SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 25, 2013

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Tom, J.P., Friedman, Sweeny, Feinman, JJ.

9951-
9952 Anglo Irish Bank Corporation Limited, etc.,
Plaintiff-Respondent,

-against-

Izzy Ashkenazy,
Defendant-Appellant.

- - - - -

Anglo Irish Bank Corporation Limited, etc.,
Plaintiff-Respondent,

-against-

Izzy Ashkenazy, et al.,
Defendants-Appellants.

Index 103550/10
650724/10

_____

Goldberg Weprin Finkel Goldstein LLP, New York (Kevin J. Nash of counsel), for appellants.

Peretore & Peretore, P.C., Staten Island (Frank Peretore and Fredda Katcoff of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 31, 2011, which, without an evidentiary hearing, fixed the amount of damages awarded to plaintiff at $1,600,000, plus statutory interest, and judgment, same court, (Eileen Bransten, J.), entered November 29, 2011, which, without

an evidentiary hearing, fixed the amount of damages awarded to plaintiff at $3,420,300 plus statutory interest, unanimously affirmed, with costs.

When defendants conceded that the election of remedies provisions of the Real Property Actions and Proceedings Law did not apply to them, they effectively waived their argument that they were entitled to a set off in the amount of the proceeds of the foreclosure sales on the amount they owed on their guaranties (*see TBS Enters. v Grobe*, 114 AD2d 445, 447-448 [2d Dept 1985], *lv denied* 67 NY2d 602 [1986]). In any event, the unconditional guaranty of payment signed by defendants waived any defense, reduction or set off, including as a result of any legal action by mortgagee against the mortgagor (*see generally McMurray v Noyes*, 72 NY 523, 524-525 [1878]). As such, defendants were not entitled to an inquest to offer evidence of the amounts plaintiff received from the out of state foreclosures on the two properties that were the subject of the mortgages.

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

ENTERED: JUNE 25, 2013

CLERK

Tom, J.P., Andrias, Renwick, DeGrasse, JJ.

10096 Alexander M. Frame, Index 601736/04
Plaintiff,

-against-

Kenneth L. Maynard, et al.,
Defendants.

- - - - -

R.H. Guthrie, et al.,
Cross Claim Plaintiffs-Respondents-Appellants,

-against-

Kenneth L. Maynard, et al.,
Cross Claim Defendants-Appellants-Respondents.

_____

Kennedy Berg, LLP, New York (James W. Kennedy of counsel), for appellants-respondents.

B. Joseph Golub, P.C., New York (Benjamin J. Golub of counsel), for Guthrie respondents-appellants.

William J. Dockery, New York, for Caroline Paulson and Paul Hines, respondents-appellants.

_____

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered October 3, 2012, which, upon remand, awarded cross claim plaintiffs "appreciation" damages in the amount of $483,593.07 per limited partnership unit owned by them, prejudgment interest from October 6, 2008 through October 27, 2008, and postjudgment interest from October 27, 2008, unanimously modified, on the law and the facts, to award damages in the amount of $414,921.37 per limited partnership unit, and remand the matter for further

proceedings on damages, and otherwise affirmed, without costs.

Following this Court's order remanding the matter for further proceedings on damages (*see Frame v Maynard*, 83 AD3d 599 [1st Dept 2011]), the trial court did not exceed its authority or abuse its discretion in reopening the proceedings to hear additional evidence on damages.

The trial court's award of *Rothko* damages (*see Matter of Rothko,* 43 NY2d 305 [1977]) was in error only to the extent it should have deducted from the net value of the partnership property the amount of $1,153,720.80, representing a hypothetical 20% payment to which plaintiff Frame would have been entitled under a settlement agreement. Using the $6,750,000 property valuation as a starting point, and deducting the value of defendant Maynard's $500,000 one-half interest in the underlying land for a fair market value of the partnership property of $6,250,000, and subtracting $226,550.00 for the mortgage balance, $224,000 for repayment of the partnership capital contribution, and $30,846 for taxes and insurance, the net value of the partnership property is $5,768,604. After taking out the $1,153,720.80 entitled to Frame, the balance of $4,614,883.20 is divided by 75%, with $3,461,162.40 to be divided by the eight limited partner shares, to arrive at $432,645.30 per limited partnership unit. From this is subtracted $17,723.93,

representing the cash distribution paid to each limited partner, which leaves a net limited partnership unit value of $414,921.37.

The court correctly declined to award cross claim plaintiffs prejudgment interest dating back to the February 7, 2002 fraudulent sale of their property. However, rather than awarding only prejudgment interest from the October 6, 2008 verdict date through the October 27, 2008 date of the judgment, the court, upon remand, should have considered the evidence showing the amount of net income cross claim plaintiffs would have realized on the property between the February 7, 2002 sale and the September 2007 trial date, and awarded the additional damages necessary to make them whole.

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

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

ENTERED: JUNE 25, 2013

CLERK

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

10206 Richard Ramos, etc., et al., Index 6119/96
Plaintiffs-Appellants,

-against

The New York City Board of Education, et al.,
Defendants-Respondents.

_____

Raymond Schwartzberg & Associates, PLLC, New York (Raymond Schwartzberg of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Bradley M. Wanner of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Larry S. Schachner, J.), entered April 19, 2012, which, to the extent appealed from as limited by the briefs, granted defendant New York City Board of Education's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

The infant plaintiff was injured when, during the course of playing basketball in the school gymnasium, as he attempted to prevent the ball from going out of bounds, he was shoved by a classmate into an electrical outlet.

Defendants moved for summary judgment, asserting that the Board lacked actual or constructive notice of the defective electrical outlet in the gym, and, in any event, was not the proximate cause of the infant plaintiff's injury. The court

granted the motion, finding that the evidence showed that the conduct of the Board was not the proximate cause of plaintiff's injuries.

We now affirm. Whatever the merit to the assertion that the outlet was improperly maintained and "dangerously protruding" from the wall, the spontaneous act of another student pushing plaintiff into the electrical outlet constituted a supervening act relieving the Board of liability (*see Cruz v City of New York*, 7 AD3d 394 [1st Dept 2004] [another student's act of shoving the plaintiff into a hallway window during a game of tag was "sufficiently attenuated" from the defendants' conduct in allegedly failing to properly maintain the window]).

Plaintiffs' claim of negligent supervision was never asserted in the notice of claim, and therefore cannot be raised now (*see* General Municipal Law § 50-e [2]; *Scott v City of New York*, 40 AD3d 408, 409-410 [1st Dept 2007]).

As expressly conceded by plaintiffs before the motion court, the City of New York is not a proper party, and the dismissal of the complaint as to that defendant is not at issue here.

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

ENTERED: JUNE 25, 2013

CLERK

Acosta, J.P., Saxe, Moskowitz, Freedman, Manzanet-Daniels, JJ.

10264 333 East 49th Partners, L.P., Index 100516/10
Plaintiff-Appellant,

-against-

Leonard Flamm,
Defendant-Respondent.

_____

Livoti, Bernstein & Moraco, P.C., New York (Robert F. Moraco of counsel), for appellant.

Leonard N. Flamm, New York, respondent pro se.

_____

Judgment, Supreme Court, New York County (Eileen A. Rakower, J.), entered July 5, 2012, awarding defendant the principal sum of $35,000 in attorneys' fees, and bringing up for review an order, same court and Justice, entered on or about July 13, 2010, which granted defendant's motion to dismiss the complaint, and an order, same court and Justice, entered July 13, 2011, which confirmed the report of the special referee determining the amount of defendant's attorneys' fees, unanimously modified, on the law and facts, to vacate the award of attorneys' fees in defendant's favor, and otherwise affirmed, without costs.

The motion court correctly determined that plaintiff landlord was not entitled to recover the attorneys' fees it allegedly incurred in a holdover licensee proceeding brought solely against defendant's subtenant. There is no basis for

disturbing the finding that although defendant signed affidavits of primary residence to facilitate the subtenant's occupancy of the subject apartment prior to his relinquishment of his right to a renewal lease, he did not cause her continued occupancy during the subsequent 14 months preceding the commencement of the holdover licensee action against the subtenant. In view of the foregoing, we need not address plaintiff's additional arguments regarding dismissal, which do not involve the actual ground for the court's determination.

However, in light of the former tenant's misconduct in signing false affidavits of primary residency and entering into a subtenancy without the consent of the landlord, equitable considerations and fairness militate against an award of attorneys' fees in his favor (*see Kralik v 239 E. 79th St. Owners Corp.*, 93 AD3d 569, 570 [1st Dept 2012]), and we hereby modify to vacate the award.

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

ENTERED: JUNE 25, 2013

CLERK

Andrias, J.P., Friedman, Moskowitz, DeGrasse, Feinman, JJ.

10400 Harvey S. Shipley Miller, etc., Index 603855/07
Plaintiff-Appellant,

-against-

The Icon Group LLC,
Defendant-Respondent.

_____

Penn Proefriedt Schwarzfeld & Schwartz, New York (Neal Schwarzfeld of counsel), for appellant.

Goldberg & Rimberg, PLLC, New York (Brad Coven of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered January 22, 2013, which denied plaintiff's motion for an order holding defendant and its principals in contempt for violation of a restraining notice, unanimously affirmed, with costs.

Plaintiff moved for an order pursuant to CPLR 5251 and Judiciary Law § 756 punishing defendant and its two managing members for contempt for violating the terms of a restraining notice served on defendant on or about June 10, 2009 in connection with a $2,400,814.93 judgment obtained by plaintiff against defendant. Plaintiff alleged that it had learned from its deposition of defendant's landlord that defendant had continued to pay $140,077.40 in rent through June 30, 2010.

Supreme Court providently exercised its discretion in

denying plaintiff's motion. The documentary evidence established that defendant did not pay rent to the landlord after the restraining notice was served. Plaintiff's argument that defendant improperly transferred its security deposit to its landlord pursuant to an early lease termination agreement, in violation of the restraining notice, was improperly raised for the first time in plaintiff's reply papers (*see e.g. Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625-626 [1st Dept 1995]), and in any event the security deposit was retained by the landlord due to defendant's non payment of rent.

