st Dept 1995], *lv denied* 87 NY2d 812 [1996]), upon which Patrizzi relies, is unavailing because there, in addition to other clear violations of DR 5-104, the lawyer engaged in a complicated purchase of a 50% interest in various businesses, and failed to explain to his client all of the legal implications of his obtaining that interest. Here, in contrast, there is no evidence that Levine failed to disclose to Patrizzi any material facts or other information which an attorney would reasonably have been expected to make known to his or her client.

Habsburg and Patrizzi challenge the denial of the three types of injunctive relief they sought. The first element of relief, which pertains to the $2 million that they allege represented inventory proceeds but were paid out by Levine to AH and/or Zimmermann, is moot, because, after the instant appeal was perfected, the motion court dismissed all claims by Habsburg and

Patrizzi related to those funds.

The second form of injunctive relief Habsburg and Patrizzi sought related to the proceeds of the sale of the inventory. AQ principally argues that there can be no irreparable harm from the mere loss of money. However, an exception to this rule exists where the monies at issue are identifiable proceeds that are supposed to be held for the party seeking injunctive relief (*see Amity Loans v Sterling Natl. Bank & Trust Co. of N.Y.*, 177 AD2d 277, 279 [1st Dept 1991] [finding that restraint on funds held by financing company was appropriate where it was required to maintain the funds in trust for the party seeking the injunction]). Here, the funds at issue are clearly identifiable as the proceeds of the sale of the pre-acquisition inventory of the Antiquorum entities, which were given in escrow to Levine. Accordingly, they should be restrained pending the resolution of the dispute concerning the proceeds.

On the other hand, Habsburg and Patrizzi also sought to require Zimmermann to pay into court the monies which he claims he received from AH as a so-called "M&A fee." However, because the claim does not involve any identifiable proceeds that were required to be held on their behalf, the claim does not fall within the exception noted in *Amity Loans*. Therefore, because Habsburg and Patrizzi have an adequate remedy at law and there is

no threat of irreparable harm, injunctive relief on this point was properly denied.

We disagree with the motion court's decision to require the posting by Habsburg and Patrizzi of security against potential costs of Levine in the amount of $75,000. Levine is correct in asserting that he may ultimately be awarded attorneys' fees under the provision in the SPA holding him harmless, as escrow agent, against claims arising from his activities in that capacity, and under Rule 130-1-1 of the Rules of the Chief Administrator. However, he has cited to no authority establishing that the costs contemplated by CPLR 8503 include attorneys' fees. In the absence of such direct support we are reluctant to require the posting of security for such fees. *Weber v Kessler* (135 Misc 2d 618 [Sup Ct, Dutchess County 1987]), upon which Levine relies, is not instructive, because CPLR 8303-a, which that case addressed, expressly authorizes an award of attorneys' fees in certain tort actions, in addition to "costs." However, we do find that Habsburg and Patrizzi should be required to post security for costs in the amount of $5,000.

Finally, we find that the court properly quashed the non-party subpoenas served by Habsburg and Patrizzi. Habsburg and Patrizzi correctly argue that the movants lacked standing to

bring motions to quash. As this Court noted in *Matter of Shapiro v Chase Manhattan Bank, N. A.* (53 AD2d 542 [1st Dept 1976]), a depositor has no ownership or other interest in a bank's records of his accounts. Thus, he has no standing to object to a subpoena directed at them. While, as Zimmermann and Levine note, that case involved an investigative subpoena, the proposition remains true, even more strongly, in the civil context.

However, this does not end the inquiry. A court has power, without any motions by the parties, to control and order discovery. Here, the court ordered TD and Karastir to preserve all responsive documents, in the event the parties did not provide the documents and the subpoenas to the nonparties had to proceed. Therefore, the court did not abuse its discretion in directing that party discovery proceed first, and nonparty discovery afterwards.

Accordingly, the order of the Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about August 3, 2012, which (1) denied the motion of Habsburg and Patrizzi for partial summary judgment (a) declaring their entitlement to payment from Levine, as escrow agent, the remaining cash proceeds of the sale of their shares in the Antiquorum entities to AH, and (b) declaring invalid the Stock/Sales Proceeds Distribution Agreement; and (2) denied preliminary injunctive relief to

Habsburg and Patrizzi (a) requiring Zimmermann and Antiquorum, S.A., or, alternatively, Levine, to pay into court $2 million previously disbursed by Levine from the escrow account; (b) enjoining AQ Asset Management LLC and Antiquorum, S.A. from disbursing any additional proceeds from the sale of certain inventory belonging to the entities; and (c) requiring Zimmermann to pay into court some $3.2 million paid to him by Artist House Holdings, Inc., should be modified, on the law, to grant Habsburg and Patrizzi partial summary judgment on their claim for payment of the remaining cash proceeds and to grant a preliminary injunction enjoining AQ Asset Management LLC and Antiquorum, S.A. from further disbursing any proceeds from the sale of the inventory, and otherwise affirmed, with costs. The order of the same court and Justice, entered on or about August 2, 2012, which granted the motion of Levine to quash a nonparty subpoena directed to Karastir LLC, should be affirmed, with costs. The order of the same court and Justice entered on or about August 3, 2012, which granted the motion of AQ Asset Management LLC, Antiquorum, S.A., Antiquorum USA, Inc. and Zimmermann to quash a nonparty subpoena directed to TD Bank, should be affirmed, with costs. The order of the same court and Justice, entered August 17, 2012, which granted the motion of Levine pursuant to CPLR 8501 to require sellers to post $75,000 as security for costs,

should be modified, on the law and the facts, to reduce the amount of security that must be posted to $5,000, and otherwise affirmed, with costs.

All concur.

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

ENTERED: OCTOBER 3, 2013

CLERK

driving hit a cow on a public road. There was evidence that the fence separating the defendant's property from the roadway was in disrepair. The Court of Appeals held

> "that a landowner or the owner of an animal may be liable under ordinary tort-law principles when a farm animal — i.e., a domestic animal as that term is defined in Agriculture and Markets Law § 108 (7) — is negligently allowed to stray from the property on which the animal is kept. We do not consider whether the same rule applies to dogs, cats or other household pets; that question must await a different case" (21 NY3d at 125).

By this language, the Court of Appeals limited its decision to farm animals and made clear that until such time as it addresses the issue, the strict liability rule still applies to cases involving household pets. Accordingly, this Court should adhere to the established rule that New York does not recognize a common-law negligence cause of action to recover damages for injuries caused by a pet dog.

I do believe that leave to appeal to the Court of Appeals should have been granted to determine whether it will extend the *Hastings* rule and depart from the strict liability rule where an accident may be deemed to have been caused by some direct action of a dog's owner rather the dog's natural propensities. However, and more to the point, I do not deem it appropriate for us to presume that the Court of Appeals will do so under the

circumstances before us, given that this case does not involve a failure to keep a farm animal within "the property where it was kept" (*id.* at 125) or a failure to make sure that an animal was not in an area where it was not legally permitted to be. While cows may be expected to be kept on the farm, the Court of Appeals has thus far declined to impose liability where an owner permits a dog to be unleashed in a public place based on a theory of common-law negligence.

