SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 3, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

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

4683 & M-3482 — Index 100970/08

Manhattan Telecommunications Corporation,
Plaintiff-Respondent,

-against-

H & A Locksmith, Inc., etc., et al.,
Defendants,

Ariq Vanunu,
Defendant-Appellant.

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Ofeck & Heinze, LLP, New York (Mark F. Heinze of counsel), for appellant.

Jonathan David Bachrach, New York, for respondent.

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Upon remittitur from the Court of Appeals (__NY3d__, 2013 NY Slip Op 03867 [2013]) for consideration of the issues raised but not determined on appeal to this Court, order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered December 28, 2009, which denied defendant Ariq Vanunu's motion to vacate the default judgment entered against him, unanimously affirmed, without costs.

In our decision entered March 31, 2011, we noted that the verified complaint alleged a contract for plaintiff to perform

telephone services for defendants for a stated fee, and defendants' failure to pay (82 AD3d 674). We further noted that the complaint did not allege that appellant was a party to the contract individually, so as to bind him to its terms. Thus, we held that because of plaintiff's failure to comply with CPLR 3215(f) and to "provide the motion court with evidence that appellant was personally liable," the default judgment entered against him on November 28, 2008 "was a nullity" (82 AD3d at 674). In so holding, we did not determine whether the motion court properly denied appellant's motion to vacate the default judgment under CPLR 5015(f) based on his failure to proffer a reasonable excuse for his default. Nor did the motion court, in finding the absence of a reasonable excuse, reach the issue of whether appellant had a meritorious defense to plaintiff's claims.

In its May 30, 2013 decision, the Court of Appeals addressed the issue that has divided the departments of the Appellate Division – namely, whether "non-compliance with [CPLR 3215(f)'s proof requirement] is a jurisdictional defect that 'renders a default judgment a nullity'" (__NY3d__, 2013 NY Slip Op 03867, *1 [internal quotation marks omitted]). The Court held that this non-compliance defect is not jurisdictional (*id.*). It reasoned that, while "[a] failure to submit the proof required by CPLR

3215(f) should lead a court to deny an application for a default judgment" and that the default judgment here was defective on that basis, "not every defect in a default judgment requires or permits a court to set it aside" (*id.*). The Court further reasoned that the non-compliance defect is not jurisdictional because "'the [motion] court had subject matter jurisdiction over the case which included the concomitant power to enter a default judgment in favor of plaintiff'" (__NY3d__, 2013 NY Slip Op 03867, *2, quoting *Freccia v Carullo*, 93 AD2d 281, 288-289 [2d Dept 1983]).

In light of the Court of Appeals' reasoning in remittal of this case, and upon consideration of the issues we did not previously determine, we affirm the motion court's denial of appellant's motion to vacate the default judgment entered against him.

First, as we noted in our previous decision, plaintiff did not comply with CPLR 3215(f)'s proof requirement because the complaint failed to allege that appellant was personally liable for the stated claims. This failure rendered the default judgment defective. However, because the defect "went, at most, only to a procedural element of plaintiff's right to enter a default judgment" (*Freccia*, 93 AD2d at 289), we decline to grant appellant's motion to vacate the default on that basis. Indeed,

as the Second Department articulated in *Freccia*, "[t]o grant defendant vacatur in this instance based solely and belatedly upon an absence of an element and not a jurisdictional defect with respect to plaintiff's claim would undo a judgment of approximately three years standing and 'undermine significantly the doctrine of res judicata, and . . . eliminate the certainty and finality in the law and in litigation which the doctrine is designed to protect'" (*Freccia*, 93 AD2d at 289, quoting *Lacks v Lacks*, 41 NY2d 71, 77 [1976]).

Moreover, we find unavailing appellant's contention that the default judgment was a nullity based on plaintiff's premature filing of its motion for a default judgment on April 29, 2008, before appellant's time to answer had expired on April 30, 2008. Indeed, the record demonstrates that plaintiff again served its motion on May 15, 2008, a full two weeks after appellant's time to answer had expired; when the default judgment was entered almost six months later, on November 28, 2008, appellant still had not appeared (CPLR 3215[a] [the plaintiff may seek a default judgment when a defendant has failed to appear or plead]).

Second, we find that the motion court correctly denied appellant's motion to vacate the default judgment based on his failure to demonstrate a reasonable excuse for his default. As the court noted, appellant "waited a period of almost 18 months"

between the court's granting of the default judgment in June 2008 and his motion to vacate, which was initially returnable in November 2009. In support of his motion, appellant claimed that he had high blood pressure requiring hospitalizations or visits to the hospital and that he needed to focus on certain business matters. However, the medical records he provided reflect emergency room visits in April and August 2008, and a visit to a psychiatrist on October 27, 2009. Moreover, appellant's evidence did not establish that he was incapacitated for over a year and unable to obtain counsel. Thus, his explanation that he failed to focus on the action because he was attending to business matters and had suffered stress is insufficient to explain his long delay.

Finally, even though appellant has presented a potentially meritorious defense to plaintiff's claims by contending that he was an agent for a disclosed principal and not personally liable for breach of the contract, and that the agreement properly terminated according to its terms, we must affirm the denial of his motion based on his failure to demonstrate a reasonable excuse (CPLR 5015[a][1]; *Benson Park Assoc., LLC v Herman*, 73 AD3d 464, 465 [1st Dept 2010] ["A party seeking to vacate a judgment on the basis of excusable default must demonstrate both a reasonable excuse and a meritorious defense"]).

M-3482 - *Manhattan Telecommunications Corp. v Vanunu*

Motion for an order requiring appellant to pay costs and post an appeal bond denied.

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

ENTERED: SEPTEMBER 3, 2013

CLERK

Friedman, J.P., Sweeny, Renwick, DeGrasse, JJ.

8577-
8577A Roy W. Lennox,
Plaintiff-Appellant,

-against-

Joan E. Weberman,
Defendant-Respondent.

Index 309930/11

Stein Riso Mantel, McDonough, LLP, New York (Allan D. Mantel of counsel), for appellant.

Kenneth David Burrows, New York, for respondent.

Order, Supreme Court, New York County (Deborah A. Kaplan, J.), entered March 30, 2012, which, to the extent appealed from, upon plaintiff's motion for reargument and renewal, adhered to a prior order, entered February 10, 2012, granting defendant's motion for pendente lite relief to the extent of awarding her tax-free maintenance in the amount of $38,000 per month, directing plaintiff to pay, inter alia, defendant's unreimbursed medical expenses up to $2,000 per month, interim counsel fees of $50,000, and expert fees of $35,000, and holding plaintiff's cross motion for summary judgment and for counsel fees in abeyance, unanimously modified, on the facts, to provide that one half of the aforesaid pendente lite relief shall be treated as an advance on the 50 percent of the parties' Joint Funds (as defined in the parties' prenuptial agreement) to which defendant is

entitled pursuant to the prenuptial agreement, and otherwise affirmed, without costs. Appeal from the February 10, 2012 order, unanimously dismissed, without costs, as superseded by the appeal from the subsequent order.