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

ENTERED: JUNE 25, 2013

CLERK

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

10448 The People of the State of New York, Respondent, Ind. 1143/10

-against-

George Thomas, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Nicolas Schumann-Ortega of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered May 11, 2011, convicting defendant, upon his plea of guilty, of attempted robbery in the second degree, and sentencing him, as a second violent felony offender, to a term of five years, unanimously affirmed.

Defendant's challenge to the voluntariness of his plea is unpreserved (*see People v Lopez*, 71 NY2d 662, 666 [1988]), and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. There was nothing before the plea court to warrant an inquiry into defendant's mental condition, or into whether he affirmatively waived an insanity defense. Shortly before he pleaded guilty, defendant had been found competent by two psychiatrists pursuant to CPL article 730, and defense counsel had declined to

controvert the finding of competency. During the plea allocution, defendant answered questions coherently, and nothing he said cast doubt on the voluntariness of the plea or suggested that he had any psychiatric or other defenses (*see People v Diallo*, 88 AD3d 511 [1st Dept 2011], *lv denied* 18 NY3d 882 [2012]).

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

ENTERED: JUNE 25, 2013

CLERK

CORRECTED ORDER - JULY 26, 2013

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

10449 West 63 Empire Associates, LLC, doing business as The Empire Hotel, Plaintiff-Appellant, Index **107010/10**

-against-

Walker & Zanger, Inc., Defendant-Respondent.

Altman Schochet LLP, New York (Irena Shternfeld of counsel), for appellant.

Reed Smith LLP, New York (Efrat Menachemi of counsel), for respondent.

Judgment, Supreme Court, New York County (Lucy Billings, J.), entered May 21, 2012, granting defendant's motion for summary judgment dismissing the complaint, and denying plaintiff's cross motion for leave to amend the complaint, unanimously affirmed, with costs.

Even assuming that plaintiff has standing to sue as an intended third-party beneficiary of a contract for the purchase of natural travertine tile, entered into between plaintiff's interior designer and defendant (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 45 [1985]), the broad, express, and conspicuous disclaimer of all warranties set forth in the invoice memorializing the sale is fatal to plaintiff's claims for breach of the implied warranties of merchantability

and fitness for a particular purpose (*see* UCC § 2-316; *Naftilos Painting, Inc. v Cianbro Corp.*, 275 AD2d 975, 975 [4th Dept 2000]; *Sky Acres Aviation Servs. v Styles Aviation*, 210 AD2d 393, 394 [2d Dept 1994]). Plaintiff's contention that the disclaimer language is not sufficiently conspicuous to be operative is unavailing. The disclaimer is printed in all-capital letters, and dominates the conditions of sale set forth at the bottom of the invoice (*see* UCC § 1-201[10]). The disclaimer is likewise fatal to plaintiff's claim for breach of contract (*see Simone v Homecheck Real Estate Servs., Inc.*, 42 AD3d 518, 521 [2d Dept 2007]; *Smith v Fitzsimmons*, 180 AD2d 177, 180 [4th Dept 1992]).

Plaintiff's unjust enrichment claim was also properly dismissed. The existence of the contract of sale "precludes recovery in quasi contract for events arising out of the same subject matter" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). The invoice contains the material terms and constitutes an integrated contract "preclud[ing] extrinsic proof to add to or vary its terms" (*Matter of Primex Intl. Corp. [Wal-Mart Stores, Inc.]*, 89 NY2d 594, 600 [1997]; *see* UCC §§ 2-202, 2-316). The parol evidence rule thus acts as a bar to plaintiff's assertion that, despite the clear disclaimer of any warranties contained in the evidence, defendant nonetheless orally warranted the unfilled natural travertine as being

suitable for use in a commercial hotel lobby.

Plaintiff has not demonstrated that there is potential evidence that might be uncovered in discovery that would serve to raise issues of fact supporting its claim. Under the circumstances, summary judgment is appropriate despite the absence of discovery (*see Noonan v New York Blood Ctr., Inc.*, 269 AD2d 323, 324 [1st Dept 2000]).

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

ENTERED: JUNE 25, 2013

CLERK

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

10450 Pablo Balzola, as Administrator of the Estate of Adriana Porras, etc., Plaintiff-Respondent, Index 114205/09

-against-

Sharon Giese, M.D., et al., Defendants-Appellants.

_____

Martin Clearwater & Bell LLP, New York (Barbara D. Goldberg of counsel), for appellants.

Langsam Law LLP, New York (Elise Hagouel Langsam of counsel), for respondents.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered February 13, 2013, which denied defendants' motion for summary judgment, unanimously modified, on the law, to grant the motion to the extent of dismissing the third cause of action for lack of informed consent, dismissing the amended complaint as against Sarah Lazarus, P.A., and precluding plaintiffs from presenting a theory of liability arising from the performance of the surgical procedures at issue in a surgi-suite, and otherwise affirmed, without costs.

This medical malpractice action seeks recovery for the alleged negligent treatment, wrongful death, and lack of informed consent of Adriana Porras in connection with an abdominoplasty and liposuction of the thighs and knees performed by Dr. Sharon

Giese, a plastic surgeon, on June 25, 2009 and assisted by Sara Lazarus, a physician's assistant employed by Dr. Giese. Plaintiffs maintain that, during the next two days, decedent developed various symptoms and that their calls to the emergency number provided by defendants went unanswered. Ms. Porras died on June 27, 2009 and the autopsy report identified the cause of death as "acute pulmonary failure due to bilateral obstructive pulmonary thromboemboli originating from thrombosed right popliteal vein."

Defendants' submissions of deposition transcripts, medical records, and expert affirmations based on the same, established a prima facie defense entitling them to summary judgment, if not rebutted (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The foregoing submissions established, inter alia, that defendants' treatment of decedent did not depart from accepted medical practices or proximately cause decedent's injuries or death.

The court properly considered the affirmation of plaintiffs' expert, Dr. Taff, the Rockland County Medical Examiner, who based his opinion, in part, on his personal observation of multiple emboli in both of decedent's lungs during the autopsy performed on her. Dr. Taff's opinion was properly based upon facts known to him based upon personal observation, which observation was not

recorded in the autopsy report prepared by another doctor. Whether or not he was being truthful goes to the weight, rather than the admissibility, of the evidence and is for the trier of fact to determine (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]). Dr. Taff's reliance on hearsay statements made by decedent to her husband Pablo Balzola concerning her postoperative complaints, was also proper. These statements fall within the "present sense impression" exception to the hearsay rule as they spontaneously and contemporaneously described decedent's physical complaints and were sufficiently corroborated with other evidence in the record (*see People v Brown*, 80 NY2d 729, 732 [1993]). Mr. Balzola's testimony of his wife's postoperative complaints was supplemented by his own personal observations of her medical condition and the ambulance report which reflect that decedent stated that she could not breathe and that Mr. Balzola reported that decedent's complaints also included increased perspiration.

We dismiss plaintiffs' failure to procure informed consent claim. To prevail on such claim, a plaintiff must establish, via expert medical evidence, that defendant failed to disclose material risks, benefits and alternatives to the medical procedure, that a reasonably prudent person in plaintiff's circumstances, having been so informed, would not have undergone

such procedure, and that lack of informed consent was the proximate cause of her injuries (*see* CPLR 4401-a; *Shkolnik v Hospital for Joint Diseases Orthopaedic Inst.*, 211 AD2d 347, 350 [1st Dept 1995], *lv dismissed in part, denied in part* 87 NY2d 895 [1995]). In response to defendants' prima facie showing that consent was properly obtained, plaintiffs failed to raise a triable issue of fact by offering expert medical evidence establishing the alleged increased risk to decedent was material and that lack of informed consent proximately caused the injury (*see* Public Health Law § 2805-d).

Ms. Lazarus, the physician's assistant, is entitled to dismissal of the claims asserted against her. The negligence claim against Lazarus arises, for the most part, out of her failure to communicate with decedent on the day after her surgery. While plaintiffs' expert plastic surgeon opined that this failure constituted a deviation from the standard of care, the expert did not opine this alleged failure was a proximate cause of decedent's injuries. Additionally, there is no evidence that Ms. Lazarus is responsible for or may be held accountable for plaintiffs' inability to communicate with Dr. Giese or was even aware of their attempts to do so.

Plaintiffs' expert's opinion that the performance of the surgical procedures in Dr. Giese's surgi-suite was contrary to

Dr. Giese's own protocol, without reference to the accepted standard of care, and speculation that performing the procedures in a hospital "might" have resulted in decedent being better monitored, allowing her to be diagnosed and treated, and affording her a chance of a cure, failed to raise a triable issue of fact on this theory of liability (*see Alvarez v Prospect Hosp.* at 324). We have considered appellants' remaining arguments and find them unavailing.

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

ENTERED: JUNE 25, 2013

CLERK

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

10451 Wilson Frias, Index 13680/07
Plaintiff-Appellant,

Franklin C. Guerrero, et al.,
Plaintiffs,

-against-

Son Tien Liu, et al.,
Defendants-Respondents.

_____

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

Kay & Gray, Westbury (Theresa P. Mariano of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered May 22, 2012, which granted defendants' motion for summary judgment dismissing plaintiff Wilson Frias's complaint based on the failure to establish a serious injury within the meaning of Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing of their entitlement to judgment as a matter of law by submitting the affirmed reports of an orthopedic surgeon who examined the alleged injured body parts, listed the tests he performed and recorded range of motion measurements, expressed in numerical degrees and the corresponding normal values, and found no limitations (*see Singer*

v Gae Limo Corp., 91 AD3d 526, 527 [1st Dept 2012]). The surgeon's examination was sufficient, even though he did not use an instrument to measure the ranges of motion (*see generally Toure v Avis Rent A Car Sys.*, 98 NY2d 345, 350 [2002]). In addition, defendants relied on plaintiff's deposition testimony that, among other things, plaintiff was able to return to work as a painter within a week after treatment and ceased treatment within four months after the accident, which demonstrated that the injuries were minor in nature (*see Gaddy v Eyler*, 79 NY2d 955, 957-958 [1992]), and required an explanation for the gap in treatment (*Pommells v Perez*, 4 NY3d 566, 574 [2005]).