The Decision and Order of this Court entered herein on April 16, 2013 is hereby recalled and vacated (*see* M-2618 decided simultaneously herewith).

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10657 The People of the State of New York, Respondent, Ind. 7979/99

-against-

George Colon, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Jan Hoth of counsel), and White & Case LLP, New York (Jayashree Mitra of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Joshua L. Haber of counsel), for respondent.

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about November 22, 2011, which denied defendant's CPL 440.46 motion for resentencing, unanimously affirmed.

The court properly exercised its discretion in determining that substantial justice dictated denial of the motion (*see e.g. People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]). Resentencing is not automatic, and courts may deny the applications of persons who "have shown by their conduct that they do not deserve relief from their sentences" (*People v Paulin*, 17 NY3d 238, 244 [2011]). Defendant has demonstrated a "chronic inability to control his behavior while at liberty" (*People v Correa*, 83 AD3d 555, 556 [1st Dept 2011], *lv denied* 17 NY3d 805 [2011]), committing numerous crimes while on parole and

even while his resentencing application was pending. Under the circumstances, evidence of defendant's rehabilitation while incarcerated and other positive factors was outweighed by the factors militating against resentencing.

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10658 In re Destiny M.,

A Dependent Child Under the
Age of Eighteen Years, etc.,

Kristina M.,
Respondent-Appellant,

The Administration for
Children's Services,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

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

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order, Family Court, New York County (Rhoda J. Cohen, J.), entered on or about March 11, 2010, which, after a hearing, found that respondent mother neglected the subject child, unanimously reversed, on the law and the facts, without costs, the finding of neglect vacated, and the petition dismissed.

The subject child was born to a mother who was unaware that she was pregnant until the moment she gave birth to a healthy baby. The mother then went to the hospital to seek treatment for the newborn child, and made statements that lead to a police investigation. The police determined that same day that there was no evidence warranting any further police action. While the

mother's judgment was impaired during the time immediately following the unexpected birth, she provided a reasonable explanation based on her medical history and weight for not realizing she was pregnant, and immediately sought appropriate medical treatment for the newborn following delivery. These facts, standing alone, were insufficient to support a finding that "'if the child were released to the mother, there [would be] a substantial probability of neglect' that places the child at risk" (*Matter of Jayvien E. [Marisol T.]*, 70 AD3d 430, 436 [1st Dept 2010]).

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10659 Peter Amato, et al., Index 100437/12
Plaintiffs-Appellants,

-against-

New York City Department of
Parks and Recreation, et al.,
Defendants-Respondents,

John Does, etc.,
Defendants.

_____

Law Office of Gregory T. Chillino, New York (Christopher M, Slowik of counsel), for appellants.

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

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Order, Supreme Court, New York County (Geoffrey D. Wright, J.), entered July 9, 2012, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiffs claim that defendants defamed them in an email informing nonparty Nasdi, LLC, the general contractor on a City construction project, that plaintiff City Safety Compliance Corp. would not be approved as a subcontractor on the project. The email stated that City Safety was "affiliated with Testwell Labs, a concrete testing company barred from public work due to a fraud conviction." Plaintiffs argue that this statement is defamatory per se because it falsely implies a formal relationship between them and a convicted felon, which discredits them in their

profession. In support, they rely on the definition of the word "Affiliate" in the rules of the City Procurement Policy Board, which involves the ownership of more than 50% of the voting stock (*see* 9 RCNY 2-08[e][1]), arguing that the audience for defendants' statement, i.e., "construction firm procurement officials," would understand the word "affiliated" to mean that City Safety would not likely be approved for City contracts – although the statement that it is affiliated with Testwell is untrue. However, since the word "affiliated" is not defined in the Procurement Policy Board Rules, the motion court correctly found that, based on the ordinary dictionary meaning of the word, an affiliation between City Safety and Testwell could be inferred from the affidavit by plaintiff Peter Amato, an owner of City Safety, stating that he was a 10% owner of another entity, Site Safety, LLC, of which the owner of the remaining 90% was also Testwell's principal, who was convicted of fraud. The truth of the statement is a complete defense to the defamation claim (*Dillon v City of New York*, 261 AD2d 34, 39 [1st Dept 1999]).

In any event, the statement was communicated for a work-related purpose and is therefore protected by a qualified privilege (*see Foster v Churchill*, 87 NY2d 744, 751 [1996]; *see e.g. O'Neill v New York Univ.*, 97 AD3d 199, 212 [1st Dept 2012]).

Contrary to plaintiffs' contention, the complaint does not

state a cause of action for tortious interference with contract, since it fails to allege the existence of a contract (*see e.g. Jagarnauth v Massey Knakal Realty Servs., Inc.*, 104 AD3d 564 [1st Dept 2013]). Defendant Department of Parks and Recreation never approved City Safety as a subcontractor, as required for a valid subcontract with Nasdi.

Nor does the complaint state a cause of action under 42 USC § 1983. While plaintiffs allege that defendants' conduct deprived City Safety of "its liberty interest in its ability to secure future government contracts," we do not find that a contractor's liberty interest is implicated either by the termination of a government contract or by a government agency's true public statements about the contractor, even if the contractor's business is damaged as a result (*see e.g. S & D Maintenance Co., Inc. v Goldin*, 844 F2d 962, 970-971 [2d Cir 1988]).

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

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10660 The People of the State of New York, Ind. 4109/10
Respondent,

-against-

Jordan Lake,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rene A. White, J.), rendered on or about March 29, 2010,

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

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

ENTERED: OCTOBER 3, 2013

CLERK

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

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10661 In re Adetokunbo C. Ogunrinde, Index 117886/09
Petitioner-Appellant,

-against-

The New York State Division of Housing
and Community Renewal,
Respondent-Respondent.

_____

Adetokunbo C. Ogunrinde, appellant pro se.

Gary R. Connor, New York (Jeffrey G. Kelly of counsel), for respondent.

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Order and judgment (one paper), Supreme Court, New York County (Judith J. Gische, J.), entered December 28, 2010, which denied petitioner tenant's petition brought pursuant to CPLR article 78 to annul respondent State Division of Housing and Community Renewal's (DHCR) determination, dated October 22, 2009, denying his rent overcharge complaint, and dismissed the proceeding, unanimously affirmed, without costs.

DHCR's determination that the base rent should be the rent that petitioner agreed to pay at the commencement of his occupancy was rationally based, since there was an absence of any

reviewable rent records prior to such agreement (*see Matter of Payne v New York State Div. of Hous. & Community Renewal*, 287 AD2d 415 [1st Dept 2001]).