We find that the court properly applied the formula set forth in Domestic Relations Law § 236(B)(5-a)(c)(2)(a) (*see Khaira v Khaira*, 93 AD3d 194 [1st Dept 2012]) in calculating defendant's temporary spousal maintenance award. Specifically, the court listed all 19 of the enumerated factors, explained how 7 of them supported an upward deviation to $38,000 per month from the $12,500 a month in guideline support, and found that $38,000 per month was not "unjust or inappropriate."

We further find that the court properly imputed an annual income to plaintiff of $2.29 million when it computed maintenance, since this was his income on the most recent tax return. A court need not rely upon the party's own account of his or her finances, but may impute income based upon the party's past income or demonstrated earning potential (*see Hickland v Hickland*, 39 NY2d 1 [1976], *cert denied* 429 US 941 [1976]). The court properly took into account plaintiff's income from his investments, voluntarily deferred compensation, and substantial distributions (*see* Domestic Relations Law §§ 236[B][5-a][b][4]; 240[1-b][b][5][i], [iv]), which was $50.5 million the previous

year.

We reject plaintiff's argument that defendant waived temporary maintenance in the parties' prenuptial agreement. Notwithstanding that defendant waived any claim to a final award of alimony or maintenance in the prenuptial agreement, the court was entitled, in its discretion, to award pendente lite relief in the absence of an express agreement to exclude an award of temporary maintenance (*see Tregellas v Tregellas*, 169 AD2d 553 [1st Dept 1991]; *see also Vinik v Lee*, 96 AD3d 522 [1st Dept 2012]). Under the circumstances of this case, however, we deem it appropriate to charge one half of the interim awards against the one-half share of the marital property to which defendant is entitled under the prenuptial agreement. In so doing, we find it significant that the parties provided in the agreement that each waived any right to the separate property of the other, that living expenses were to be paid out of the marital property, and, as previously noted, that the marital property would be equally divided in the event of divorce. We also find it significant that, here, the equal division of the marital property to which the parties agreed will leave each of them with substantial wealth.

Domestic Relations Law § 237(a) authorizes the court in its discretion to direct either spouse to pay counsel fees to the other spouse "to enable the other [spouse] to carry on or defend the action or proceeding" (*see also Charpié v Charpié*, 271 AD2d 169, 172 [1st Dept 2000]). The court's award of interim counsel fees of $50,000 and expert fees of $35,000 was warranted under the circumstances where the parties' assets appear to be anywhere from $77 million to $90 million. In any event, the amounts awarded were significantly less than the $200,000 and $75,000 amounts defendant requested for interim counsel and expert fees, respectively. While there are some funds in defendant's possession, plaintiff is in a far better financial position than defendant (see *Prichep v Prichep*, 52 AD3d 61, 66 [2d Dept 2008]), and defendant should not have to deplete her assets in order to have legal representation comparable to that of plaintiff (*see Wolf v Wolf*, 160 AD2d 555, 556 [1st Dept 1990]).

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

The Decision and Order of this Court entered herein on February 26, 2013 is hereby recalled and vacated (*see* M-1841 decided simultaneously herewith).

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

ENTERED: SEPTEMBER 3, 2013

CLERK

Acosta, J.P., Saxe, Renwick, Richter, Clark, JJ.

10376 In re Theodore Smith, Index 108154/10
Petitioner-Appellant,

-against-

The New York City Department of Education,
Respondent-Respondent.

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Law Offices of Stewart Lee Karlin, P.C., New York (Stewart Lee Karlin of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Cindy A. Singh of counsel), for respondent.

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Judgment, Supreme Court, New York County (Barbara Jaffe, J.), entered March 18, 2011, granting respondent's cross motion to dismiss the petition brought pursuant to, inter alia, CPLR article 75 to vacate an arbitration award, which sustained certain disciplinary charges and found that respondent had just cause to terminate petitioner's employment as a tenured teacher, unanimously affirmed, without costs.

This appeal involves a second disciplinary proceeding brought against petitioner Theodore Smith. Petitioner, a tenured teacher, was terminated when the arbitrator in the instant proceeding found that respondent New York City Department of Education had sustained the charges stemming from the claim that

petitioner had made death threats against the initial arbitrator in the prior disciplinary proceeding. The death threats took place during a telephone conversation between petitioner and the lawyer who represented him in the prior disciplinary proceeding.

When the arbitrator learned about the death threats, he recused himself and was replaced by a second arbitrator, who sustained the charges against petitioner based on, among other things, a failure to properly supervise students and excessive absences. As a result, petitioner was suspended without pay for one year. Thereafter, respondent investigated the alleged death threats, and instituted the instant proceeding. Upon finding the evidence supporting the alleged death threats credible, the arbitrator recommended a penalty of termination.

We find that the arbitration award was made in accord with due process, is supported by adequate evidence, is rational and is not arbitrary and capricious *(see Lackow v Department of Educ. of City of N.Y.*, 51 AD3d 563, 567 [1st Dept. 2008]). Contrary to petitioner's contention, hearsay evidence can be the basis of an administrative determination *(Matter of Gray v Adduci*, 73 NY2d 741, 742 [1988]), and each of the specifications upheld by the arbitrator was supported by testimony of witnesses having

personal knowledge of the material facts or hearsay evidence that substantiated the basis for the charges. The arbitrator's credibility findings are entitled to deference (*see Matter of D'Augusta v Bratton*, 259 AD2d 287, 288 [1st Dept. 1999]), and there is no basis upon which to disturb those findings.

We reject petitioner's allegations that the instant disciplinary proceeding and the ultimate discipline imposed against him violated the right to free speech under the First Amendment to the United States Constitution. Supreme Court properly deferred to the arbitrator's finding that petitioner's statements are exempt from First Amendment protection because they constitute "true threats." We note that petitioner's former attorney only disclosed the threats because he believed that petitioner's increasingly erratic behavior rendered him genuinely dangerous. Under the circumstances, it cannot be argued that petitioner's speech implicates matters of public concern (*see Melzer v Board of Educ. of City School Dist. of City of New York*, 336 F3d 185 [2nd Cir 2003], cert denied 540 US 1183 [2004]). Nor

can it be disputed that petitioner's death threats disrupted the initial arbitration proceeding (*see Matter of Santer v Board of Educ. of E. Meadow Union Free Sch. Dist.*, 101 AD3d 1026 [2nd Dept. 2012]).

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

ENTERED: SEPTEMBER 3, 2013

CLERK

Mazzarelli, J.P., Acosta, Renwick, Richter, Gische, JJ.

9748 Oppenheimer AMT-Free Municipals, et al., Plaintiffs-Respondents, Index 653290/11

-against-

ACA Financial Guaranty Corporation, Defendant-Appellant.

_____

Duane Morris LLP, New York (Thomas R. Newman of counsel), for appellant.

Sidley Austin LLP, New York (John G. Hutchinson of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Charles Ramos, J.), entered August 14, 2012, modified, on the law, to delete reference to Enhanced Committee on Uniform Securities Identification Procedures (CUSIP) Nos. 20786LCS8 and 20786LCU3, which were not owned by plaintiffs, and otherwise affirmed, without costs.

Opinion by Gische, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Angela M. Mazzarelli, J.P.
Rolando T. Acosta
Dianne T. Renwick
Rosalyn H. Richter
Judith J. Gische, JJ.

9748
Index 653290/11

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Oppenheimer AMT-Free
Municipals, et al.,
Plaintiffs-Respondents,

-against-

ACA Financial Guaranty Corporation,
Defendant-Appellant.