In opposition, plaintiff failed to raise a triable issue of fact. In particular, plaintiff failed to offer evidence of significant limitations to his neck and shoulder (*see Levinson v Mollah*, 105 AD3d 644, 644 [1st Dept 2013]; *Moore v Almanzar*, 103 AD3d 415, 416 [1st Dept 2013]). Plaintiff also failed to tender competent objective medical evidence of an injury to his lumbar spine (*see Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept 2012]). In addition, he failed to adequately explain his complete cessation of treatment less than four months after the accident (*see Ramkumar v Grand Style Transp. Enters., Inc.*, 94 AD3d 484, 485 [1st Dept 2012]).

Plaintiff's deposition testimony that he was confined to bed and home for about one week after the accident, and that his work day was shortened by an hour, defeats his 90/180-day claim (*see Martin v Portexit Corp.*, 98 AD3d 63, 68 [1st Dept 2012]).

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

ENTERED: JUNE 25, 2013

CLERK

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

10452 In re Michael Donovan, Index 100289/12
Petitioner-Appellant,

-against-

Robert D. LiMandri, etc., et al.,
Respondents-Respondents.

_____

Thomas C. Monaghan, Broad Channel, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter Jr., J.), entered May 24, 2012, denying the petition to annul respondents' determination, dated September 15, 2011, which denied petitioner's application to renew his stationary engineer license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the matter remanded to respondents for further proceedings consistent herewith.

The determination to deny petitioner's renewal application for a stationary engineer license was in violation of lawful procedure and lacked a rational basis. Respondents arbitrarily concluded that petitioner's prior federal conviction for conspiracy bore a direct relationship to the duties and responsibilities attendant to a stationary engineer, the license

for which he sought renewal after having his license renewed several times (*see* Correction Law § 750[3]; 752[2]; *Dellaporte v New York City Dept. of Bldgs.*, __ AD3d __, 2013 NY Slip Op 3281 [1st Dept 2013]). Petitioner's prior conviction resulted from the misuse of his administrative powers in his former position, which granted him control over hiring, payroll, and selection of vendors. Such actions bear no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license, and thus do not satisfy the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses (*see* Correction Law § 752[1]).

Respondents also could not have rationally found petitioner to pose an unreasonable risk to public safety or welfare so as to satisfy the second exception to the general prohibition (*see* Correction Law § 752[2]). There was no evidence that petitioner had submitted false documents that related to his stationary engineer responsibilities or implicated public safety, and he disclosed his 2008 conviction, on prior license renewal applications, all of which were granted. It is also undisputed that he has been employed as a stationary engineer without incident since 2006, and submitted performance evaluations and letters of reference from both of his current employers attesting

to his character, fitness, and qualifications for the license. Moreover, petitioner's probation officer advised respondents that since petitioner has been on probation, he "has been a productive member of society and has shown considerable remorse for his actions." In contrast, respondents offered only "speculative inferences unsupported by the record" to raise an issue concerning any potential risk to the public (*Matter of Marra v City of White Plains*, 96 AD2d 17, 25 [2d Dept 1983] [internal quotation marks omitted]).

In reversing, we note that *Dellaporte*, which is on point, was decided after the motion court's decision.

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

ENTERED: JUNE 25, 2013

CLERK

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

10453 In re Kerry M. Ryan, Index 116328/10
Petitioner-Appellant,

-against-

Robert D. LiMandri, etc., et al.,
Respondents-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order and judgment (one paper), of the Supreme Court, New York County (Paul Wooten, J.), entered on or about October 20, 2010,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 7, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 25, 2013

CLERK

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

10454 In re Christopher Robles, Index 111312/11
Petitioner-Appellant,

-against-

Robert D. LiMandri, etc., et al.,
Respondents-Respondents.

_____

Robert N. Felix, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered June 22, 2012, denying the petition to annul respondents' determination, dated June 13, 2011, which denied petitioner's application to renew his stationary engineer license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the matter remanded to respondents for further proceedings consistent herewith.

The determination to deny petitioner's renewal application for a stationary engineer license was in violation of lawful procedure and did not have a rational basis. Respondents arbitrarily concluded that petitioner's federal conviction of unlawfully accepting property of another bore a direct relationship to the duties and responsibilities attendant to a

stationary engineer, the license for which he sought renewal after having his license renewed several times (*see* Correction Law § 750[3]; § 752[2]; *Dellaporte v New York City Dept. of Bldgs.*, __ AD3d __, 2013 NY Slip Op 3281 [1st Dept 2013]). Petitioner's misdeeds were committed by utilizing the administrative powers in his former position, which granted him control over hiring, payroll, and selection of vendors. Such actions bear no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license, and thus do not satisfy the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses (*see* Correction Law § 752[1]).

The record also shows that respondents failed to afford petitioner the mandatory presumption of rehabilitation attendant to his certificate of relief from disabilities (see Correction Law § 753[2]) and appeared to have disregarded his additional evidence of rehabilitation. Respondents found petitioner's evidence of rehabilitation to be insufficient and in clear contravention of the statutory presumption, and did not raise any evidence in rebuttal, which, under the circumstances, shows the arbitrariness and capriciousness of the determination (*see Matter of Bonacorsa v Van Lindt*, 71 NY2d 605, 612-614 [1988]).

Nor could respondents have rationally found petitioner to

pose an unreasonable risk to public safety or welfare so as to satisfy the second exception to the general prohibition (*see* Correction Law § 752[2]). There was no evidence that petitioner had submitted false documents that related to his stationary engineer responsibilities or implicated public safety, and he disclosed his 2005 conviction on his prior renewal applications, which were granted. Moreover, petitioner has been employed as a stationary engineer without incident since 2006, and submitted performance evaluations and letters of reference from his current employer, verifying his character, fitness, and qualifications for the license and the position. In contrast, respondents offered only "speculative inferences unsupported by the record" to raise an issue concerning any potential risk to the public (*Matter of Marra v City of White Plains*, 96 AD2d 17, 25 [2d Dept 1983] [internal quotation marks omitted]).

In reversing, we note that *Dellaporte*, which is on point, was decided after the motion court's decision.

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

ENTERED: JUNE 25, 2013

CLERK

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

10455 In re Thomas G. Wyler, Index 104779/11
Petitioner-Appellant,

-against-

Robert D. LiMandri, etc., et al.,
Respondents-Respondents.

_____

An appeal having been taken to this Court by the above-named appellant from an order and judgment (one paper), of the Supreme Court, New York County (Joan B. Lobis, J.), entered on or about October 26, 2011,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated June 10, 2013,

It is unanimously ordered that said appeal be and the same is hereby withdrawn in accordance with the terms of the aforesaid stipulation.

ENTERED: JUNE 25, 2013

CLERK

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

10456 In re Nicholas F. Nuziale, Index 110657/11
Petitioner-Appellant,

-against-

Robert D. LiMandri, etc., et al.,
Respondents-Respondents.

_____

Thomas C. Monaghan, Broad Channel, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for respondents.

_____

Judgment, Supreme Court, New York County (Alexander W. Hunter Jr., J.), entered April 11, 2012, denying the petition to annul respondents' determination, dated May 26, 2011, which denied petitioner's application to renew his stationary engineer license, and dismissing the proceeding brought pursuant to CPLR article 78, unanimously reversed, on the law, without costs, the judgment vacated, the petition granted, and the matter remanded to respondents for further proceedings consistent herewith.

The determination to deny petitioner's renewal application for a stationary engineer license was in violation of lawful procedure and lacked a rational basis. Respondents arbitrarily found that petitioner's prior federal conviction for theft of funds bore a direct relationship to the duties and responsibilities attendant to a stationary engineer, the license

for which he sought renewal after having his license renewed several times (*see* Correction Law § 750[3]; § 752[2]; *Dellaporte v New York City Dept. of Bldgs.*, AD3d, 2013 NY Slip Op 3281 [1st Dept 2013]). Petitioner's prior conviction resulted from the misuse of his administrative powers in his former position, which granted him control over hiring, payroll, and selection of vendors. Such actions bear no direct relationship to the equipment maintenance duties and responsibilities inherent in the stationary engineer license, and thus do not satisfy the first exception to the general prohibition of discrimination against persons previously convicted of criminal offenses (*see* Correction Law § 752[1]).

Respondents also could not have rationally found petitioner to pose an unreasonable risk to public safety or welfare so as to satisfy the second exception to the general prohibition (*see* Correction Law § 752[2]). Petitioner disclosed his 2006 conviction on his prior license renewal applications, all of which were granted. It is also undisputed that petitioner was a well-regarded employee, and his renewal application included letters verifying his character and fitness, including one from his immediate supervisor at his current employer, who said that petitioner was "the most dedicated, conscientious employee" he had come across in his career and was an unmatched value to the

agency. In contrast, respondents offered only "speculative inferences unsupported by the record" to raise an issue concerning any potential risk to the public (*Matter of Marra v City of White Plains*, 96 AD2d 17, 25 [2d Dept 1983] [internal quotation marks omitted]).

In reversing, we note that *Dellaporte*, which is on point, was decided after the motion court's decision.

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

ENTERED: JUNE 25, 2013

CLERK

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

10457 The People of the State of New York, Ind. 4311/10
Respondent,

-against-

Andre Skinner,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Rena Uviller, J. at plea; A. Kirke Bartley, J. at sentencing), rendered on or about March 30, 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: JUNE 25, 2013

CLERK

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

10458- Ind. 2923/08
10458A The People of the State of New York,
Respondent,

-against-

Mark Jurgins,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Lisa A. Packard of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Catherine M. Reno of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Colleen D. Duffy, J.), rendered July 2, 2010, convicting defendant, upon his plea of guilty, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 25 years, unanimously modified, as a matter of discretion in the interest of justice, to the extent of reducing the sentence to a term of 15 years, and otherwise affirmed. Order, same court and Justice, entered on or about January 27, 2012, which denied defendant's CPL 440.20 motion to set aside the sentence, unanimously affirmed.

Defendant's claim that his out-of-state conviction was not the equivalent of a New York felony is unpreserved and waived (*People v Smith*, 73 NY2d 961 [1989]; *People v Kelly*, 65 AD3d 886, 887 [1st Dept 2009], *lv denied* 13 NY3d 860 [2009]), and we

decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Resort to the foreign accusatory instrument is appropriate here (*see People v Gonzalez*, 61 NY2d 586, 590 [1984]; *see also People ex rel. Goldman v Denno*, 9 NY2d 138, 140 [1961]), and it establishes the necessary equivalency. The foreign statute criminalizes several acts, each of which constitutes a category of theft even if not separately enumerated, as opposed to constituting mere ways of committing the crime (*compare People v Muniz*, 74 NY2d 464, 468-69 (1989).