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

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10663 Harvey Tanton, et al., Index 106601/08
Plaintiffs-Respondents-Appellants,

-against-

Lefrak SBN Limited Partnership,
Defendant-Respondent,

Bay Leaf Enterprises, Ltd., et al.,
Defendants,

Temco Service Industries, Inc.,
Defendant-Appellant.

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Lester Schwab Katz & Dwyer, LLP, New York (Steven B. Prystowsky of counsel), for appellant.

Sanders, Sanders, Block, Woycik, Viener & Grossman, P.C., Mineola (Martin Block of counsel), for respondents-appellants.

Dreifuss Bonacci & Parker, PC, White Plains (Jeremy D. Platek of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered January 25, 2013, which, to the extent appealed from as limited by the briefs, denied the motion of defendant Temco Service Industries (Temco) for summary judgment dismissing the complaint as against it, and granted the cross motion of defendant Lefrak SBN LP (Lefrak) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff Harry Tanton was allegedly injured when he slipped and fell on a greasy condition on the sidewalk adjacent to a

building owned by Lefrak. Lefrak had contracted with Temco to provide cleaning services to the building, including the adjacent sidewalk.

Dismissal of the complaint as against Lefrak was warranted. There is no evidence that the greasy condition was a recurring condition that Lefrak, as owner, had actual or constructive notice of and sufficient opportunity to remedy (*see generally Gordon v American Museum of Natural History*, 67 NY2d 836 [1986]; *see Dennis v Bartow Stationary*, 28 AD3d 238 [1st Dept 2006]).

Regarding Temco, the record demonstrates that its motion for summary judgment was properly denied. Both Tanton and his coworker testified that Tanton's clothing was covered with a greasy substance after the accident. Moreover, Temco's employee testified to his general cleaning procedures, which included applying a degreaser to the sidewalk if necessary, brushing the area and washing away the degreaser, which itself was slippery. However, the employee did not testify as to what he actually did on the day of the accident. Accordingly, triable issues exist as to whether Temco properly followed its standard procedures in cleaning the sidewalk that morning, or applied a slippery degreaser but failed to remove it, thereby creating or

exacerbating a dangerous condition (*see e.g. Espinal v Melville Snow Contrs.*, 98 NY2d 136, 141-142 [2002]).

We have considered the remaining arguments and find them unavailing.

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10664 In re Joel S., and Others,

Children Under the Age
of Eighteen Years, etc.,

Charles C.,
Respondent-Appellant,

Administration for Children's
Services,
Petitioner-Respondent.

_____

Neal D. Futerfas, White Plains, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Jane L. Gordon of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Susan Clement of counsel), attorney for the children.

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Order, Family Court, Bronx County (Monica Drinane, J.), entered on or about July 23, 2012, which, after a hearing, found that respondent father had neglected the children, unanimously affirmed, without costs.

The record supports the court's credibility determinations made in connection with its finding that the father neglected the children by using drugs in the home, by not participating in any drug rehabilitation program, and by expelling the mother and the children from the home on several occasions (Family Court Act § 1012[f][i][A],[B]; *see also Matter of Keoni Daquan A. [Brandon W.-April A.]*, 91 AD3d 414 [1st Dept 2012]; *Matter of Amondie T.*

[Karen S.], 107 AD3d 498 [1st Dept 2013]).

The father also admitted to at least one act of domestic violence against the mother. Even if the father's claim that the children were not in the home when he choked the mother is credited, the father's own admissions concerning his other neglectful behavior supported the court's finding (*compare Matter of Eustace B. [Shondella M.]*, 76 AD3d 428, 429 [1st Dept 2010]).

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman JJ.

10665 In re Stephanie Shamblee, Index 401629/12
Petitioner-Appellant,

-against-

John B. Rhea, etc., et al.,
Respondents-Respondents,

Fulton Park 4 Associates,
Respondent.

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Steven Banks, The Legal Aid Society, New York (Stephen Myers of counsel), for appellant.

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

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Order, Supreme Court, New York County (Michael D. Stallman, J.), entered March 13, 2013, which denied the petition brought pursuant to CPLR Article 78, seeking to annul the determination of respondent New York City Housing Authority (NYCHA) terminating petitioner's Section 8 rent subsidy, and granted NYCHA's cross motion to dismiss the proceeding as time-barred, unanimously affirmed, without costs.

Irrespective of the purported ambiguity in NYCHA's notice of its final determination to terminate petitioner's housing subsidy, or its alleged error in continuing to issue petitioner's subsidy for ten months after the issuance of the notice, which petitioner alleges to have confused her and led her to believe

that her subsidy had not been terminated, the evidence indicates that NYCHA eventually issued its last subsidy payment on April 1, 2010. Even if petitioner did not know of the nonpayment at that time, she had to have known by no later than the commencement of a holdover proceeding by her landlord, respondent Fulton Park 4 Associates, which was based solely on nonpayment of the subsidy. Petitioner admits that the holdover proceeding was commenced in February 2012, more than four months before she initiated the instant Article 78 proceeding on July 20, 2012. Accordingly, the proceeding is time-barred (*see* CPLR 217[1]; *90-92 Wadsworth Ave. Tenants Assn. v City of N.Y. Dept. of Hous. Pres. & Dev.*, 227 AD2d 331, 331-332 [1st Dept 1997]).

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10666-
10667 Edith Wiener, etc.,
Plaintiff-Respondent,

-against-

Laura Spahn,
Defendant,

3900 Greystone Associates, LLC,
Defendant-Appellant.

- - - - -

Edith Wiener, etc.,
Plaintiff-Respondent,

-against-

Laura Spahn,
Defendant,

Chaim Schweid,
Defendant-Appellant.

Index 23962/06
2451/05

_____

McMillan Constabile Maker & Perone, LLP, Larchmont (William Maker Jr. of counsel), for appellants.

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

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Orders, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered July 7, 2011, and November 27, 2012, which, inter alia, set aside defendant Laura Spahn's conveyance of her partnership interest in Absar Realty Company to defendant 3900 Greystone Associates, LLC, and her partnership interest in Absar-Gerard Associates to defendant Chaim Schweid, unanimously

affirmed, without costs.

While the deeds to the properties reflect title held by certain individual partners of the family partnerships as tenants in common, the abundant circumstantial trial evidence shows that the original partners considered the partnerships to be the true owners of the properties (*see Vick v Albert*, 17 AD3d 255, 256-257 [1st Dept 2005]). Moreover, the property management agreements, of which defendants were well aware, expressly so stated. Nor are defendants bona fide purchasers for value, since they actively ignored evidence that Spahn may have misrepresented both the ownership status of the properties and the nature of her interests therein (*see Fleming-Jackson v Fleming*, 41 AD3d 175 [1st Dept 2007]).

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

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10668 The People of the State of New York, Ind. 2824/11
Respondent,

-against-

Jean Dufresne,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Naomi C. Reed of counsel), for respondent.