_____x

Defendant appeals from an order and judgment (one paper) of the Supreme Court, New York County (Charles Ramos, J.), entered August 14, 2012, which denied its motion for summary judgment seeking a declaration that it was not obligated to provide coverage under the terms of the financial guaranty insurance policies it issued, and granted plaintiffs' cross motion for summary judgment declaring that defendant was required to provide coverage.

Duane Morris LLP, New York (Thomas R. Newman, Cameron MacRae III, Hugh T. McCormick and Nathan Abramowitz of counsel), for appellant.

Sidley Austin LLP, New York (John G. Hutchinson, Lee S. Attanasio, John J. Lavelle and Benjamin J. Hoffart of counsel), for respondents.

GISCHE, J.

The underlying complaint seeks a declaration that defendant is still obligated to pay plaintiffs under certain insurance policies that guaranteed payment of municipal bonds when they matured in the event the issuing entity did not make the payment. Defendant seeks a declaration that it is relieved of liability for any further payment under the policies.

In February 1998, a public benefit corporation (issuer) issued and sold $200,177,680 in municipal bonds to finance the extension of a toll road in Greenville, South Carolina (original bonds). The issuance was made in accordance with a February 1, 1998 Master Indenture of Trust between the issuer and the First Union National Bank, as trustee (trust agreement). Under the trust agreement if the issuer files a voluntary petition in bankruptcy, it is an event of default which entitles a bond holder to pursue all its legal remedies.

In June 2001, defendant, a financial guaranty insurance company, issued a number of secondary market insurance policies to guaranty the issuer's timely payment of obligations under certain of the original bonds. The policies were subject to the terms of a November 3, 1997 custody agreement between First Trust of New York, National Association, a National Banking Association (custodian) and defendant. The individual policies were

evidenced by certificates of bond insurance (collectively CBIs) which "wrapped" the particular bond defendant was insuring. The purpose of the CBIs was to improve the marketability and perceived creditworthiness of the original bonds.

Each CBI contained identical provisions which, insofar as relevant here, provide that defendant would pay the custodian the amount due for payment resulting from the issuer's nonpayment of its obligations under the bonds. Nonpayment is defined as the "failure of the Issuer to have provided sufficient funds . . . for the payment in full of all principal and interest on any Due Date of Payment of an Obligation." In the event of the issuer's nonpayment, once defendant received a Notice of Nonpayment, it was obligated to pay the custodian the monies due under the bonds, less any partial payments made. The monies paid, however, were for the benefit of the bond holders who received payment from the custodian according to a proscribed mechanism. Upon defendant making payment, it would become fully subrogated to the rights of the bond holder.

CBIs are "noncancellable except in the event the holder or the Owner surrenders its interest in the Certificate of Bond Insurance or in the position . . . and waives its rights to receive payment from the Insurer under this policy pursuant to

Sections 3.03(f)[1] and 4.06(b) of the Custody Agreement." The referenced custody agreement waiver of rights under the policy was a document required from a bond holder in order to collect monies from the custodian on account of an issuer's default.

Between 2003 and 2007, plaintiffs purchased, on the secondary market, a large amount ($37.18 million par value) of the original bonds with corresponding CBIs. This litigation concerns 1998 Series B bonds identified by Committee on Uniform Security Identification Procedures (CUSIP) Nos. 20786LAQ4, 20786LAR2, 20786LAU5 and 20786LAW1, with Enhanced CUSIP Nos. 20786LCV1, 20786LCW9, 20786LCX7 and 20786LCY5. The Enhanced CUSIP identifies that each of the corresponding bonds is covered by a CBI.

The original bonds had maturity dates ranging from January 1, 2020 to January 1, 2026. They were zero coupon bonds, with interest accreting and paid at maturity, along with the principal. Although the court below issued a declaration with respect to Enhanced CUSIP Nos. 20786LCS8 and 20786LCU3, the parties agree that plaintiffs do not own or hold those underlying bonds.

The toll revenues received by the issuer were substantially

[1]The copies of the custody agreement provided in the record on appeal do not contain any Section 3.03.

less than projected and, on January 1, 2010, the issuer defaulted in making payments on certain of the outstanding original bonds, none of which were owned by plaintiffs. On June 24, 2010, however, the issuer filed for Chapter 9 bankruptcy protection, which allows insolvent municipalities to reorganize their debts. Defendant was listed in the petition as one of the creditors holding twenty (20) of the largest unsecured debts. It was a "special notice" party and filed a proof of claim on its own behalf. Defendant was aware of all of the proceedings in bankruptcy court.

The bankruptcy filing had the effect of accelerating the claims on the original bonds. The CBIs, however, have no parallel acceleration requirement, except at the sole option of defendant, which it did not exercise. This policy provision is consistent with Insurance Law §6905(a), which, as a protection for the insurer, provides that where payments on the insured bonds are accelerated for any reason, the guaranteed payments shall still be made when the payments were originally scheduled to come due, unless the insurer accelerates payment. While the parties disagree on whether defendant has any obligation at all to pay under the CBIs, plaintiffs concede that no payment is due until such time as payments would have been made by the issuer under the original bonds had no bankruptcy proceeding been filed.

As part of the bankruptcy, the issuer's bond offering was restructured in the manner set forth in the order entered April 1, 2011, Confirming Debtor's First Amended Plan (restructuring plan). The restructuring plan which, after notice, was voted on by the creditors, called for a mandatory exchange of the original bonds for new bonds and the consequent cancellation of the original bonds. The new bonds differ primarily from the old bonds in that the principal amount of the new bonds is reduced to $150,150,650 (from $200,177,680) and they have extended maturity dates. Among other differences between the old and new bonds are the remedies and protections in the event of default. The new bonds do not afford remedies for failure to make payments on Senior Subordinate Bonds unless there are no Senior bonds outstanding. As part of the restructuring, the holders of the original bonds are required to execute a general release in favor of the issuer. The release provisions neither expressly include nor exclude defendant.

Defendant acknowledges that it would have been contractually obligated to pay for any loss suffered by plaintiffs under the original bonds when they matured, in the event of the issuer's bankruptcy, but it claims that as a result of the Restructuring Plan that was adopted, the original bonds were cancelled, completely relieving it of any obligation to pay under the CBIs.

The court rejects this position because it is inconsistent with the terms of the policies and contrary to law.

The CBIs are financial guaranty insurance policies, which defendant is specially licensed to sell throughout the United States, including New York. As a monoline insurer, defendant is only authorized to sell this kind of insurance (*see Matter of McFerrin-Clancy v Insurance Dept. of State of New York*, 23 Misc 3d 1223[A], 2009 NY Slip Op 52257[U] [Sup Ct New York County 2009]). The policies are primarily governed by Article 69 of the Insurance Law. While they have some unique characteristics, they are generally subject to the same laws and principles underlying insurance policies in general (*see* Insurance Law §6908). Thus, CBIs are policies of insurance that should be analyzed in accordance with general principles of contract interpretation and insurance law (*see Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170 [2008]).