Since defendant's challenge to his sentencing as a second felony offender lacks merit, counsel was not ineffective for failing to raise that claim (*see Kelly*, 65 AD3d at 890). In any event, counsel's determination that there was no valid ground upon which to challenge the second felony offender adjudication was within "the wide range of professionally competent assistance" (*Strickland v Washington*, 466 US 668, 690 [1984]).

The record does not establish a valid waiver of the right to appeal with respect to the excessive sentence issue raised by defendant. We find the sentence excessive to the extent indicated.

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

ENTERED: JUNE 25, 2013

CLERK

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

10459 Felicia Komina, Index 302014/10
Plaintiff-Appellant,

-against-

Ramon DeJesus Gil, et al.,
Defendants-Respondents.

_____

Ephrem J. Wertenteil, New York, for appellant.

Richard T. Lau & Associates, Jericho (Kathleen E. Fioretti of counsel), for Ramon DeJesus Gil and Onesimo Volquez, respondents.

Cheven, Keely & Hatzis, New York (William B. Stock of counsel), for Uchenna Gogor, respondent.

_____

Order, Supreme Court, Bronx County (Ben R. Barbato, J.), entered March 12, 2012, which granted defendants' motions for summary judgment dismissing the complaint based on plaintiff's failure to demonstrate that she suffered any serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants made a prima facie showing that plaintiff did not suffer a serious injury to her lumbar or cervical spine. Defendants submitted, among other things, the affirmed report of an orthopedist who opined that plaintiff had no deficits in range of motion in her lumbar or cervical spine, and the affirmed report of a radiologist who opined that the MRI films of plaintiff's lumbar and cervical spine showed no herniated or

bulging discs or any other evidence of traumatic injury (*see Mitrotti v Elia*, 91 AD3d 449, 449-450 [1st Dept 2012]; *Graves v L &N Car Serv.*, 87 AD3d 878, 879 [1st Dept 2011]).

In opposition, although plaintiff's treating chiropractor found limitations in the range of motion of her cervical and lumbar spines, plaintiff failed to submit any objective medical proof of these injuries (*see Thomas v City of New York*, 99 AD3d 580, 581 [1st Dept 2012]). Furthermore, plaintiff's chiropractor made no attempt to explain the conflicting findings of the tests he performed during plaintiff's physical examination and the MRI reports of plaintiff's radiologist, which found normal lumbar and cervical spine images with no evidence of disc bulging or herniation, and defendants are thus entitled to summary judgment on this basis (*Jno-Baptiste v Buckley*, 82 AD3d 578 [1st Dept 2011], citing *Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446, 447 [1st Dept 2009]).

Defendants also established prima facie that plaintiff did not suffer a 90/180-day injury by submitting plaintiff's deposition testimony that she was confined to home for only one week and that she resumed her collegiate studies by taking three courses when the fall semester began in September 2009, less than two months after the accident (*see Mitrotti*, 91 AD3d at 450). Although plaintiff offered proof that her chiropractor directed

her not to return to work within the 90 days following the accident, in light of the lack of restrictions imposed upon her returning to school, plaintiff failed to raise an issue of fact as to whether her claimed injuries prevented her from "performing substantially all of the material acts which constitute[d her] usual and customary daily activities" (Insurance Law § 5102[d]; *see Merrick v Lopez-Garcia*, 100 AD3d 456, 457 [1st Dept 2012]).

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

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

ENTERED: JUNE 25, 2013

CLERK

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

10462 Barbara Casey, etc., Index 116522/08
Plaintiff-Respondent,

-against-

New York Elevator & Electrical Corporation,
Defendant-Appellant-Respondent,

Winoker Realty Co., Inc.,
Defendant-Respondent-Appellant.

- - - - -

New York Elevator & Electrical Corporation,
Third-Party Plaintiff-Appellant-Respondent,

-against-

Broadway 36th Realty, LLC,
Third-Party Defendant-Respondent-Appellant.

_____

Babchik & Young, LLP, White Plains (Bruce M. Young of counsel), for appellant-respondent.

Patrick J. Crowe, Melville, for Winoker Realty Co., Inc., respondent-appellant.

Dillon Horowitz & Goldstein LLP, New York (Michael M. Horowitz of counsel), for Broadway 36th Realty, LLC, respondent-appellant.

Gair, Gair, Conason, Steigman, Mackauf, Bloom & Rubinowitz, New York (Richard M. Steigman of counsel), for Barbara Casey, respondent.

_____

Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered July 23, 2012, which, insofar as appealed from as limited by the briefs, denied defendant/third-party plaintiff New York Elevator & Electrical Corporation's (NYE) motion for summary judgment dismissing the portion of the amended complaint that

alleged negligence based upon the condition of the building's fifth-floor hoistway door interlock, denied NYE's motion for summary judgment dismissing the contribution claims against it, denied NYE's motion for summary judgment on its common-law indemnification claims against defendant Winoker Realty Co., Inc. and third-party defendant Broadway 36th Realty, LLC, granted so much of Winoker's and Broadway's respective motions for summary judgment as sought dismissal of NYE's common-law indemnification claims against them, denied the portion of Winoker's motion for summary judgment that sought dismissal of the cross claims for contribution against it and dismissal of Broadway's cross claim for contractual indemnification against it, and denied the portion of Broadway's motion for summary judgment that sought dismissal of the contribution claims against it and dismissal of Winoker's cross claim for contractual indemnification against it, unanimously modified, on the law, to dismiss the amended complaint in its entirety as against NYE, dismiss Broadway's counterclaim and Winoker's cross claim for contribution against NYE, dismiss NYE's third-party claim and Winoker's cross claim for contribution against Broadway, dismiss Winoker's cross claim for contractual indemnification against Broadway, dismiss Broadway's cross claim for contractual indemnification against Winoker, dismiss NYE's and Broadway's cross claim for

contribution against Winoker, and otherwise affirmed, without costs. The Clerk is directed to dismiss the amended complaint, the third-party complaint, and all counterclaims and cross claims.

In this action, plaintiff seeks damages for the alleged wrongful death of decedent, who fell down a freight elevator shaft in a building owned by third-party defendant Broadway and managed by defendant Winoker.

The amended complaint should have been dismissed as against defendant/third-party plaintiff NYE in its entirety. NYE did not have an exclusive agreement with Broadway to maintain or service the freight elevator (*compare Rogers v Dorchester Assoc.*, 32 NY2d 553, 559 [1973], *and Isaac v 1515 Macombs, LLC*, 84 AD3d 457, 458 [1st Dept 2011], *lv denied* 17 NY3d 708 [2011]). It was merely retained on an on-call basis to make specific repairs and inspections and, therefore, did not have a duty to inspect or repair unrelated defects (*see McMurray v P.S. El.*, 224 AD2d 668, 670 [2d Dept 1996], *lv denied* 88 NY2d 811 [1996]; *Casey v New York El. & Elec. Corp.*, 82 AD3d 639, 640 [1st Dept 2011]). Indeed, NYE may only be held liable if it failed to exercise reasonable care in making any requested repairs or inspections (*see McMurray*, 224 AD2d at 670; *see also Sanzone v National El. Inspection Serv.*, 273 AD2d 94, 94 [1st Dept 2000]).

Here, there is no evidence that NYE was negligent in inspecting the freight elevator in August 2007, 13 months before the accident. In particular, the record is bereft of any evidence that the fifth-floor hoistway door interlock had been bypassed or was in a dangerous condition when NYE conducted the inspection. In fact, the evidence indicates that the interlock functioned properly at the time of the inspection. Indeed, the building's former superintendent testified that the alleged hazardous condition never existed during his 18-year tenure as superintendent, which ended days before the accident. In addition, the Department of Buildings' (DOB) February 20, 2008 notice of violation, issued 7 months before the accident, does not mention the fifth-floor hoistway door interlock, and according to NYE's expert, "[i]f at the time of [the DOB] inspection there were other existing violating conditions they would have been noted."

Because the amended complaint against NYE should have been dismissed, Broadway's counterclaim and Winoker's cross claim for contribution against NYE, and NYE's claims for contribution against Broadway and Winoker, should also have been dismissed (*see San Andres v 1254 Sherman Ave. Corp.*, 94 AD3d 590, 592 [1st Dept 2012]; *Dilena v Irving Reisman Irrevocable Trust*, 263 AD2d 375, 377 [1st Dept 1999]). The court properly dismissed NYE's

common-law indemnification claims against Broadway and Winoker, and NYE was not entitled to summary judgment on those claims (*see id.*).

Broadway's cross claim for contractual indemnification against Winoker should have been dismissed, given the plain language of the indemnification clause in their agreement (*see generally Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 158-159 [1977]). In any event, Broadway has abandoned any arguments with respect to its cross claim by failing to address it in its appellate briefs (*see Asabor v Archdiocese of N.Y.*, 102 AD3d 524, 528 n 1 [1st Dept 2013]).

Broadway's cross claim for contribution against Winoker also should have been dismissed, as Winoker lacked exclusive control and authority, under its management contract with Broadway, to expend funds for repairs (*cf. Ortiz v Gun Hill Mgt., Inc.*, 81 AD3d 512 [1st Dept 2011]).

Lastly, Winoker's cross claims for contribution and contractual indemnification against Broadway should have been dismissed, since the court dismissed the amended complaint as against Winoker (*see Dilena*, 263 AD2d at 377).

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

ENTERED: JUNE 25, 2013

CLERK

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

10463 The People of the State of New York, Respondent, Ind. 112/11

-against-

Jason Salters, Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Bruce D. Austern of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered October 13, 2011, convicting defendant, after a jury trial, of attempted gang assault in the first degree and assault in the second degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

By failing to object, by making only generalized objections, and by failing to request further relief after objections were sustained, defendant failed to preserve his present challenges to the People's summation, and we decline to review them in the interest of justice. "The word 'objection' alone [is] insufficient to preserve [an] issue" for review as a question of law (*People v Tevaha*, 84 NY2d 879, 881 [1994]). As an

alternative holding, we find no basis for reversal (*see People v Overlee*, 236 AD2d 133 [1st Dept 1997], *lv denied* 91 NY2d 976 [1998]; *People v D'Alessandro*, 184 AD2d 114, 118-119 [1st Dept 1992], *lv denied* 81 NY2d 884 [1993]). The challenged remarks were permissible arguments on issues of credibility, made in response to defense arguments, and there was no shifting of the burden of proof. To the extent anything in the summation could be viewed as objectionable, the court took sufficient curative actions.