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles H. Solomon, J.), rendered on or about April 24, 2012,

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

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

ENTERED: OCTOBER 3, 2013

CLERK

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

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10669 Beryl Zyskind, et al., Index 651240/10
Plaintiffs-Appellants,

-against-

FaceCake Marketing Technologies, Inc.,
Defendant-Respondent.

_____

Sichenzia Ross Friedman Ference LLP, New York (Daniel S. Furst of counsel), for appellants.

Locke Lord LLP, New York (R. James De Rose, III of counsel), for respondent.

_____

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered May 21, 2012, which, to the extent appealed from, granted defendant's motion to dismiss the first, second and ninth counterclaims and so much of the third and fourth counterclaims as is based on the anti-dilution provision of the parties' agreements, unanimously modified, on the law, to deny the motion as to the parts of the first and second counterclaims that are based on defendant's cancellation of the shares for which plaintiffs had already paid and as to the parts of the first, third, and fourth counterclaims that allege breach of the anti-dilution provision, and to allow plaintiffs to assert a breach of contract claim based on defendant's failure to provide the financial statements required by the promissory notes it issued, and otherwise affirmed, without costs.

We decline to consider defendant's argument that plaintiffs' counterclaims to its surviving counterclaim are improper. First, defendant did not appeal from the September 2011 order permitting plaintiffs to file counterclaims. Second, in its motion to dismiss plaintiffs' counterclaims, defendant did not argue that the counterclaims were procedurally impermissible. Third, defendant did not cross appeal from so much of the May 2012 order as denied its motion to dismiss (*see Duran v Heller*, 203 AD2d 414, 416 [2d Dept 1994], *lv denied* 84 NY2d 803 [1994]).

Contrary to plaintiffs' contention, the motion court did not use a summary judgment standard in deciding defendant's motion to dismiss. Neither did it impermissibly consider the affidavit by defendant's CEO; rather, it considered the exhibits attached to the affidavit, such as the agreements between plaintiffs and defendant, which constitute documentary evidence (*see 150 Broadway N.Y. Assoc., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

However, the court erred when it interpreted a supposed lack of clarity in the pleadings against plaintiffs. The court dismissed so much of plaintiffs' first and second counterclaims as was based on defendant's cancellation of shares for which plaintiffs had already paid, on the ground that it was unclear if and when the shares were cancelled. However, defendant alleged

in its counterclaim that, in April 2006, it cancelled all the notes and shares that had been issued to plaintiffs, as a result of plaintiffs' defaults and refusal to cure.

The court dismissed the cancellation claim on the alternate ground that plaintiffs failed to allege any specific provision in the parties' agreements that would prevent it from cancelling the shares. However, the agreements, which are governed by New York law, did not have to contain such a provision. Each agreement states, "The Shares, *upon the issuance thereof*, shall be validly authorized and validly issued, *fully paid*, and nonassessable . . ." (emphasis added). Thus, these shares were shares "upon which no further payments [could] be demanded by the company" (*Middleton v Wooster*, 184 App Div 165, 168 [1st Dept 1918]). Plaintiffs' shares being "fully paid" "upon the issuance thereof," defendant's argument that plaintiffs failed to make additional payments is unavailing. Defendant points to no provision in the agreements that would permit it to cancel shares that it had already issued because plaintiffs failed to make later payments.

Furthermore, a share is the property of the shareholder, not of the corporation (*Gilbert Paper Co. v Prankard*, 204 App Div 83, 86 [3d Dept 1923]). Hence, the corporation has to reacquire the share to cancel it (*In re Enron Creditors Recovery Corp.*, 407 BR

17, 40 [Bankr SD NY 2009], *revd on other grounds* 422 BR 423 [SD NY 2009], *affd* 651 F3d 329 [2d Cir 2011]). Defendant did not reacquire its stock before purporting to cancel it.

The anti-dilution provision of the parties' agreements applies "so long as Investor [i.e., plaintiff] is not in breach of any of its obligations." Although plaintiffs did not make all the payments required by the agreements, they claim that they withheld payment because defendant failed to provide them with the financial statements required by the notes.[1] Whether defendant's breach excuses plaintiffs' performance depends on whether the breach was material (*see e.g. Unigard Sec. Ins. Co. v North Riv. Ins. Co.*, 79 NY2d 576, 581 [1992]). At this early, pre-discovery stage, it cannot be determined as a matter of law that defendant's failure to provide plaintiffs with financial statements was not a material breach.

Contrary to the motion court's conclusion, plaintiffs alleged, "Defendant . . ., with limited exception, . . . failed to provide to Plaintiffs . . . updates, notices, or financial or audit statements as required by the Agreements. Defendant simply took Plaintiffs' money and 'cut them off.'" Accordingly,

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[1]Since the notes and the agreements were part of the same transaction, they should be read together (*see e.g. Gulf Ins. Co. v Transatlantic Reins. Co.*, 69 AD3d 71, 81 [1st Dept 2009]).

plaintiffs should be permitted to assert that defendant breached the parties' contracts by failing to provide such statements.

The ninth counterclaim, which seeks an accounting, fails to state a cause of action, since it does not, and could not, allege a fiduciary relationship between plaintiffs and the corporation (*see Trepuk v Frank*, 104 AD2d 780, 781 [1st Dept 1984]; *Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012]). Indeed, in their opening brief, plaintiffs stated that "[t]he relationship between a shareholder and a corporation is contractual" (citing *Kun v Fulop*, 71 AD3d 832, 834 [2d Dept 2010], *lv denied* 15 NY3d 701 [2010]). Nor does Business Corporation Law § 624 avail plaintiffs. Even if, arguendo, the statute applied to defendant – a California corporation with its principal place of business in California (*see* Business Corporation Law § 103[a]) – inspection of books and records (*see* Business Corporation Law § 624[b], [d]) and the furnishing of an

annual balance sheet and profit and loss statement (*see* Business Corporation Law § 624[e]) are not the same as an accounting.

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10670 In re Leslie R. Whitted, Petitioner, Index 403141/11

-against-

New York City Housing Authority, Respondent.

_____

Leslie R. Whitted, petitioner pro se.

Kelly D. MacNeal, New York (Laura R. Bellrose of counsel), for respondent.

_____

Determination of respondent New York City Housing Authority, dated October 5, 2011, which, after a hearing, terminated petitioner's public housing tenancy on the ground of nondesirability and breach of respondent's rules and regulations, unanimously confirmed, the petition denied and the proceeding brought pursuant to article 78 (transferred to this Court by order of the Supreme Court, New York County [Manuel J. Mendez, J.], entered April 23, 2012), dismissed, without costs.