Insurance policies are to be afforded their plain and ordinary meaning and interpreted in accordance with the reasonable expectations of the insured party (*see Cragg v Allstate Indem. Corp.*, 17 NY3d 118 [2011]). Exclusions from policy obligations must be in clear and unmistakable language *(see Pioneer Tower Owners Assn. v State Farm Fire and Cas. Co.*, 12 NY3d 302, 307 [2009]), and if the terms of a policy are

ambiguous, any ambiguity must be construed in favor of the insured and against the insurer (*see White v Continental Cas. Co.*, 9 NY3d 264 [2007]. The CBIs each expressly provide that they are to be governed by the laws of the State of New York (*see Aon Risk Servs. v Cusack*, 102 AD3d 461 [1st Dept 2013]).

The plain meaning of the contractual language contained in the CBI requires defendant to absolutely and unconditionally guarantee payment on the individual bonds in the event of the issuer's nonpayment. Issuer insolvency is clearly a covered risk, as is bankruptcy, which is a societal hallmark of insolvency. These are the very risks for which defendant received payment of premiums. The CBIs were noncancellable, with a narrow exception not applicable here, and did not provide for any exclusion in the event of bankruptcy. The filing of the bankruptcy petition by the issuer is an event of default under the trust agreement and it also served to accelerate plaintiff's claims against the issuer, which the issuer could not fully pay. The restructuring occurred only after the default under the trust agreement had occurred. Confirmation of the restructuring plan made it a certainty that the issuer would not make any future payments to plaintiffs on the original bonds at their respective maturity dates. It is the restructuring of the bonds and their reissuance in a lower principal amount with a longer payment

period that concretely represents that plaintiffs have sustained a loss.

Neither the restructuring plan, nor the issuer's discharge of debt in the bankruptcy proceeding, changed the obligations under the parties' contracts of insurance. Although releases were made in favor of the issuer and others, the terms of the releases do not include, and consequently do not extend to, defendant (*see Union Trust Co. v Willsea*, 275 NY 164, 167 [1937]; *Culver v Parsons*, 7 AD3d 931 [3d Dept 2004]). Additionally, while the Bankruptcy Court had jurisdiction and power to permanently enjoin claims and actions against nondebtors, it did not issue such an order in favor of defendant (*see In re Connector 2000 Assn.*, 447 BR 752, 767 [Bankr D SC 2011]).

Defendant's primary argument is that the cancellation of the original bonds and replacement with new and materially different bonds under the restructuring plan relieves it from any obligation to make payments to plaintiffs under the policies. It relies on the principle of law that a surety/guarantor is relieved of liability where, without its consent, there is any alteration of the underlying insured obligation (*see Bier Pension Plan Trust v Estate of Schneierson*, 74 NY2d 312, 315 [1989]). We do not go so far as to adopt plaintiffs' position that a monoline insurer can never assert such a defense on account of the

insurer's unique statutory right to accelerate payment. We find, however, that this common-law defense has no application to the CBIs at issue.

The defense is inconsistent with the nature and purpose of the policies themselves. As noted, the policies are noncancellable, except for a narrow nonapplicable exception. Noncancellability is consistent with and integral to the singular risk that the CBIs were clearly intended to cover, which is the insolvency or bankruptcy of the issuer. Reorganization is a likely, if not desirable outcome of bankruptcy, so that when a municipal bond issuer files for bankruptcy, such reorganization should not in itself vitiate obligations under contracts with third parties. If defendant were allowed to assert the common law defense it proposes, defendant would avoid paying for the very risk it undertook to insure and for which it received premiums.

The cases relied upon by defendant only apply the defense to the situation where the debtor and creditor have entered into a private agreement altering the terms of the obligations that were guaranteed. None of the cases arise in the context of a bankruptcy proceeding where the alteration is part of a reorganization plan and court ordered (*see Bier Pension Plan, 74 NY2d at 315*; *Geiger v ENAP, Inc.*, 264 AD2d 755 [2d Dept 1999]; *In*

re Dexel Bernham Lambert Group, Inc., 151 BR 674 [Bankr SD NY 1993], *affd* 157 BR 532 [SD NY 1993]). Additionally, there is no claim made that by virtue of the bond exchange defendant is now obligated to insure payment on the new bonds. Plaintiffs' claim is, as it should be, only for the known default under the original bonds, which was the very risk that defendant was insuring under the CBIs. Defendant's arguments about having to bear increased risk associated with the new bonds is misplaced. The new bonds are meaningful in terms of subrogation rights and/or offsets to payment. The loss that is payable under the CBIs takes into account any partial value received by the bond holder from the issuer, which in this case would reflect and be equal to the value of the new bonds. This is different than the risk of insuring the new bonds, which defendant is not required to assume under the restructuring plan. Because defendant has the sole right to accelerate payment for the losses to plaintiffs occurring as a result of issuer nonpayment under the original bonds, defendant has control over when it makes payments and it can do so at a time when it believes the value of the new bonds is favorable to it, provided payment is no later than the maturity date on the original bonds.

Since it is undisputed that plaintiffs are not the owners of Enhanced CUSIP Nos. 20786LCS8 and 20786LCU3, the court below erred in including these bonds in its order and judgment.

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

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Charles Ramos, J.), entered August 14, 2012, which denied defendant ACA Financial Guaranty Corporation's motion for summary judgment seeking a declaration that it was not obligated to provide coverage under the terms of the financial guaranty insurance policies it issued, and granted the cross motion for summary judgment by plaintiffs Oppenheimer AMT-Free Municipals, Oppenheimer Multi-State Municipal Trust and Oppenheimer Municipal Fund, declaring that defendant was required to provide coverage, should be modified, on the law, to delete reference to Enhanced Committee on Uniform Security

Identification Procedures (CUSIP) Nos. 20786LCS8 and 20786LCU3, and otherwise affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 3, 2013

CLERK

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

10141 Rachel Aiello, etc., Index 117442/08
Plaintiff-Appellant,

-against-

Burns International Security
Services Corporation,
Defendant-Respondent,

Command Security Services, Inc.,
Defendant,

Saint Vincents Catholic Medical
Centers of New York, et al.,
Defendants-Appellants.

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Law Offices of William Cafaro, New York (Steven M. Pivovar of counsel), for Rachel Aiello, appellant.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza of counsel), for Saint Vincents Catholic Medical Centers of New York, Richmond University Medical Center, RUMC-Bayley Seton, Bayley Seton Hospital, Archna Sarwal, M.D., and Adriana Boiangiu, M.D., appellants.

Marin Goodman, LLP, Harrison (Russell Jamison of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered July 23, 2012, affirmed, without costs.

Opinion by Renwick, J. All concur except Tom, J.P. who concurs in a separate Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Dianne T. Renwick
Leland G. DeGrasse
Rosalyn H. Richter, JJ.

10141
Index 117442/08

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Rachel Aiello, etc.,
Plaintiff-Appellant,

-against-

Burns International Security
Services Corporation,
Defendant-Respondent,

Command Security Services, Inc.,
Defendant,

Saint Vincents Catholic Medical
Centers of New York, et al.,
Defendants-Appellants.

_____x

Plaintiff and defendants St. Vincents Medical Centers of New York, Richmond University Medical Center, RUMC-Bayley Seton, Bayley Seton Hospital, Archna Sarwal, M.D. and Adriana Boiangiu, M.D. appeal from the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered July 23, 2012, which granted defendant Burns International Security Services Corporation's motion for summary judgment dismissing the complaint and cross claims asserted against it.