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

ENTERED: JUNE 25, 2013

CLERK

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

10464 In re Milton S. Rattner, Deceased. File 3427/12

- - - - -

Dawn Rattner, et al., Appellants,

-against-

Ruth Koppel Rattner, Respondent.

- - - - -

New York County Public Administrator, Respondent.

_____

Edwards Wildman Palmer LLP, New York (Anthony J. Viola of counsel), for appellants.

Wincig & Wincig, New York (Owen Wincig of counsel), for Ruth Koppel Rattner, respondent.

Schram & Graber, P. C., New York (Peter S. Schram of counsel), for New York County Public Administrator, respondent.

_____

Order, Surrogate's Court, New York County (Nora S. Anderson, S.), entered on or about March 6, 2013, which, to the extent appealed from, denied petitioners Dawn Rattner and Bambi Rattner's (petitioners) request for preliminary letters testamentary and directed that temporary letters issue to the Public Administrator, unanimously reversed, on the law and the facts, without costs, preliminary letters granted to petitioners, and the Public Administrator's temporary letters revoked.

Petitioners (decedent's daughters) were nominated executors in each of the three wills executed by decedent. "A testator's choice of executor is not lightly to be disregarded" (*Matter of Gottlieb*, 75 AD3d 99, 106 [1st Dept 2010], *lv denied* 16 NY3d 706 [2011]). Because process had issued, and because petitioners provided the affidavits required by SCPA 708, preliminary letters testamentary were required to be issued to petitioners (*see* SCPA 1412[3][a]) unless bona fide issues of wrongdoing were raised (*see* SCPA 707[1]). In this case, there was no showing of misconduct or wrongdoing (*see Matter of Lurie*, 58 AD3d 575, 576 [1st Dept 2009]). Although petitioners tried to probate decedent's 2006 will rather than his latest, 2009 will, "a nominated fiduciary need not offer for probate a will which he believes to be invalid" (*Matter of Mandelbaum*, 7 Misc 3d 539, 540 [Sur Ct, Nassau County 2005]). Further, petitioners claim that when they transferred decedent's East End Avenue apartment to a trust, they were not aware of the 2008 and 2009 wills giving the apartment to cross petitioner, Ruth Koppel Rattner. In any event, if the 2008 and 2009 wills are found to be invalid, the transfer would not be contrary to decedent's testamentary intent. Moreover, "it is actual misconduct, not a conflict of interest, that justifies the removal of a fiduciary" (*Matter of Rudin*, 15 AD3d 199, 200 [1st Dept 2005], *lv denied* 4 NY3d 710 [2005]). Nor

does the hostility between cross petitioner and petitioners require denial of preliminary letters to petitioners (*see id.*).

Neither cross petitioner nor the Public Administrator relies on the reasons given in the Surrogate's decision to deny petitioners preliminary letters. We also find those reasons insufficient.

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

ENTERED: JUNE 25, 2013

CLERK

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

10465N 915 2nd Pub Inc., doing business as Thady Con's Bar & Restaurant, et al., Plaintiffs-Respondents, Index 604047/07

-against-

QBE Insurance Corporation, Defendant-Appellant.

_____

Abrams, Gorelick, Friedman & Jacobson, LLP, New York (Chris Christofides of counsel), for appellant.

Carman, Callahan & Ingham, LLP, Farmingdale (James M. Carman of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 30, 2012, which, insofar as appealed from as limited by the briefs, granted plaintiffs' motion to compel production of an appraisal report, unanimously reversed, on the law, without costs, and the motion denied.

There is no dispute that the subject appraisal report was prepared by an expert at defense counsel's direction as an aid in litigation, and thus, the report was protected as attorney work product (*see Hudson Ins. Co. v Oppenheim,* 72 AD3d 489 [1st Dept 2010]; CPLR 3101[c]). The single notation in the claim file that the report was sent to plaintiffs' prior counsel is insufficient to show waiver of the privilege, since plaintiffs fail to provide evidence supporting their allegation that the disclosure was

made; they did not set forth evidence of any attempts made to obtain the findings from prior counsel; they cannot explain why the findings were never given to them by prior counsel; and they have not produced anyone from prior counsel who has ever seen the report.

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

ENTERED: JUNE 25, 2013

CLERK

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

10466N Tanya Gonzalez, Index 302570/10
Plaintiff-Respondent,

-against-

Riverbay Corporation, et al.,
Defendants-Appellants,

William Thomas,
Defendant-Respondent.

_____

Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Marcia K. Raicus of counsel), for appellant.

_____

Order, Supreme Court, Bronx County (Kenneth L. Thompson, Jr., J.), entered January 11, 2012, which denied the motion of defendants Riverbay Corporation and Marion Scott Real Estate, Inc. (collectively Riverbay) for leave to depose nonparty witnesses, unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff commenced this action for personal injuries that she allegedly sustained when she was assaulted in the basement of an apartment building owned and managed by Riverbay. Riverbay served subpoenas seeking depositions and related materials from two detectives and a police officer who investigated the incident and alleged that the depositions were needed to adequately address plaintiff's claims based on alleged security failures or inadequate security measures employed by Riverbay. Neither at

Supreme Court nor in this Court has any opposition to the requested relief been expressed. Accordingly, we grant the motion.

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

ENTERED: JUNE 25, 2013

CLERK

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

10467N Buro Happold Consulting Engineers, PC.,
Plaintiff-Appellant,

-against-

RMJM, et al.,
Defendants-Respondents.

Index 650609/12

L'Abbate, Balkan, Colavita & Contini, LLP, Garden City (Douglas R. Halstrom of counsel), for appellant.

Wolff & Samson PC, New York (Bruce D. Ettman of counsel), for respondents.

Order, Supreme Court, New York County (Anil C. Singh, J.), entered December 17, 2012, which, in an action for unpaid fees incurred for design services, granted defendants' motion to vacate the default judgment entered against them and reinstated the complaint, unanimously reversed, on the law, without costs, the motion denied, the default judgment reinstated, and the matter remanded for further proceedings.

Defendants (collectively RMJM) failed to set forth a reasonable excuse for the failure to submit a timely answer to the complaint. RMJM's bare and self-serving contention that it was unable to afford counsel, made without any offer of financial proof, is not a reasonable excuse for the default (*see Kanat v Ochsner*, 301 AD2d 456, 457-458 [1st Dept 2003]). Because RMJM

failed to proffer a reasonable excuse for its default, its motion to vacate the judgment must be denied, regardless of whether it demonstrated a potentially meritorious defense (*see* CPLR 5015[a][1]; *M.R. v 2526 Valentine LLC*, 58 AD3d 530, 532 [1st Dept 2009]).

As to a meritorious defense, we find that RMJM has failed to proffer one. Plaintiff never agreed to the proposed contract, which would have limited its right to collect fees due to it.

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

ENTERED: JUNE 25, 2013

CLERK

Tom, J.P., Acosta, Feinman, Clark, JJ.

9896 African Diaspora Maritime Corporation, Plaintiff-Appellant, Index 653419/11

-against-

Golden Gate Yacht Club, Defendant-Respondent.

_____

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein of counsel), for appellant.

Boies, Schiller & Flexner LLP, New York (Philip M. Bowman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 18, 2013, modified, on the law, to deny the motion as to the breach of contract claim, and otherwise affirmed, without costs.

Opinion by Acosta J. All concur except Tom, J.P. who dissents in an Opinion.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Rolando T. Acosta
Paul G. Feinman
Darcel D. Clark, JJ.

9896
Index 653419/11

_____x

African Diaspora Maritime
Corporation,
Plaintiff-Appellant,

-against-

Golden Gate Yacht Club,
Defendant-Respondent.

_____x

Plaintiff appeals from an order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 18, 2013, which granted defendant's motion to dismiss the complaint.

McDermott Will & Emery LLP, New York (Andrew B. Kratenstein, Banks Brown and Audrey Lu of counsel), for appellant.

Boies, Schiller & Flexner LLP, New York (Philip M. Bowman and Julia C. Hamilton of counsel), for respondent.

ACOSTA, J.

The primary issue in this case is whether plaintiff, which submitted a timely application to compete in the upcoming America's Cup sailing regatta and was rejected, sufficiently pleaded a breach of contract claim to survive a CPLR 3211 motion to dismiss. Although defendant, the current trustee of the trophy, has discretion in selecting the defender, we find that plaintiff has alleged the existence of an enforceable contract between the parties and bad faith on defendant's part sufficiently to state a breach of contract cause of action. Contrary to the dissent's position, given the rules of the race, submission of an entry application with the appropriate fee binds defendant to review the application in good faith, and its failure to do so is a breach of contract. Whether plaintiff can ultimately establish its claim is irrelevant at this juncture since the sole consideration on a CPLR 3211 motion is whether the complaint sufficiently states a cause of action.

The America's Cup is governed by a Deed of Gift. The Deed of Gift is a trust instrument executed under the laws of New York State. The corpus of the trust is the well-recognized trophy, simple possession of which spurs the sailing competition.