By so-ordered stipulation entered into in Civil Court on or about November 8, 2012, petitioner consented to entry of a judgment of possession, which consent became final on May 8, 2013. Petitioner is collaterally estopped from attacking the stipulation and the appropriate vehicle to seek relief from it is by application to the Civil Court (*see Matter of Matinzi v Joy*,

60 NY2d 835, 836 [1983]; *Matter of Garcia v New York State Div. of Hous. & Community Renewal*, 225 AD2d 451 [1st Dept 1996]).

In any event, respondent's determination is supported by substantial evidence, including the arresting officer's testimony and affidavit that, upon execution of a search warrant, which was obtained after a number of controlled marijuana purchases had been made from the subject apartment, she recovered a large ziplock bag containing marijuana on the floor, in the back right side bedroom, and a ziplock bag containing 66 smaller bags of marijuana and 80 ziplock bags, in the closet of that bedroom; and a small ziplock bag containing marijuana, a cigarette containing marijuana, and a grinder containing marijuana residue, in the living room, on top of the TV stand (*see Matter of Santana v New York City Hous. Auth.*, 106 AD3d 449 [1st Dept 2013]; *Matter of Zimmerman v New York City Hous. Auth.*, 84 AD3d 526 [1st Dept 2011]). The officer's inability to recall certain details almost a year after the arrest, which details had been memorialized in contemporaneous affidavits prepared for the District Attorney's Office, does not undermine her credibility. The fact that the criminal charges were subsequently dismissed against petitioner does not affect respondent's right to penalize the underlying conduct or render the evidence submitted at the hearing

insubstantial (*see Matter of Bell v New York City Hous. Auth.*, 49 AD3d 284 [1st Dept 2008]; *Matter of Simons v New York City Hous. Auth.*, 232 AD2d 195 [1st Dept 1996]).

The penalty of termination does not shock our sense of fairness (*see Zimmerman*, 84 AD3d at 526). While termination of the lease will create a hardship to petitioner and her son, this fact does not render the penalty shocking to the conscience (*see Matter of Cubilete v Morales*, 92 AD3d 470 [1st Dept 2012]). Any assurances by respondent's representatives that petitioner's tenancy would not be terminated and/or that she would be offered probation, are not binding on respondent and do not estop respondent from enforcing its regulations (*see Muhammad v New York City Hous. Auth.*, 81 AD3d 526, 527 [1st Dept 2011]).

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10671 In re Jamie S.,

A Person Alleged to be
a Juvenile Delinquent,
Appellant.
- - - - -
Presentment Agency

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

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

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Order of disposition, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about June 1, 2012, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of assault in the second degree, menacing in the second degree and criminal possession of a weapon in the fourth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility and identification, including its evaluation of any inconsistencies in testimony.

The court properly exercised its discretion when it denied appellant's request for an adjournment in contemplation of dismissal, and instead adjudicated him a juvenile delinquent and placed him on probation, which was the least restrictive dispositional alternative consistent with appellant's needs and the community's need for protection (*see Matter of Katherine W.*, 62 NY2d 947 [1984]). The 12-month period of supervision was warranted by the seriousness of appellant's violent attack on the victim, as well as appellant's truancy, poor academic performance, and school disciplinary record. These factors outweighed the mitigating factors cited by appellant.

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10672 Square Mile Structured Debt (One), LLC, et al., Petitioners, Index 603825/08

-against-

Kent M. Swig, et al., Respondents.

- - - - -

Kent M. Swig, et al., Cross Claim Plaintiffs-Respondents,

-against-

KMS Holdings, LLC, Cross Claim Defendant-Appellant.

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Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for appellant.

The Law Office of Thomas M. Mullaney, New York (Thomas M. Mullaney of counsel), for Kent M. Swig, respondent.

Greenberg Traurig, LLP, New York (James W. Perkins of counsel), for FTI Consulting, Inc., respondent.

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Amended order and judgment (one paper), Supreme Court, New York County (Bernard J. Fried, J.), entered on or about June 12, 2012, which, to the extent appealed from as limited by the briefs, awarded attorney's fees to defendants/cross claim plaintiffs Kent M. Swig and FTI Consulting Inc. (FTI), unanimously modified, on the law, to the extent of vacating the award of fees to FTI, and otherwise affirmed, without costs.

The indemnification clause at issue provides for coverage of

extremely broad claims, and is consistent with other clauses that have been held to provide for indemnification of attorney's fees for intra-party disputes (*see Crossroads ABL LLC v Canaras Capital Mgt., LLC,* 105 AD3d 645 [1st Dept 2013]; *cf. Hooper Assoc. v AGS Computers,* 74 NY2d 487 [1989]). Thus, cross claim plaintiff Swig, a party to the agreement, was entitled to the award of attorney's fees. However, because Swig's obligation to reimburse FTI for its fees is not covered under the agreement, and FTI itself claims no right to fees directly under that agreement, the award of attorney's fees to FTI was error (*see Matter of A.G. Ship Maintenance Corp. v Lezak,* 69 NY2d 1 [1986]).

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10673 The People of the State of New York, Respondent, Ind. 1892/10

-against-

Hector Velez, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

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Judgment, Supreme Court, New York County (Herbert J. Adlerberg, J.H.O. at suppression hearing; Rena K. Uviller, J. at suppression ruling; A. Kirke Bartley, Jr., J. at plea; Rena K. Uviller, J. at sentencing), rendered July 28, 2011, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 2½ years, unanimously reversed, on the law, and the indictment dismissed.

The suspicionless vehicle checkpoint stop that led to the recovery of contraband in this case was constitutionally impermissible because the primary purpose of the checkpoint was "essentially to serve the governmental interest in general crime control" (*People v Jackson*, 99 NY2d 125, 129 [2002], citing *City of Indianapolis v Edmond*, 531 US 32 [2000]). It is undisputed

that the primary purpose of the checkpoint was to deter or control auto theft. Contrary to the People's assertions, the interest in "controlling automobile thefts," as described in this case, "is not distinguishable from the *general interest* in crime control" (*People v Jackson*, 99 NY2d at 131 [quoting *Delaware v Prouse*, 440 US 648, 659 n 18 [1979] [emphasis supplied by Court of Appeals]; *see also City of Indianapolis*, 531 US at 39-40). Under the applicable precedents, a secondary goal of promoting highway safety does not justify a checkpoint stop.

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10674 The People of the State of New York, Respondent, Ind. 5758/10

-against-

Taquan Alleyne, Defendant-Appellant.

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Steven Banks, The Legal Aid Society, New York (Laura Boyd of counsel), for appellant.

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Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about January 25, 2011, unanimously affirmed.

Application by appellant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1976]). We have reviewed this record and agree with appellant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department on reasonable notice to the respondent within thirty (30) days after service of a copy of this order.

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

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10675N Tina Vazquez, Index 301773/08
Plaintiff-Respondent,

-against-

Lambert Houses Redevelopment Company,
Defendant-Appellant.

_____

Kral Clerkin Redmond Ryan Perry & Van Etten, LLP, Melville (Geoffrey H. Pforr of counsel), for appellant.