Law Offices of William Cafaro, New York (Steven M. Pivovar of counsel), for Rachel Aiello, appellant.

Bartlett, McDonough & Monaghan, LLP, Mineola (Robert G. Vizza and Patricia D'Alvia of counsel), for Saint Vincents Catholic Medical Centers of New York, Richmond University Medical Center, RUMC-Bayley Seton, Bayley Seton Hospital, Archna Sarwal, M.D., and Adriana Boiangiu, M.D., appellants.

Marin Goodman, LLP, Harrison (Russell S. Jamison of counsel), for respondent.

RENWICK, J.

Plaintiff commenced this wrongful death action as administratrix of the estate of her deceased husband, Jason Aiello. Plaintiff alleges that defendants were negligent in allowing her husband to escape from the emergency room of a psychiatric care unit. At the time, Aiello, a retired NYPD Sergeant, had been admitted to the unit but was waiting for an in-patient bed to become available. After the hospital elopement, Aiello was shot and killed in front of his home during an armed confrontation with the police. Plaintiff sued, among others, the hospital and the security agency retained by the hospital to provide security at the psychiatric care unit. Supreme Court, however, dismissed the claims asserted against the agency on the ground that, as a matter of law, the agency did not owe plaintiff a duty of care in the performance of its contract with the hospital. A threshold issue addressed in this appeal is whether the security service agreement, which disavows any third-party beneficiaries, was rendered unenforceable by the contracting parties' failure to set forth, in writing, the security agency's duties.

Factual and Procedural Background

The psychiatric care unit where the elopement took place is

part of defendant Richmond University Medical Center (RUMC), a hospital located in Staten Island. The hospital occupies buildings that were formerly St. Vincent Catholic Medical Centers of New York. RUMC has adjunct facilities at the Bayley Seton Hospital, where it operates several clinics, including the psychiatric care unit at issue here.

Security Agreement

Pursuant to several renewed contracts starting in August 2007, defendant Burns International Security Services Corporation (Burns) was retained to supply security guards to the psychiatric care unit at Bayley Seton. Specifically, on August 27, 2007, RUMC and Burns executed a "security services agreement," which provided that "security services will commence on TBD and will continue until terminated." With regard to compensation, the agreement delineates four different rates of hourly compensation for four different positions: "Officer I," "Officer II," "Officer III," and "Supervisor."

Paragraph 1, under "terms and conditions," defines the "scope of services," and provides as follows: "[Burns] will provide services pursuant to this Agreement in accordance with mutually-acceptable, written security officer, patrol officer or alarm response orders (which are incorporated into this Agreement

by this reference). [Burns] will not be obligated to perform any duties or services (and will bear no responsibility for duties or services) other than expressly specified in such orders or this Agreement."

Paragraph 4 provides that RUMC must give Burns notice of any claim "arising out of or relating to this Agreement" within 30 days of the occurrence, and that "[n]o action to recover for any Claim will be instituted or maintained against [Burns] unless said action is instituted no later than 12 months following the date of the occurrence."

Paragraph 5(b) provides as follows: "[Burns] agrees to and will indemnify, defend and hold [RUMC] harmless from and against any Claims arising from [Burns's] performance of the services under this Agreement, but only to the extent the Claim is caused by the negligence of [Burns]."

Paragraph 5(h) provides as follows: "The services provided under this Agreement are solely for the benefit of [RUMC], and neither this Agreement nor any services rendered hereunder confer any rights on any other party, as a third-party beneficiary or otherwise."

Paragraph 17 is a merger clause, and provides, in relevant part, that "[n]o representations, inducements, promises or

agreements of [Burns] not embodied herein will be of any force or effect," and "[n]o changes to this Agreement will be binding on [Burns] unless approved in writing."

Testimony Regarding Burns's Security Duties

Michael Esposito was the director of security and public safety at RUMC. He delegated to his assistant, Vincent Forgione, the negotiation of the security service contract with Burns for Bayley Seton. Forgione entered into the aforementioned contract with Burns after consulting with Linda Paradiso, who was the director of nursing and in-patient services at Bayley Seton. Paradiso told Forgione that she needed security guards to be posted at, at least, three different locations in the psychiatric care unit: Intake (on the third floor); the Comprehensive Psychiatric Emergency Program (C-PEP on the first floor) and a supervisory post (on the third floor, down the hall from Intake). Paradiso also recommended that the supervisor should "roam" all areas of the psychiatric unit and provide relief to the guards serving permanent posts so that no post remained unoccupied at any time.

The C-PEP unit was on a portion of the ground floor of the psychiatric care unit. It was next to the Extended Observation Beds (EOB), a separate wing that had individual patient rooms

used for short term observation of patients. Although separated by a locked door, the EOB was considered part of the C-PEP. C-PEP also contained a waiting room located immediately adjacent to the locked entrance door; this was the "Control Room" from which the RUMC staff would operate the unit. The C-PEP also contained private rooms where patients would be interviewed during triage. Outside of the entrance door to the waiting room was an ambulance bay. RUMC also provided the security officer a small desk inside the C-PEP waiting room that was located against a wall at the opposite end of the room from the entrance door.

According to both Esposito and Forgione, Paradiso directed Burns's security staff. On several occasions she terminated Burns' security officers who were not following "rules." The security officers were required to be licensed by the state. RUMC also provided in-house training for medical staff and security guards for "non-violent" crisis intervention. The guards were also given written materials on "non-violent" crisis intervention and methods for restraining patients.

At the time of Aiello's incident, there were no written post orders provided to security guards; instead, post orders were communicated verbally to the officers. Each guard was required to be at his post, except the guard at the C-PEP post, who was

required to make rounds every 15 minutes, from the C-PEP post to the EOB room and back. Each guard was also required to address "crisis and emergencies," at the behest of the "clinical staff," including the nurses and doctors. Guards were not allowed to restrain patients, but they assisted the medical staff in such endeavor.

The Patient's Elopement Incident

On the evening of July 21, 2008, Aiello was brought by his family to Bayley Seton for psychiatric concerns. Around 8:45 p.m., a C-PEP nurse triaged Aiello and directed him to go back to the waiting room. Around 4:15 a.m., Aiello was interviewed by RUMC's psychiatric resident, Dr. Boiangiu, who also attempted to examine him, but he refused. Around 4:20 a.m., Dr. Boiangiu issued an order admitting Aiello and prescribing various anti-psychotic medications for him that were not immediately available. Instead, Aiello was directed to wait in the C-PEP waiting room for an in-patient bed to become available.

Around 6:30 a.m., emergency medical technicians (EMTs) arrived at C-PEP to transport a patient to a different facility. Allison Rozenkier-Larson, a mental health technician at RUMC, unlocked the door of the waiting room to allow the EMTs to transport the other patient. One of the EMTs reported that

Rozenkier was the only staff member present and there was no security in the waiting room. When Rozenkier unlocked the door, Aiello ran past her and the EMTs, and fled the hospital. Charles Brown, Burns's security guard, was stationed at the C-PEP desk that night, but he was not there when Aiello fled. Brown claimed that, at the time, he had been ordered to remain at the EOB unit to cover for Lisa Hernandez, a mental health technician. Hernandez denied making that request. In addition, Rozenkier stated that only mental health technicians relieve each other.