Since the 1970s, the America's Cup has allowed boats from multiple nations to participate in America's Cup events. A

formal, initial "Challenger" triggers each competition for the Cup. In accordance with the Deed of Gift, the winner of the preceding competition (the Defender) and the Challenger must agree on rules, i.e., a protocol, for the next competition. Accordingly, defendant, Golden Gate Yacht Club (GGYC), the winner of the 33rd America's Cup held February 14, 2010, and the nonparty Club Nautico di Roma (CNR), the challenger, agreed on "The Protocol Governing the 34th America's Cup" (the Protocol). Pursuant to the Protocol, additional participants from countries other than the country that holds the Cup are candidates for "Challenger"; additional participants from the country that possesses the cup are called "Defender-Candidates." Challenger candidates, as well as the Challenger, must engage in an elimination series called the "Louis Vuitton Cup" to determine which single boat, from a single foreign country, may vie to compete against the Defender for the Cup. Similarly, Defender candidates, potentially including the last winner of the Cup, may (but are not required to) have their own elimination series to deermine which organization's boat will represent the Defender's interest in a scheduled America's Cup event.[1] "Defender

[1] In an article on ESPN.com dated August 2, 2012, it was noted that Oracle Racing, the racing syndicate that represented GGYC in the 33rd America's Cup, intended to "hold defender trials" between July 4, 2013 and September 1, 2013 between two

Candidate" is defined as "a team selected by GGYC to participate in the America's Cup Defender Series, if any."

Pursuant to the Deed of Gift, the Protocol states that the holder of the Cup (i.e., GGYC) acts as "trustee" in managing the Cup event, and must "act in the best interests of all Competitors collectively" and "not unreasonably favor the interests of any Competitor over another."

Plaintiff African Diaspora Maritime Corporation (ADM), a sailing organization based in North Carolina, alleges that on or about July 7, 2010, it contacted GGYC to inquire about applying to become a Defender Candidate in the 34th Cup. ADM was allegedly instructed by GGYC to contact the chairman of the America's Cup Committee, Tom Ehman. ADM claims that GGYC had already formed a "Competitor Forum" (for the purpose, as defined in the Protocol, of "consultation and communication with Competitors) and could have put ADM in contact with its liaison to the Competitor Forum, Anthony Romano. Instead, ADM claims that between July 8, 2010 and March 26, 2011, it contacted GGYC, through Ehman, on a monthly basis, seeking information about becoming a Defender Candidate. ADM alleges that GGYC exhibited a

---

specified boats: (1) the boat that won the 33rd Cup (headed by the same winning skipper, Jimmy Spithill), and (2) a boat skippered by Ben Ainslie, who has won three Olympic gold medals in sailing.

pattern of continuing avoidance, providing it with little information until it was almost too late for ADM to enter the 34th Cup as a Defender Candidate. On March 26, 2011, GGYC referred ADM to Romano, and Romano provided ADM with information critical to its application, which allegedly had been made available to the Competitor Forum months earlier.

On March 31, 2011, just one day before the deadline, ADM was able to submit an application to be considered as a Defender Candidate for the 34th Cup. Along with its application, ADM paid the required $25,000 fee.

The Defender Application states in relevant part:

> "(2) The Defender Candidate by this Notice hereby challenges for the 34th America's Cup in accordance with the Protocol Governing the 34th America's Cup dated 31 August 2010 as amended. The Defender Candidate hereby agrees to be bound by and undertakes to comply with the terms of the said Protocol and all other rules set forth in its Article 11, and any amendments to the Protocol or those rules.
>
> "(3) Details of the Defender Candidate's corporate structure, registered business address and team management. We agree to provide further details of our challenge as GGYC may request to review and consider this application."

In paragraph (4) the Defender Application provides in relevant part that the Defender Candidate is bound by the terms of the Deed of Gift, the Protocol, and documents that are noted in

Article 11 of the Protocol.

Article 8 of the Protocol, called "Acceptance of Defender Candidates," provides:

> "8.1 GGYC will accept applications to be a Defender Candidate from 1 November 2010 until 31 March 2011. There after, applications may be accepted at the discretion of GGYC upon such terms as it may determine.
>
> "8.2 Defender Candidates shall comply with the Protocol and shall submit the documents and fees as set out in Article 9.
>
> "8.3 GGYC will review Defender Candidate applications and will accept those it is satisfied have the necessary resources (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series."

ADM alleges that from April 1, 2011 through April 15, 2011, GGYC falsely and repeatedly claimed that its application was deficient due to the lack of a signature and the lack of a document that evidenced payment of the $25,000 fee.

ADM alleges that it met all other application requirements, inasmuch as it had, inter alia: (1) assembled a qualified sailing team; (2) secured the services of a renowned boat designer (Dave Pedrick); (3) lined up commitments of "several wealthy African-Americans" to fund ADM's pursuit of a defender opportunity; (4) organized "a plan" with North Carolina's Secretary of Commerce and the State's Department of Tourism "to build a 'boat park' in

Raleigh"; and (5) had "detailed plans ... to create a media frenzy around its team (for both publicity and fundraising efforts)." As for its sailing team, ADM alleges that it included "three Olympians, an All-American, [and] several additional talented, experienced, and award-winning sailors." Further, ADM alleges that other "world class African-American sailors intended to join ADM's campaign" if "GGYC accept[ed] ADM as a Defender Candidate." ADM alleges that Pedrick is "an America's Cup award-winning yacht designer."

ADM further alleges that GGYC informed it that since ADM did not have a contract with Pedrick (Pedrick had conditioned his participation with ADM on ADM's obtaining Defender Candidate status), the information in its application was not accurate. ADM alleges that GGYC's objections to its application were "technical objections" that were "groundless." For instance, ADM alleges, GGYC "twist[ed]" Pedrick's statement that he had a conditional arrangement with ADM to mean that Pedrick had "denied" his association with ADM. ADM alleges that emails from Pedrick to ADM, as well as an April 15, 2011 email from Pedrick to GGYC, establish Pedrick's intent to design for ADM.

By letter dated April 15, 2011, GGYC advised ADM that its application had been rejected. According to ADM, GGYC's stated reason was that it was "not satisfied that ADM has, or *will have*

the necessary resources (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series."

In December 2011, ADM commenced this action against GGYC alleging three causes of action: (1) breach of contract; (2) breach of trust; and (3) breach of fiduciary duty. With respect to the breach of contract claim, the complaint alleges that a contract was formed between ADM and GGYC when ADM accepted GGYC's offer/invitation to participate as a Defender Candidate. ADM asserts that its submission to GGYC of a completed Defender Candidate application, together with the $25,000 required under the Protocol, constituted an acceptance of the Defender Candidate offer, and that GGYC's failure to review the application in good faith breached the contract.

ADM alleges that GGYC had no basis to claim a lack of "satisfaction" with its application, since ADM stated that it would provide further details upon request, and GGYC never attempted to verify the status of ADM's team, its proposed funding sources, or its proposed team's experience. ADM alleges that GGYC knew that potential competitors typically do not draw funding until they are granted competitor status. ADM also alleges that GGYC had provided material and financial help to some struggling competitors, such as yachts or design packages,

but not to all competitors, thus breaching its duty to treat all competitors equally. ADM seeks compensatory damages and numerous forms of equitable relief, including an order directing GGYC to accept its application.

In May 2012, GGYC moved to dismiss the complaint pursuant to CPLR 3211(a)(1), (3) and (7), arguing, inter alia, that the complaint fails to state a cause of action.

As to the breach of contract claim, GGYC argued that the Protocol was a binding agreement between the Challenger (CNR) and itself only. At best, GGYC contended, the Protocol could be construed as a solicitation of bids, which, under New York law, would make a potential candidate's application the equivalent of an offer to participate in the Defender Series. Even assuming, arguendo, the existence of a binding contract between itself and ADM under the terms of the Protocol, GGYC further argued, ADM failed to show how it breached the terms of the Protocol in relation to ADM, since the Protocol expressly affords GGYC unfettered discretion to decide if an applicant meets the qualifications to compete. GGYC also argued that it gave ADM more than a fair opportunity to demonstrate its capacity to assemble a competitive, financially backed team that could compete in a Defender Series. GGYC stated that ADM did not allege that a proposed team member of ADM had ever competed in an

America's Cup or that the ADM team had ever competed together on the same boat in a regatta. By contrast, GGYC noted, among the potential defenders for the 34th Cup, is Team Oracle, the victor in the 33rd Cup. Thus, GGYC argued, ADM's allegations failed to establish that its rejection of ADM's application was not reasonable and not in good faith. GGYC also argued that ADM failed to allege damages arising from a purported breach of contract, since, even if its application were accepted (based on an alleged contract), there was no guarantee that ADM would be selected as a Defender Candidate or that it would prevail in a Defender Series and win the 34th Cup.

ADM opposed the motion, arguing, inter alia, that it stated a contract claim by alleging that it accepted the offer in the Protocol for defender applications and submitted a completed application and the requisite $25,000 fee. ADM argued that it did not have to allege that but for GGYC's wrongful rejection of its application it would have made a successful bid for the 34th Cup, and therefore was damaged, since GGYC's deprivation of its opportunity to compete constitutes compensable harm in and of itself.

By order entered January 18, 2013, the motion court dismissed the complaint in its entirety, with prejudice. Since we find that ADM stated a breach of contract claim, we modify the

order to reinstate that claim.

The sole criterion for deciding a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), "is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). As the Court of Appeals instructed in *511 W. 232nd Owners Corp. v Jennifer Realty Co.* (98 NY2d 144, 151-152 [2002]),

> "In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference. Dismissal under CPLR 3211 (a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" [internal citations and quotation marks omitted]).

Indeed, "[w]hether a plaintiff . . . can ultimately establish its allegations *is not taken into consideration* in determining a motion to dismiss" (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493, 497 [1st Dept 2008] [emphasis added], *lv denied* 12 NY3d 713 [2009]).

Here, viewing the alleged facts in the light most favorable to ADM, we find that the complaint states a breach of contract claim so as to avoid dismissal. "[T]he rules of a contest constitute a contract offer and . . . the participant's [entry

into] the contest constitute[s] an acceptance of that offer," creating a binding contract (*Sargent v New York Daily News, L.P.*, 42 AD3d 491, 493 [2d Dept 2007] [internal quotation marks omitted]; *see also Robertson v United States*, 343 US 711, 713 [1952] [contestant's acceptance of the contest sponsor's offer to compete in a symphonic works contest created an enforceable contract]).

Articles 8 and 9 of the Protocol set forth the procedure for applying to become a Defender Candidate in "definite and certain detail" by specifying the dates during which applications will be accepted and the required documentation and application fee, and Schedule Two to the Protocol provides applicants for Defender Candidate ("Defender Applicants") with the exact language that should be used in their applications (*see Keis Distrib. v Northern Distrib. Co.*, 226 AD2d 967, 969 [3d Dept 1996] [internal quotations marks omitted]; *see also Caride v Alonso*, 78 AD3d 466, 467 [1st Dept 2010], *lv dismissed in part, denied in part*, 16 NY3d 806 [2011]). Thus, the Protocol constituted an offer.