Paul Ajlouny & Associates, P.C., Garden City (Neil Flynn of counsel), for respondent.

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Order, Supreme Court, Bronx County (Laura G. Douglas, J.), entered August 30, 2012, which, inter alia, denied defendant's motion to vacate a conditional order, same court and Justice, entered March 3, 2011 upon defendant's default, granting plaintiff's motion for sanctions to the extent of ordering that, in the event defendant failed to produce certain outstanding discovery within 30 days of the issuance of the order, defendant's answer would be stricken and an order of preclusion entered against it, and granted plaintiff's motion to enforce the conditional order, unanimously affirmed, without costs.

The court properly granted plaintiff's motion to enforce the conditional order striking defendant's answer since defendant did not produce the specified materials within the identified time period, and did not establish both a reasonable excuse for its

failure to timely produce the specified materials and the existence of a meritorious defense (*see Keller v Merchant Capital Portfolios, LLC*, 103 AD3d 532, 533 [1st Dept 2013], citing *Gibbs v St. Barnabas Hosp.*, 16 NY3d 74, 80 [2010]).

Defendant's motion to vacate the conditional order was properly denied since its "conclusory and unsubstantiated" claims of law office failure cannot excuse its default in failing to oppose plaintiff's motion for sanctions (*Galaxy Gen. Contr. Corp. v 2201 7th Ave. Realty LLC*, 95 AD3d 789, 790 [1st Dept 2012]). Having failed to proffer an acceptable excuse for its default, it is unnecessary to determine whether a meritorious defense exists (*id.*).

Alternatively, defendant's failure to timely and fully comply with three court orders directing it to produce certain materials - one of which was a conditional order striking defendant's answer if it did not timely comply within 30 days - warrants an inference of willful noncompliance (*see Keller*, 103 AD3d at 533; *Perez v City of New York*, 95 AD3d 675, 677 [1st Dept 2012]). Such an inference is further supported by defendant's failure to explain the numerous discrepancies between its discovery responses and its employee's deposition testimony as to the existence of responsive records. Notably, defendant never offered any explanation regarding its employee's testimony that

highly relevant records had been destroyed by flooding at some unspecified time, but were preserved electronically.

The affidavit proffered by defendant regarding the unavailability of documents that are the subject of the court's discovery order was insufficient, as it failed to include any details as to when the search was performed, "'where the subject records were likely to be kept, what efforts, if any, were made to preserve them, whether such records were routinely destroyed, [and] whether a search [was] conducted in every location where the records were likely to be found'" (*Henderson-Jones v City of New York*, 87 AD3d 498, 505 [1st Dept 2011], quoting *Jackson v City of New York*, 185 AD2d 768, 770 [1st Dept 1992]).

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

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

ENTERED: OCTOBER 3, 2013

CLERK

Mazzarelli, J.P., Renwick, DeGrasse, Freedman, Feinman, JJ.

10676N Bank of America, National Association, etc.,
Plaintiff-Appellant,

-against-

Frank Douglas,
Defendant-Respondent,

New York City Department of Social Services, et al.,
Defendants.

Index 109305/10

_____

Hogan Lovells US LLP, New York (Jessica M. Prunell of counsel), for appellant.

Nadel & Associates, P.C., New York (David C. Van Leeuwen of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered November 5, 2012, which denied plaintiff's motion to voluntarily discontinue the action without prejudice and cancel a lis pendens, and granted defendant Frank Douglas's cross motion to compel disclosure, unanimously reversed, on the law, the facts and in the exercise of discretion, without costs, the motion granted and the cross motion denied.

The court erred in declining to permit plaintiff to voluntarily discontinue the action. CPLR 3217(b) authorizes a court to grant a motion for voluntary discontinuance "upon terms and conditions, as the court deems proper." While the

determination upon such an application is generally within the sound discretion of the court (*see Tucker v Tucker*, 55 NY2d 378, 383 [1982]), a party ordinarily cannot be compelled to litigate and, absent special circumstances, such as prejudice to adverse parties, a discontinuance should be granted (*see Burnham Serv. Corp. v National Council on Compensation Ins.*, 288 AD2d 31 [1st Dept 2001]). No special circumstances have been shown here, especially since the action is still in the early stages of litigation. Nor was there any showing that plaintiff sought the discontinuance only to avoid an adverse determination in this action (*see Gonzalez v Kaye*, 58 AD3d 578 [1st Dept 2009]). Since we are granting plaintiff's motion, the cross motion to compel discovery must be denied.

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

ENTERED: OCTOBER 3, 2013

CLERK

Renwick, J.P., DeGrasse, Freedman, Feinman, JJ.

10677 In re Jose Luna, Index 100677/08
[M-3639] Petitioner,

-against-

Clerk of the New York County
Supreme Court, etc., et al.,
Respondents.

_____

Sim & Record, LLP, Bayside (Sang J. Sim of counsel), for petitioner.

John W. McConnell, Office of Court Administration, New York (Shawn Kerby of counsel), for Clerk of the New York County Supreme Court, respondent.

Andrew P. Saulitis P.C., New York (Andrew P. Saulitis of counsel), for Tower Insurance Company of New York, respondent.

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

Now, upon reading and filing the papers in said proceeding (deemed filed under the above caption), and due deliberation having been had thereon,

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

ENTERED: OCTOBER 3, 2013

CLERK

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

10209N- Index 652367/10
10210N-
10211N-
10212N AQ Asset Management LLC, etc., et al.,
Plaintiffs-Respondents,

-against-

Michael Levine, etc.,
Defendant-Respondent,

Habsburg Holdings Ltd., et al.,
Defendants-Appellants.

- - - - -

Michael Levine, etc.,
Interpleader Counterclaimant-Respondent,

-against-

AQ Asset Management LLC, etc., et al.,
Interpleader Defendants,

Habsburg Holdings Ltd., et al.,
Interpleader Defendants-Appellants.

- - - - -

Habsburg Holdings Ltd. et al.,
Fourth-Party Plaintiffs-Appellants,

-against-

Michael Levine, etc.,
Fourth-Party Defendant-Respondent.

[And a Fifth-Party Action]

_____

Michael A. Haskel, Mineola, for appellants.

Reitler, Kailas & Rosenblatt LLC, New York (Leo G. Kailas of counsel), for AQ Asset Management LLC, Antiquorum, S.A., Antiquorum USA, Inc., and Evan Zimmermann, respondents.

Levine & Associates, P.C., Scarsdale (Michael Levine of counsel), for Michael Levine, respondent.

Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered on or about August 3, 2012, modified, on the law, to grant Habsburg and Patrizzi partial summary judgment on their claim for payment of the remaining cash proceeds and to grant a preliminary injunction enjoining AQ Asset Management LLC and Antiquorum, S.A. from further disbursing any proceeds from the sale of the inventory, and otherwise affirmed, with costs. Order, same court and Justice, entered on or about August 2, 2012, affirmed, with costs. Order, same court and Justice, entered on or about August 3, 2012, affirmed, with costs. Order, same court and Justice, entered August 17, 2012, modified, on the law and the facts, to reduce the amount of security that must be posted to $5,000, and otherwise affirmed, with costs.

Opinion by Mazzarelli, J.P. All concur.

Order filed.

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

10291 The People of the State of New York, Respondent, Ind. 3651/09

-against-

Kenneth Minor, Defendant-Appellant.

_____

Lawrence Fleischer, New York, for appellant.

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

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Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered April 4, 2011, reversed, on the law, and the matter remanded for a new trial.

Opinion by Richter, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John W. Sweeny, Jr.
Rosalyn H. Richter
Darcel D. Clark, JJ.

10291
Ind. 3651/09

_____x

The People of the State of New York,
Respondent,

-against-

Kenneth Minor,
Defendant-Appellant.

_____x

Defendant appeals from the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered April 4, 2011, convicting him, after a jury trial, of murder in the second degree, and imposing sentence.

Lawrence Fleischer, New York, (Daniel J. Gotlin and David S. Delbaum of counsel), for appellant.

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

RICHTER, J.

The facts of this case are largely undisputed. On the morning of July 16, 2009, the decedent was found stabbed to death in his car in upper Manhattan. Although the police initially believed he had fallen prey to a violent robbery, they later discovered that he had traveled to Manhattan for the express purpose of finding someone to kill him. Because of mounting financial troubles, the decedent had devised a plan to end his life so that his family could receive his life insurance proceeds.

The evidence at trial consisted primarily of defendant's statement to the police made after his arrest. Defendant told the police that he met the decedent on a street in upper Manhattan. The decedent invited defendant into his car, told defendant about his financial problems and asked defendant to kill him. The decedent explained that it needed to look like a robbery so his family could get the life insurance benefits. The decedent told defendant to open up the glove department where defendant saw a knife. The decedent instructed defendant to hold the knife against the steering wheel with the blade facing the decedent. The decedent then leaned forward into the knife several times, told defendant to move the knife over, and the decedent leaned forward into the knife a couple of more times.

At that point, the decedent was alive, and defendant left the car.

At trial, both the People and the defense agreed that the decedent sought defendant's assistance to help him accomplish his goal of ending his life and making it look like he was killed. The only real dispute involved the manner in which the knife wounds were inflicted. The People's medical expert testified that the nature of the decedent's wounds was inconsistent with defendant's account, and that it was defendant who stabbed the decedent. To counter this evidence, the defense presented expert testimony from a forensic pathologist who testified that he could not rule out the possibility that the decedent had impaled himself on a knife held by defendant against the steering wheel.

Prior to deliberations, the trial court instructed the jury on the elements of murder in the second degree. With no objection from the People, the court also charged the affirmative defense of assisted suicide.[1] A person is guilty of murder in the second degree when "[w]ith intent to cause the death of another person, he causes the death of such person" (Penal Law §

[1] At the charge conference, the court initially expressed some doubts about whether it should give the affirmative defense charge, but agreed to do so because "the People are really jumping up and down." Thus, the record supports the conclusion that the People fully agreed with the decision to charge the defense.

125.25[1]). The statute further provides that "it is an affirmative defense that . . . defendant's conduct consisted of causing or aiding, without the use of duress or deception, another person to commit suicide" (Penal Law § 125.25[1][b]). The standard criminal jury instruction (CJI) mirrors the words of the statute (*see* CJI2d[NY] Penal Law § 125.25[1][b]).

In its final instructions, the court went substantially beyond the statutory language and the CJI charge, telling the jury that:

> "If the defendant intentionally aided [the decedent] in taking his own life or if the defendant encouraged or advised [the decedent] to take his own life, that's assisted suicide.
>
> "However, if the defendant *actively* caused [the decedent's] death even with [the decedent's] consent, then that's not assisted suicide because the consent of the victim is not a defense to murder" (emphasis added).

During deliberations, the jury sent out a note asking for the definition of the word "active." Defendant, who had objected to the wording of the original charge, and in particular to the passive-active distinction created by the court, objected to further defining the term. Defendant instead asked the court to simply read the standard CJI charge, which had been defendant's position when the charge was first given. The court rejected defendant's request, and instructed the jury that "active" means

"[d]oing something, carrying out an actual process, or carrying out by involvement, energy or action."

On appeal, defendant's principal argument is that the court's initial and supplemental charges misstated the law on the assisted suicide affirmative defense. "In considering a challenge to a jury instruction, 'the crucial question is whether the charge, in its entirety, conveys an appropriate legal standard and does not engender any possible confusion'" (*People v Hill*, 52 AD3d 380, 382 [1st Dept 2008], quoting *People v Wise*, 204 AD2d 133, 135 [1st Dept 1994], *lv denied* 83 NY2d 973 [1994]). Where the court's charge creates undue confusion in the minds of the jurors, reversal is warranted (*Hill*, 52 AD3d at 382; *People v Rogers*, 166 AD2d 23 [1st Dept 1991], *lv denied* 78 NY2d 1129 [1991]). Moreover, "each time a judge declines to employ the carefully thought-out measured tone of the standard jury charge in favor of improvised language, an additional risk of reversal and a new trial is created" (*Hill*, 52 AD3d at 382 [internal quotation marks omitted]). Thus, "the better practice for the trial courts is, when feasible, to utilize the charges contained in the Criminal Jury Instructions" (*People v King*, 85 AD3d 412, 413 [1st Dept 2011], *lv denied* 18 NY2d 925 [2012]).

Guided by these principles, we believe that the court's charge was error. The trial presented two starkly different

scenarios of the decedent's death. Under the People's version, defendant stabbed the decedent as he lay prone in the seat of his car. Under defendant's version, the decedent impaled himself on a knife held by defendant. We agree with the People that their version, if accepted, would constitute murder, not assisted suicide. If the decedent took no part whatsoever in the ultimate act that led to his death, it cannot be characterized as suicide, even if the record shows the decedent wanted to die. In this regard, we find that the jury's verdict convicting defendant of murder was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The testimony of the People's medical expert provided ample proof that defendant repeatedly stabbed the decedent. Based on this evidence, the jury was entitled to reject defendant's claim that he merely held the knife.

But the jury was also free to accept defendant's account of events. Under that version, a jury could have found that the decedent committed suicide because he committed the final overt act that caused his death, i.e., thrusting himself into the knife. Notably, the People did not argue below that defendant's version, if believed, would not satisfy the affirmative defense to murder. In fact, the record shows that the People acquiesced to the defense being charged, and they do not argue otherwise on

appeal. The People made no objection to the charge, and in fact offered their own proposed language to the court. The trial court determined that defendant's version supported the assisted suicide defense because it decided to give the charge (*see People v Taylor*, 80 NY2d 1, 12 [1992] ["court must charge the jury on any claimed defense that is supported by a reasonable view of the evidence"]).