After fleeing the hospital, Aiello walked to his family's home and retrieved two handguns. Two NYPD officers arrived at the home, and when Aiello came outside, they directed him to submit to arrest. While they were walking Aiello from the house towards the police vehicle, one of the officers removed a gun from the back of Aiello's pants, at which time Aiello broke free and pulled out a second gun from the front of his pants. The officers took cover and repeatedly told Aiello to put the gun down, but Aiello fired at them; the officers returned fire and fatally shot Aiello.

Pleadings and Burns's Motion for Summary Judgment

In December 2008, plaintiff commenced this action against RUMC and Burns, among others. In January 2009, RUMC interposed

an answer that did not assert any cross claims. In May 2011, RUMC interposed an amended answer generally denying the complaint, raising affirmative defenses, and asserting a cross claim against Burns for indemnification and/or contribution. Burns interposed an answer, inter alia, generally denying the complaint and raising affirmative defenses.

After discovery was completed, Burns moved for summary judgment seeking to dismiss the complaint and cross claims asserted against it, arguing that Aiello was not an intended third-party beneficiary of its security agreement with RUMC. Burns also argued that RUMC's cross claim should be dismissed because paragraph 4 of their agreement requires RUMC to give Burns notice of the claim within 30 days of its occurrence, and requires RUMC to assert claims against it within 12 months of occurrence, but RUMC served the amended answer asserting the cross claims more than three years after the incident.

Supreme Court granted Burns's motion and dismissed the complaint and cross claim asserted against it. The court reasoned that it did not need to decide whether the written agreement was enforceable, because Burns did not wholly displace RUMC's duty to provide security, and there was no evidence "that fully details the scope of Burns' responsibilities for security."

The court also held that Burns did not launch an instrument of harm, and that there was no detrimental reliance, because it was undisputed that the decedent had no knowledge of what kind of security system RUMC had.

The court also dismissed RUMC's cross claim for contractual indemnification against Burns because the written agreement was unenforceable, and "to the extent the cross[]claims seek common[-]law indemnification or contribution, they must be dismissed, as the RUMC defendants (and plaintiff] have failed to raise a triable issue of fact as to whether plaintiff was a third-party beneficiary of Burns' contract or whether Burns had an independent duty of care to plaintiff." Both plaintiff and RUMC appealed the adverse rulings rendered against them.

Discussion

In determining whether plaintiff is entitled to proceed to trial on a negligence theory against Burns, the threshold question is whether Burns owed a duty of care to plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]). To answer this question, we first look to the above-quoted paragraph 5h of the agreement between RUMC and Burns. Again, that provision expressly provides as follows: "The services provided under this Agreement are solely for the benefit of [RUMC], and neither this

Agreement nor any services rendered hereunder confer any rights on any other party, as a third-party beneficiary or otherwise." Thus, plaintiff was not an intended third-party beneficiary of Burns's contract with RUMC.

Plaintiff, however, argues that the written agreement is unenforceable. Furthermore, plaintiff argues, the third-party duties were orally agreed to by RUMC and Burns. With regard to the service agreement, plaintiff points out that it failed to set forth any of Burns's duties, and although the contract required the parties to reduce the duties to writing, that never happened. Additionally, plaintiff argues that its merger clause precludes using unwritten extrinsic evidence to establish the scope of duties. We reject plaintiff's suggestion that the security agreement was merely an agreement to agree because Burns's duties were left for future incorporation in a writing that never took place.

We begin with one of the basic tenets of contract law: the requirement of definiteness (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 483 [1989], *cert denied* 498 US 816 [1990]; *see also Brown v New York Cent. R.R. Co.*, 44 NY 79, 83 [1870]). "[A] court cannot enforce a contract unless it is able to determine what in fact the parties have agreed to" (*Matter of*

166 Mamaroneck Ave. Corp. v 151 East Post Rd. Corp., 78 NY2d 88, 91 [1991]). Therefore, the parties must make a manifestation of mutual assent sufficiently definite to assure that they are truly in agreement with respect to the material terms of their contract (*Matter of Express Indust. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]). In other words, before we can enforce a contractual right, we must first find that the contract is sufficiently definite to allow us to ascertain the terms of the parties' agreement *(Joseph Martin, Jr., Delicatessen v Schumacher*, 52 NY2d 105, 109 [1981]; Restatement [Second] of Contracts § 33[1]). Otherwise, the court in intervening would be imposing its own perception of what the parties should or might have undertaken, rather than confining itself to the implementation of the bargain to which the parties have mutually committed themselves *(Joseph Martin, Jr., Delicatessen,* 52 NY2d at 109).

Accordingly, "a mere agreement to agree, in which a material term is left for future negotiations, is unenforceable" (*166 Mamaroneck Ave. Corp.*, 78 NY2d ai 91 [internal quotation marks omitted]; *see also Bernstein v Felske*, 143 AD2d 863, 865 [2d Dept 1988]). However, "[a] contract does not necessarily lack all effect merely because it expresses the idea that something is

left to future agreement" (*Four Seasons Hotels v Vinnik*, 127 AD2d 310, 317 [1st Dept 1987]). The court shall enforce a contract if the parties have completed negotiations of essential elements, even when "the parties have expressly left . . . other elements for future negotiation and agreement" (*id.* at 317; *cf. Conopco, Inc. v Wathne Ltd.*, 190 AD2d 587 [1st Dept 1993]).

Applying these principles, we find that the security service agreement here is sufficiently definite to establish that the parties intended to be bound and sufficiently definite to establish the nature of the parties' agreement. The contract clearly identifies, among other things, the parties, the subject matter of the agreement (security services), and the price to be paid. With regard to compensation, the agreement also delineates ascending levels of compensation for a hierarchy of security officers: "Officer I," "Officer II," "Officer III" and "Supervisor."

Certainly the memorialization of the details of the security service was not an indispensable prerequisite to the performance of the contract, as evidenced by the fact that neither side took any step to raise the issue once the security services (24/7 work schedule with 8-hour shifts) were implemented and renewed several times. Moreover, disputed terms are not to be considered in

isolation, but in the context of the overall agreement (*Cobble Hill*, 74 NY2d at 483). In essence, the parties here bargained for a security scheme comprised of three guards and one supervisor at determinative levels of compensation. Therefore, the provision requiring the parties to reduce the duties to writing does not destroy the definiteness of the security service agreement.

Nor can this Court ignore the fact that at the making of a contract for a right, it may sometimes be impossible to determine details because of the nature of the service. In fact, as hospitals can present complex security considerations, a hospital security officer can expect to confront numerous, and sometimes conflicting, security challenges while on the job. Thus, the changing situation of affairs may indicate that details may also be subject to modification and, therefore, should not be definitely prescribed but should be left to settlement by an agreement or decree at the time the right is insisted upon.

Furthermore, courts have consistently held that "where [as here] it is clear from the language of an agreement that the parties intended to be bound and there exists an objective method for supplying a missing term, the court should endeavor to hold the parties to their bargain" (*166 Mamaroneck Ave. Corp.*, 78 NY2d

at 91; *Edelman v Poster*, 72 AD3d 182, 186 [1st Dept 2010]; *Marshall Granger & Co., CPA's, P.C. v Sanossian & Sardis, LLP*, 15 AD3d 631, 632 [2d Dept 2005]). Under such circumstances, "[s]triking down a contract as indefinite and in essence meaningless is at best a last resort" (*166 Mamaroneck Ave. Corp.*, 78 NY2d at 91 [internal quotation marks omitted]; *Cobble Hill Nursing Home*, 74 NY2d at 483).