The duties that GGYC offered to undertake to an applicant that submitted the prescribed application along with the $25,000 fee were also definite and certain. GGYC agreed to "review" the application and to accept the applicant as a Defender Candidate

if it was "satisfied" that the applicant had a "reasonable chance of winning" the America's Cup Defender Series. The Protocol's terms demonstrate GGYC's unequivocal intent to be bound by those terms.

The dissent attempts to distinguish *Sargent* (42 AD3d at 491) and *Robertson* (343 US at 711) by noting that in those cases the plaintiffs had already won, while in the present case, "the applicant must first be approved by the defender to be qualified and then participate in a series of yacht races with the objective of winning the ACCS." The dissent misses the point. The Protocol in this case creates a mutual obligation between GGYC as trustee and Defender Applicants: a Defender Applicant is obligated to abide by the Protocol and GGYC is obligated to administer the Protocol in good faith (*see Curtis Props. Corp. v Greif Cos.*, 212 AD2d 259, 265-266 [1st Dept 1995] ["courts avoid an interpretation that renders a contract illusory and therefore unenforceable for lack of mutual obligation and prefer to enforce a bargain where the parties have demonstrated an intent to be contractually bound"] [internal citation omitted]).

ADM accepted GGYC's offer by timely submitting its "Application of Defense" in the required form along with the required fee, thus creating an enforceable contract (*see Robertson*, 343 US at 713; see also *Kowalchuk v Stroup*, 61 AD3d

118, 122 [1st Dept 2009]).

ADM's acceptance of GGYC's offer obligated GGYC to review ADM's application in "good faith" (*Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995] ["Where the contract contemplates the exercise of discretion, this pledge includes a promise not to act arbitrarily or irrationally in exercising that discretion"]; *see also Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009] ["Even if the . . . agreement does not, on its face, set limits on the board's ability to refuse to approve the scope of work, the contract's implied covenant of good faith and fair dealing would prevent defendants from exercising that power arbitrarily"]); *C & E 608 Fifth Ave. Holding, Inc. v Swiss Ctr.*, Inc., 54 AD3d 587, 588 [1st Dept 2008] ["exercise of an apparently unfettered discretionary contract right breaches the implied obligation of good faith and fair dealing if it frustrates the basic purpose of the agreement and deprives plaintiffs of their rights to its benefits"] [internal quotation marks omitted]). The dissent is correct in noting that our holding gives "expansive scope to Woody Allen's observation" that "eighty percent of success is showing up." Success, however, is accomplished in this case by having GGYC, as trustee of the Cup, review properly submitted applications in good faith. Thus, contrary to GGYC's and the dissent's contention, the contract did

not give it unfettered discretion to reject ADM's application (*see Dalton*, 87 NY2d at 389). Rather, GGYC had the discretion to reject applications which in good faith it deemed unsatisfactory. Moreover, whether GGYC acted in good faith is not appropriately decided on a motion to dismiss (*see Peacock*, 67 AD3d at 443 ["Whether defendants acted arbitrarily or unreasonably presents questions of fact"]).

ADM alleges facts sufficient to raise the question whether GGYC acted in bad faith. Specifically, ADM alleges that: GGYC attempted to sabotage its efforts to submit an Application of Defense by excluding it from the Competitor Forum, thereby preventing it from obtaining information critical to the application; GGYC initially sought to deny ADM's Application of Defense on various technicalities, including that it was not signed and did not include a document evidencing payment of the $25,000 fee; GGYC falsely asserted that ADM had lied about its proposed team, claiming that Pedrick, ADM's yacht designer, had denied being a member of ADM's team; and GGYC falsely claimed that it rejected ADM's Application of Defense because it was not satisfied that ADM "[would] have the necessary resources" to compete, even though America's Cup teams do not obtain funding until after their applications are accepted.

We reject GGYC's argument that the complaint fails to allege

damages. ADM does not have to plead that, had its Application been accepted, it would have beaten Team Oracle or won the Cup. Rather, denying ADM fair consideration of its application was harm in and of itself (*see Dalton*, 87 NY2d at 393 ["Dalton is entitled to relief that comports with ETS's contractual promise - good-faith consideration of the material he submitted to ETS"]). As GGYC recognizes, under *Dalton*, "GGYC would . . . be required to consider ADM's application in good faith."

The dissent, citing *Matter of Pollak v Conway* (276 App Div 435, 437 [3rd Dept 1950], *lv denied* 301 NY 816 [1950]), notes that an organization "may set such standards for candidates as it deems appropriate" and that courts should decline to interfere in administrative matters. Although that may generally be true, the deed of trust has expressly made New York courts the arbiter of its disputes (*see Mercury Bay Boating Club Inc. v San Diego Yacht Club*, 150 AD2d 82 [1st Dept 1989], *affd* 76 NY2d 256 [1990]; *Golden Gate Yacht Club v Société Nautique de Genève*, 55 AD3d 26 [1st Dept 2008], *revd* 12 NY3d 248 [2009]; *Golden Gate Yacht Club v Société Nautique de Genève*, 68 AD3d 552 [1st Dept 2009]), and its Protocol guides this Court in deciding those disputes. In the end, this is a sporting competition, and the winner should be decided in the open waters, rather than in a courtroom. After all, it is not a competition if the defender wins by default (*see*

Norimitsu Onishi, *When Billionaire Sets Rules, It's an Exclusive Race*, NY Times, June 4, 2013, § A at 1, col 2). Although plaintiff does not have the right to be deemed a challenger, it is entitled to have its timely submitted application reviewed in good faith.

ADM's remaining arguments have no merit since it has no basis for asserting a beneficiary interest in the charitable trust (*see Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465 [1985]). Nor does it have standing to assert a breach of fiduciary duty claim (*see Matter of Rosenthal*, 99 AD3d 573 [1st Dept 2012], *lv dismissed in part, denied in part* 20 NY3d 1058, [2013]).

Accordingly, the order of the Supreme Court, New York County (Barbara R. Kapnick, J.), entered January 18, 2013, which granted defendant's motion to dismiss the complaint, should be modified, on the law, to deny the motion as to the breach of contract claim, and otherwise affirmed, without costs.

All concur except Tom, J.P. who dissents in an Opinion:

TOM, J.P. (dissenting)

This is ostensibly an action for breach of contract, to which plaintiff has appended claims of an asserted breach of trust, based on defendant's rejection of plaintiff's application to participate in the America's Cup yacht race, to be held this year. Since no contract between the parties ever arose, the contract claim must be dismissed. Further, any right to participate in the America's Cup competition that plaintiff might be said to possess is bestowed solely by the agreement or "Protocol" between defendant Golden Gate Yacht Club (GGYC), as Defender and trustee of the trophy under the Deed of Gift, and nonparty Club Nautico di Roma, as Challenger of Record.[1] Because plaintiff is not a prospective beneficiary under the Deed of Gift, it lacks standing to assert any claim based upon the trust instrument. Thus, the complaint fails to state a cause of action.

Contrary to the position adopted by the majority, true contract actions[2] are amenable to summary disposition on the

---

[1] Defendant informs this Court that Club Nautico di Roma has withdrawn from the competition and on May 18, 2011 was replaced, as Challenger of Record, by Kungl Svenska Segal Sallskapet, the Royal Swedish Yacht Club, which has agreed to be bound by the terms of the Protocol.

[2] That is, actions in which the relief sought is limited to the contract, as opposed to proceedings in which an equitable

basis of the documents comprising the parties' agreement, except where a legitimate ambiguity requires resort to extrinsic evidence to establish the parties' intent. It is settled that the interpretation of a contract is a question of law for the court (*West, Weir & Bartel v Mary Carter Paint Co.*, 25 NY2d 535, 540 [1969]; *Eden Music Corp. v Times Sq. Music Publs. Co.*, 127 AD2d 161, 164 [1st Dept 1987]), and where, as here, no cause of action is discernable, further proceedings will be futile. What the majority fails to appreciate is that, in a contract action, the four corners of the complaint are constrained by the four corners of the agreement.

The race for the America's Cup is regarded as the most prestigious event in yacht racing, and it is certainly one of the most highly contested – both on and off the water. In the last quarter century, it has been the subject of three controversies brought before this Court. The first involved the propriety of challenging a single-hulled vessel with a catamaran, abrogating what has become the custom of racing yachts of a similar design or class (*Mercury Bay Boating Club v San Diego Yacht Club*, 150 AD2d 82 [1st Dept 1989], *affd* 76 NY2d 256 [1990]). The second concerned the requirement that to be recognized as a bona fide

---

claim or defense is raised.

challenger for the Cup, a yacht club must have held an annual regatta before giving its notice of challenge; the result there was the disqualification of the challenger designated by the defending club (*Golden Gate Yacht Club v Societe Nautique de Geneve*, 55 AD3d 26 [1st Dept 2008], *revd* 12 NY3d 248 [2009], *on remand* 68 AD3d 552 [1st Dept 2009]). This third action, like the others, involves the distinction between what is required by the Deed of Gift and what is mutually agreed upon by the two contenders subject to its terms, as a matter of contract.

The prestige of winning the America's Cup attracts sailing organizations from around the world, which vie to win and retain possession of the silver Cup for what is typically a champion-reigning period of three to four years, that is, until the next "Challenger" for the trophy officially initiates a new worldwide competition. The trophy derives its name from the schooner America, to which it was awarded after the vessel won a race at Cowes, England on August 21, 1851. By Deed of Gift dated October 24, 1887, the Cup was transferred by its sole surviving owner, George L. Schuyler, to the New York Yacht Club "upon the conditions that it shall be preserved as a perpetual Challenge Cup for friendly competition between foreign countries."

The Deed of Gift is a trust instrument executed under the laws of New York State (subsequently amended by orders of the

Supreme Court of the State of New York dated December 17, 1956 and April 5, 1985). The corpus of the America's Cup trust is the trophy itself, and the honor and recognition bestowed by the mere possession of the coveted prize is the impetus for the worldwide interest in the sailing competition. Any yacht club to which the Cup is transferred must agree to comply with the terms and conditions of the Deed of Gift. The trust instrument provides:

> "Any organized Yacht Club of a foreign country . . . shall always be entitled to the right of sailing a match of this Cup, with a yacht or vessel propelled by sails only and constructed in a country to which the Challenging Club belongs, against any one yacht or vessel constructed in the country of the Club holding the Cup."