Under these circumstances, the portion of the court's instruction that the assisted suicide defense is not made out if defendant "actively" caused the decedent's death, along with the expansive definition of the word "active" given in the supplemental charge, was confusing and conveyed the wrong standard. Neither the word "active," nor its antonym "passive," appears in the statutory language and thus, by giving this charge, the court added an element that is not part of the defense. Moreover, although sparse, the legislative history of the current statute supports the view that the assisted suicide defense allows for at least some "active" assistance to one who commits suicide. The affirmative defense of assisted suicide was added as part of the 1965 overhaul of the Penal Law. As originally proposed by the Commission on Revision of the Penal Law and Criminal Code, the statute defined the assisted suicide defense as "causing or aiding a suicide [without the use of]

force, duress or deception" (Proposed Penal Law of 1964 § 130.25[1][b] [emphasis added]). Thus, under the proposed law, a person who used force, duress or deception in aiding a suicide could still be prosecuted for murder. In enacting the current statute, the Legislature rejected the Commission's proposal and removed the word "force," retaining only the phrase "without the use of duress or deception" (Penal Law § 125.25[1][b]). Although the legislative history is silent as to why the word "force" was removed, it suggests that the Legislature contemplated some active conduct within the scope of the assisted suicide defense.

Likewise, the fact that assisted suicide exists as an affirmative defense to murder shows that active conduct could be included in the defense. The jury was required to consider the affirmative defense only upon finding that defendant intentionally caused the decedent's death, which necessarily means that defendant engaged in some active conduct that caused the death. But the court's instruction advised the jury that if defendant actively caused the decedent's death, he was not entitled to the affirmative defense. Such a circular instruction was confusing, and could have led the jury to conclude that if they found intentional murder, the affirmative defense was not applicable. By using the phrase "actively caused," the court effectively thwarted the affirmative defense and mandated a

directed verdict of guilt.

The court's error was compounded by its overly broad definition of the term "active." The court told that jury that "active" meant "[d]oing something, carrying out an actual process, or carrying out by involvement, energy or action." The affirmative defense exists to protect from murder charges those who assist others to commit suicide. A person obviously cannot provide assistance to one committing suicide without "doing something." Under this expansive definition, the jury might well have believed that any of defendant's actions, under his version of events, constituted "actively causing" the decedent's death.[2] Thus, the jury could have been confused into thinking that defendant's taking the knife out of the glove compartment, or holding the knife, would constitute murder and not assisted suicide, a position the People did not take at trial.

We disagree with the People's assertion that the words of the statute lacked sufficient guidance. There is nothing confusing or unclear about the words "aiding . . . another person to commit suicide." The ordinary meaning of the term "aid" is to

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[2] The broad definition given by the court in its supplemental charge could cover conduct such as opening a bottle of pills for a terminally ill family member since such conduct would fall within the phrase "carrying out an actual process." Yet this is exactly the type of situation the People suggest the defense was intended to cover.

help or assist and encompasses both active and passive assistance. And where the language of a statute is plain, courts should "construe words of ordinary import with their usual and commonly understood meaning" (*Rosner v Metropolitan Prop. & Liab. Ins. Co.*, 96 NY2d 475, 479 [2001]; *see* McKinney's Cons Laws of NY, Book 1, Statutes § 94). By adding words not chosen by the Legislature, the court effectively rewrote the statute, and imposed a greater burden on defendant than the statute required. Moreover, if the jury needed additional guidance after being given the standard charge, it could have requested it.

The People do not argue that the error here was harmless nor could such an argument be made because defendant's entitlement to the affirmative defense was the central issue at trial. Under the circumstances, the error in the court's charge, which was objected to, resulted in significant prejudice to defendant because it essentially gutted his defense (*see People v Soriano*, 36 AD3d 527, 529 [1st Dept 2007] [error in charge not harmless where point at issue went to the heart of the proffered defense]).

The court properly denied defendant's motion to dismiss the indictment and order the People to resubmit the case to a new grand jury on the basis of evidence discovered after the indictment was filed. CPL 190.75(3), upon which defendant

relies, authorizes resubmission only when the grand jury has dismissed a charge. Since no charge was dismissed by the grand jury, CPL 190.75(3) is inapplicable.

To the extent defendant argues that the People should have charged the grand jury on the assisted suicide affirmative defense, that claim is unpreserved. In his letter-motion seeking to compel the People to resubmit the case, defendant asked only that a second grand jury consider charges of manslaughter in the second degree and promoting a suicide attempt. Defendant never asked that a new grand jury be instructed on the affirmative defense of assisted suicide. We decline to reach the issue in the interest of justice because even defendant acknowledges in his appellate brief that, at the time of the grand jury presentation, his account "seemed farfetched and self-serving."

As an alternative holding, we would reject defendant's claim on the merits. Even if defendant's statement to the police could be read as supporting the assisted suicide affirmative defense, the People had no obligation to instruct the grand jury on that defense. It is well-settled that a prosecutor is not required to present mitigating defenses to a grand jury (*People v Harris*, 98 NY2d 452, 475 [2002]; *People v Valles*, 62 NY2d 36, 38-39 [1984]). Whether or not a particular defense should be charged "depends upon its potential for eliminating a needless or unfounded

prosecution" (*Valles*, 62 NY2d at 38). "Unlike exculpatory defenses, which may result in a finding of no criminal liability, mitigating defenses only reduce the gravity of the offense committed" (*Harris*, 98 NY2d at 475; *accord Valles*, 62 NY2d at 39). Here, even if defendant's statement satisfied the affirmative defense, it would not eliminate a "needless or unfounded prosecution," but instead would warrant prosecution for the manslaughter crime of assisted suicide (*see* Penal Law § 125.15[3] [defining manslaughter as intentionally causing or aiding another person to commit suicide]).

In concluding that the conviction should be reversed, we recognize that the manner in which the decedent died is disturbing. But the People, at trial and on appeal, acknowledge that the decedent was looking for someone to help him end his life, and this appeal does not raise the question of whether the assisted suicide charge should have been given at all. Nor is there any support in the statutory language or case law for the People's view that the assisted suicide defense applies only to sympathetic situations. It is the role of the jury, not this Court, to determine whether defendant's or the People's version is the correct one, and whether the defense is borne out by the evidence. Because the jury's decision must be based on a proper legal instruction, a new trial is warranted.

In light of our decision to reverse the judgment, we need not reach defendant's claim that the trial court unduly limited his direct examination of the defense expert witness.

Accordingly, the judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered April 4, 2011, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 20 years to life, should be reversed, on the law, and the matter remanded for a new trial.

All concur.

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

ENTERED: OCTOBER 3, 2013

CLERK