In this case, there is a clear method for supplying the missing term, the parties' course of conduct; all other terms were adopted directly from the written agreement. Thus, the only thing that was absent in this contract was a writing evincing the particulars of a non essential provision, which was later filled in by the parties' mutual consent and course of conduct. As indicated, the hospital developed a scheme of assigning three guards to permanent posts, and another guard to a semipermanent post, which required that guard to make rounds every 15 minutes. It also appears that they were trained in-house to assist the medical staff in emergencies and crisis, primarily involving the handling of psychiatric patients. Under these circumstances, the security services to be provided were sufficiently specific to ascertain "what was promised" (*Joseph Martin, Jr., Delicatessen*, 52 NY2d at 109).

Significantly, this Court has held, albeit by implication, that security service agreements that do not expressly specify the services are, nevertheless, enforceable contracts (*see e.g. Lebron v Loco Noche, LLC,* 82 AD3d 669, 670 [1st Dept 2011]*; Rahim v Sottile Sec. Co.*, 32 AD3d 77, 82 [1st Dept 2006]; *see also Buckley v I.B.I. Sec. Serv.*, 157 AD2d 645 [2nd Dept 1990]). For example, in *Rahim*, the agreement provided that the security company "agreed 'to furnish Security Officer service,'" and that the guards "'shall perform such services as agreed upon by [the security company] and the Client,'" which services were not further detailed (32 AD3d at 780. That agreement also expressly disavowed any intent to create third-party beneficiaries (*id.*). This Court held that the agreement's language specifically precluded plaintiffs from claiming third-party beneficiary status, and that the three *Espinal* exceptions were inapplicable (*id.* at 80-82). While not explicitly addressing the agreement's enforceability, by holding that plaintiff was not a third-party beneficiary thereto, this Court implicitly held that the written agreement was enforceable.

Plaintiff's attempt to distinguish *Rahim* is not persuasive. Plaintiff points out that the agreement in *Rahim* merely provided that the security company "shall perform such services as agreed

upon by" it and the client (*Rahim*, 32 AD3d at 78 [internal quotation marks omitted]). Unlike the agreement at issue here, the agreement in *Rahim* did not require that those services also be set forth in writing. While, in this case, the contract calls for such services to be specified in writing, as indicated, the parties' course of conduct provided the service requirements.

Furthermore, the law is abundantly clear in New York that, even where a contract specifically contains a nonwaiver clause and a provision stating that it cannot be modified except by a writing, it can, nevertheless, be effectively modified by actual performance and the parties' course of conduct (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006] ["Contractual rights may be waived if they are knowingly, voluntarily and intentionally abandoned. Such abandonment may be established by affirmative conduct or by failure to act so as to evince an intent not to claim a purported advantage" [internal quotation marks and citation omitted]; *All-Year Golf, Inc. v Products Inv. Corp. Ltd*, 34 AD2d 246, 250 [4th Dept 1970], *lv denied* 27 NY2d 485 [1970]).

In this case, while the parties do not argue waiver or modification, per se, RUMC does not deny that the services were specified orally, that no party objected or sought to enforce the

writing provision, or that the services provided and the price paid were all identical to the written agreement. Moreover, only a few months after the incident in this case, RUMC signed another, identical agreement with Burns, changing only the price paid for the services, and containing the same provision disavowing any third-party beneficiary. Thus, this was essentially a renewal of the first contract.

In sum, we now hold explicitly what was implicit in *Rahim* and *Lebron*: that security agreements that do not expressly specify services, nevertheless, are enforceable contracts. The specifics of such service are generally not a material provision necessary to the formation of a binding contract, but may be provided later (*Rahim*, 32 AD3d 77; *Lebron*, 82 AD3d 669; *cf. Buckley*, 157 AD2d 645)

Our finding of enforceability of the security service agreement disavowing third-party beneficiary status, however, does not end the inquiry as to whether Burns is potentially liable in tort to plaintiff. As this Court explained in *Rahim*, where "[a] plaintiff was neither a party to [a] contract nor an intended third-party beneficiary thereof, we must look beyond the contract to determine whether there is evidence of any circumstances that, under applicable precedent, could support a

finding that [Burns] owed plaintiff a duty of care" (32 AD3d at 80).

Generally, a nonparty to a contract cannot impose tort liability upon a party to a contract for breach thereof *(see Church v Callanan Indus.*, 99 NY2d 104, 111 [2002]; *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168-169 [1928]). However, there are three exceptions where the contracting party may be liable to a nonparty to the contract for the contracting party's performance of the contractual obligations: (1) where the contracting party launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other contracting party's duty to maintain the premises safely or securely (*see Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253, 257 [2007]; *Church*, 99 NY2d at 111-112; *Espinal*, 98 NY2d at 140).

This Court finds that none of the *Espinal* exceptions apply here. It is conceded that the first *Espinal* exception, launching a force or instrument of harm, does not apply. The second *Espinal* exception, detrimental reliance, is not applicable because, as Burns correctly points out, this exception requires that the noncontracting party has actual knowledge of the

contract between the contracting parties *(see Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 215 [2d Dept 2010]; *Wheaton v East End Commons Assoc.*, 50 AD3d 675, 677 [2d Dept 2008]). Here, there is no indication in the record that either Aiello or plaintiff had any knowledge about RUMC's security service agreement with Burns.

As to the third exception, the record demonstrates that Burns did not totally displace RUMC's duty to secure the facility. It is undisputed that Burns retained a supervisor at the premises at all times. It is, however, also undisputed that RUMC's management and medical staff retained supervisory authority over the security guards. Indeed, on several occasions Burns guards were fired by Paradiso for not following the RUMC staff's directions. In addition, RUMC required Burns's staff to complete certain training it provided.

We next examine whether any of RUMC's cross claims against Burns (i.e., contractual indemnification, common-law indemnification or contribution) were properly dismissed. With regard to contractual indemnification, we find that RUMC's cross claim is barred under paragraph 4 of the agreement. Paragraph 4 requires RUMC to send notice of any claims to Burns's legal department (in California) within 30 days of the occurrence. It is undisputed that RUMC never did so. Further, RUMC's reliance

upon the incident reports of either Burns's employees or RUMC's employees is misplaced; the issue is not whether Burns had actual notice of the incident, but whether RUMC furnished Burns with notice of the potential claim against Burns, as contractually specified, which RUMC did not.

Even if the notice provision had been complied with, RUMC's cross claim would still not be viable, because it was not timely commenced. RUMC's original answer was served in January 2009, and its amended answer, asserting a cross claim against Burns, was served in May 2011. Contrary to RUMC's allegations, its amended answer cannot be deemed to relate back to RUMC's original answer, because the original answer does not make any allegations pertaining to Burns's negligence. Thus, RUMC cannot be deemed to have instituted its claim against Burns within 12 months of its occurrence, which was July 2008, as the contract required.

We also find that RUMC's cross claim against Burns for common-law indemnification was properly dismissed. "Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine"

(*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]; *see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 567-568 [1987]; CPLR 1401). Here, given Rozenkier's conduct described above, the record establishes that RUMC "actually participated to some degree in the wrongdoing" and, therefore, cannot sustain a claim for common-law indemnification against Burns (*Richards Plumbing & Heating Co., Inc. v Washington Group Intl., Inc.*, 59 AD3d 311, 312 [1st Dept 2009] [internal quotation marks omitted]).

Finally, we examine whether RUMC's cross claim against Burns for common law contribution was properly dismissed. Generally, a claim for common-law contribution involves the apportionment of liability amongst joint tortfeasors, both of whom owed a duty to an injured plaintiff (*see Smith v Sapienza*, 52 NY2d 82, 87 [1981]). As Burns correctly contends, it has neither a contractual duty under third-party beneficiary status nor an independent duty to Aiello at common law or otherwise. However, one joint tortfeasor may nevertheless seek common-law contribution against another joint tortfeasor even where that tortfeasor did not owe a duty to the injured plaintiff (*see*

Guzman, 69 NY2d at 558, n5; *Garret v Holiday Inns*, 58 NY2d 253, 261 [1983] ["If an independent obligation can be found on the part of a concurrent wrongdoer to prevent foreseeable harm, he should be held responsible for the portion of the damage attributable to his negligence, despite the fact that the duty violated was not one owing directly to the injured person"]).

In this case, contrary to RUMC's allegations, the record does not provide any grounds for finding Burns negligent. As previously noted, no employee of Burns was present at the time of the escape. The hospital's mental health technician had a key, and it is not alleged that she lacked independent authority to permit entry or exit. Even if it were to be established that the contracting parties had adopted some protocol requiring a security guard to be present whenever entry to the waiting room was permitted, it was the hospital's employee who, in the exercise of her sole judgment, elected to open the door. Thus, we perceive no basis for liability on the part of Burns, and RUMC's cross claim against Burns for common-law contribution was properly dismissed.

Accordingly, the order of the Supreme Court, New York County (Marcy S. Friedman, J.), entered July 23, 2012, which granted defendant Burns's motion for summary judgment dismissing the complaint and cross claims asserted against it, should be affirmed, without costs.

All concur except Tom, J.P. who concurs in a separate Opinion:

TOM, J.P. (concurring)

Plaintiff's decedent Jason Aiello, a former police officer, was shot and killed in an exchange of gunfire with two uniformed police officers. Earlier that same morning, he had been in a waiting room at Bayley Seton Hospital in Richmond County, where he was being evaluated for admission by a psychiatrist under the hospital's Comprehensive Psychiatric Emergency Program. He escaped from the waiting room when a mental health technician employed by the hospital unlocked the door to permit two emergency medical technicians to enter. He then walked home and retrieved two handguns. In the attempt to take him into custody, the police officers recovered one of the handguns from his person, but Aiello broke free and opened fire, which the officers returned, fatally wounding him.

Plaintiff fails to articulate her theory of liability but suggests that she should be allowed to recover damages from defendant Burns International Security Services Corporation, whose employee was not even in the vicinity at the time of Aiello's escape, for the death of her husband at the hands of the police. However, she identifies no legal basis under which recovery may be had and advances no grounds for extending liability under New York law to the facts at bar. Thus, the

complaint fails to state a cause of action and must be dismissed. Finally, even if a basis for liability could be found, Supreme Court correctly concluded that the law affords no grounds for recovery against Burns.

While New York law does not generally impose liability for failure to prevent third persons from causing injury to others (*D'Amico v Christie*, 71 NY2d 76, 88 [1987]), liability may be imposed "when the defendant has authority to control the actions of such third persons" (*Purdy v Public Adm'r of County of Westchester*, 72 NY2d 1, 8 [1988]; *see Schrempf v State of New York*, 66 NY2d 289, 295 [1985]). A psychiatric facility, including one operated by the state, may be subject to liability for negligently permitting the release of a patient who is a threat to the safety of himself or others and who, upon release, inflicts harm on others (*see Rivera v New York Health & Hosps. Corp.*, 191 F Supp 2d 412, 422-423 [SD NY 2002]; *Williams v State of New York*, 308 NY 548, 554-555 [1955]). Likewise, liability may be imposed where the person negligently released inflicts injury upon himself (*Huntley v State of New York*, 62 NY2d 134 [1984]; *Bell v New York City Health & Hosps. Corp.*, 90 AD2d 270 [2d Dept 1982]). No authority is cited for imposing liability where, as here, harm is inflicted not *by* the person negligently

released but by some third person who inflicts harm *on* the person negligently released.

In this case, the immediate and proximate cause of Aiello's fatal injuries was a number of shots fired by police officers in self-defense. Thus, the causal relationship between any alleged negligence on the part of defendants and the fatal injuries he sustained was broken by police action, which defendants were under no legal duty to anticipate (*cf. Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507 [1980] [common-law duty of a possessor of land]). Nor can a compelling argument be made for extending liability for action taken by the police to protect themselves — and society — from a negligently released person presenting a clear danger to others. It remains that Aiello was shot while attempting to gun down two police officers, fortunately without success. However, the lack of injury to those officers is merely propitious. Had the outcome been less so, plaintiff would be in the anomalous position of advancing a right to recover for the death of Aiello equal to the right of the spouse of a police officer who was injured or killed in the exercise of his responsibility to protect the public from the danger posed by Aiello. Thus, I discern no basis for relief by plaintiff against any defendant.

Even if liability could be imposed under the facts presented, I am in full agreement that New York law affords no basis for recovery as against Burns, which was retained under contract to provide security services at Bayley Seton Hospital. Of the three situations enumerated in *Espinal v Melville Snow Contrs.* (98 NY2d 136, 140 [2002]), the only possibly pertinent basis for liability is the assumption of a duty to provide security that "entirely displaced" the hospital's duty to secure the premises. Burns did not unleash an agent of harm, which was accomplished by the hospital's mental health technician who unlocked the waiting room door, thereby facilitating Aiello's elopement (*id.*, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]). Likewise, irrespective of Aiello's knowledge of Burns's contractual duties, he lacked a sufficiently extensive history of treatment at the hospital to have developed any detrimental reliance that Burns would continue to provide security services (*Espinal*, 98 NY2d at 140, citing *Eaves Brooks Costume Co. v Y.B.H. Realty Corp.*, 76 NY2d 220, 226 [1990]). Since hospital employees had supervisory authority over the guards employed by Burns and since a hospital employee exercised control over admission to the waiting room, it is apparent that Burns did not entirely displace the hospital's duty to provide

security at the premises, and that ground for liability is unavailing (*Espinal*, 98 NY2d at 140).

Examination of the record finds no basis for imposing liability on Burns for negligence. Its employee was not present when the hospital's mental health technician took it upon herself to open the waiting room door, thereby affording Aiello a means of egress. That the technician had a key indicates a retention of control over access to and from the area by hospital personnel, for whose actions the hospital bears sole responsibility. Finally, the hospital's employee exercised her independent judgment to allow access to the waiting room in the absence of a security guard and without attempting to summon assistance.

Thus, there is no basis for imposing liability on the part of Burns, regardless of whether any other defendant can be held liable to plaintiff.

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

ENTERED: SEPTEMBER 3, 2013

CLERK