Once a notice of challenge (required to be made on 10 months' notice) has been received and accepted, the Challenger and Defender of the Cup "may, by mutual consent, make any arrangement satisfactory to both as to the dates, courses, number of trials, rules and sailing regulations, and any and all other conditions of the match, in which case also the ten months' notice may be waived." If the contenders "cannot mutually agree upon the terms of a match, then three races shall be sailed, and the winner of two of such races shall be entitled to the Cup." The Deed of Gift prescribes the type, length and minimum depth of the courses, the timing of the races and the rules to be applied.

The default provisions conclude, "The challenged Club shall not be required to name its representative vessel until at a time agreed upon for the start, but the vessel when named must compete in all the races, and each of such races must be completed within seven hours."

Defendant was represented in the 33rd America's Cup event by a racing syndicate known as Team Oracle Racing (not a party to this litigation). Consistent with the cycle of recent America's Cup events, Team Oracle prevailed in the 33rd Cup's initial elimination series, earning the right to compete against the 32nd Cup winner and Defender, nonparty Societe Nautique de Geneve of Switzerland. Defendant succeeded to the position of Defender and trustee of the America's Cup when its yacht, sailed by Team Oracle, won that match on February 14, 2010.

In February 2010, defendant announced that it had accepted the notice of challenge from Club Nautico di Roma, designating that yacht club as the Challenger of Record under the Deed of Gift against defendant, as the Defender, trustee and holder of the Cup. The two yacht clubs then entered into the agreement known as "the Protocol" dated September 13, 2010, the stated purpose of which "is to promote a competitive regatta for all Competitors consistent with the provisions of the Deed of Gift." The Protocol recites that applications will be accepted from

other yacht clubs. It states that the parties "have agreed to hold a series of races to select the challenger for the Match," designated the America's Cup Challenger Series.[3] As pertinent to this dispute, the Protocol provides that defendant "may hold a series of races to select the Defender to represent GGYC in the Match." Section 8.3 of the Protocol provides that defendant "will review Defender Candidate applications and will accept those it is satisfied have the necessary resources (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series." Defendant and Club Nautico di Roma also entered into a "34th America's Cup Host and Venue Agreement," which selected San Francisco as the situs of the current America's Cup race.

The complaint alleges that defendant's failure to accept plaintiff's application to be a Defender Candidate constitutes a breach of contract, breach of trust and breach of fiduciary duty because, it asserts, plaintiff has all the requisite qualifications set forth in the Protocol to qualify as a Defender Candidate, and defendant failed to consider its application in good faith. The complaint states that defendant's reason for

[3] The propriety of this arrangement under the terms of the Deed of Gift is not before us.

rejecting plaintiff's application was that it was "not satisfied that [plaintiff] has, or *will have the necessary resources* (including but not limited to financial, human, and technological) and experience to have a reasonable chance of winning the America's Cup Defender Series."

The Deed of Gift is the instrument of a charitable trust (*see Golden Gate Yacht Club v Societe Nautique de Geneve*, 12 NY3d 248 [2009]; *Mercury Bay Boating Club v San Diego Yacht Club*, 76 NY2d 256, 260 [1990]). Generally, the Attorney General is the party vested with statutory authority to enforce the provisions of a charitable trust on behalf of its beneficiaries (EPTL 8-1.1[f]; 8-1.4; *see Lefkowitz v Lebensfeld*, 51 NY2d 442, 445 [1980]), following the well-settled rule that "a possible beneficiary of a charitable trust, or a member of a class of possible beneficiaries, is not entitled to sue for enforcement of the trust" (*Alco Gravure, Inc. v Knapp Found.*, 64 NY2d 458, 465 [1985]). A limited exception, which has been applied in other America's Cup cases entertained by the courts, is that standing may exist where "a particular group of people has a special interest in funds held for a charitable purpose . . . and the class of potential beneficiaries is sharply defined and limited

in number" (*id.*).[4]

The express provisions of the Deed of Gift govern the match race to be held between the Defender of the Cup, as trustee, and the Challenger of Record, as potential beneficiary (*see Mercury Bay Boating Club*, 76 NY2d at 267). Within the ambit of potential beneficiaries are the trustee and the yacht club formally recognized by the trustee as the Challenger of Record. Also accorded standing, as exemplified by *Golden Gate Yacht Club*, is a club claiming the right to be designated as the Challenger on the ground that the Challenger recognized by the Defender fails to meet the eligibility requirements stated in the Deed of Gift, in which case the would-be Challenger is deemed to possess a sufficient special interest in the corpus of the trust to be entitled to sue for its enforcement.

In sum, standing has been limited to the Defender of the Cup, the recognized Challenger, and a yacht club claiming the right to be designated as the Challenger. Patently, plaintiff can assert no claim to be the Defender because the capacity of Defender and trustee under the Deed of Gift is fulfilled by defendant. Equally, plaintiff can assert no claim to be

---

[4] The Attorney General appeared on behalf of the charitable beneficiaries in *Mercury Bay Boating Club* but not in *Golden Gate Yacht Club* or the instant matter.

designated Challenger of Record because it is not a foreign yacht club. Finally, plaintiff does not attack the qualifications of the Challenger recognized by the Defender. Thus, plaintiff cannot accede to the position of one of the two parties recognized under the trust instrument.

There is no merit to plaintiff's theory that it should be considered a *potential* beneficiary of the trust because it desires to compete as a Defender Candidate in the America's Cup Challenger Series and ultimately might succeed in being chosen to represent defendant in the match for the America's Cup. Even if this eventuality were to arise, plaintiff would not be promoted to the position of Defender under the trust instrument. The Defender is defendant Golden Gate Yacht Club. The Deed of Gift affords the Defender the right to designate its vessel at any time before the start of the match. The most to which plaintiff can aspire is the right to sail on behalf of the Defender as the defending vessel; it cannot become the Defender, as that term is used in the trust instrument. Even if plaintiff were designated to sail on behalf of the Defender and won the match, it would merely become the winning yacht. Possession of the trophy would remain in defendant in its capacity as Defender and trustee. Finally, were plaintiff permitted to proceed with its trust claims, standing could be asserted by all of the yacht clubs

chosen to participate in the regatta, as well as all those who applied but were not chosen to participate. This is a potentially numerous and amorphous class that is neither "limited in number" nor "sharply defined" so as to come within the exception to the general rule enunciated in *Alco Gravure* (64 NY2d at 465). Thus, plaintiff lacks standing, and its causes of action for breach of trust and breach of fiduciary duty were properly dismissed.

As to plaintiff's contract claim, it is elementary that before a court can enforce a contract, it must establish, first, that the parties intended to be mutually bound by an agreement and, second, what the agreement requires of them, both factors implicating the doctrine of definiteness (*Cobble Hill Nursing Home v Henry & Warren Corp.*, 74 NY2d 475, 482 [1989], *cert denied* 498 US 816 [1990]; *see also Charles Hyman, Inc. v Olsen Indus.*, 227 AD2d 270, 275-276 [1st Dept 1996]). It is plaintiff's theory that the parties are mutually bound because the Protocol constitutes an offer, extended by defendant and accepted by plaintiff upon submission of its application and accompanying fee. It concludes that a contract was thereby formed requiring defendant to exercise good faith in reviewing the application, which defendant is alleged to have breached in various ways set forth in the complaint. Plaintiff posits that the Protocol

"memorializes the Deed of Gift's hopes for fair play," and charges that defendant breached this duty by manufacturing "lame" excuses to deny plaintiff the right to participate in the competition as a Defender Candidate.

Dispositive of the question of contract formation in general is whether indeed an offer has been made (*see Kasowitz, Benson, Torres & Friedman, LLP v Duane Reade*, 98 AD3d 403 [1st Dept 2012], *affd* 20 NY3d 1082 [2013]); if so, whether the offer invites acceptance by the means used (*see Defeo v Amfarms Assoc.*, 161 AD2d 904 [3d Dept 1990]); and whether all conditions required for a valid acceptance have been fulfilled (*see King v King*, 208 AD2d 1143 [3d Dept 1994]). By imposing a contractual obligation on defendant, when there is none, the majority ignores the clear language of the Protocol relating to Defender applications.

The Protocol, by its express terms under section 8.3, extends only an invitation to prospective Defender Candidates to submit an application that, after review, defendant "will accept" if "it is satisfied" that the applicant meets the specified criteria. This provision clearly negates any mutual assent by defendant to be bound to an agreement with an applicant for Defender Candidate (*see generally Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 103-104 [1st Dept 2009], *lv denied* 15 NY3d 703 [2010] [language contained in invitation does not

manifest an intent to be bound, warranting dismissal of breach of contract claim]; *Kowalchuk v Stroup*, 61 AD3d 118, 121 [1st Dept 2009] ["To establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and intent to be bound"]).

There is nothing in the unambiguous language of section 8.3 or within the four corners of the contract that would impose a contractual duty upon defendant to accept an applicant for Defender Candidate upon submission of a compliant application. Rather, the solicitation of applications initiates a process of evaluation of the credentials and capabilities of the applicants for the purpose of determining those that are most suitable for a particular purpose (*see Wright v Ford Motor Co.*, 111 AD2d 810 [2d Dept 1985]). The soliciting organization may set such standards for candidates that it deems appropriate, and where the issue has been directly considered, the courts have declined to interfere in what has been regarded as an administrative matter (*see Matter of Pollak v Conway*, 276 App Div 435, 437 [3d Dept 1950], *lv denied* 301 NY 816 [1950]). Thus, an organization is free to accept or reject any applicant in the exercise of its judgment (*see Sabetay v Sterling Drug*, 69 NY2d 329, 333 [1987] [employment]; *Sitomer v Half Hollow Hills Cent. School Dist.*, 133 AD2d 748 [2d Dept 1987] [participation in high school athletics

program]*; Matter of Lesser v Board of Educ. of City of N.Y.*, 18 AD2d 388, 390 [2d Dept 1963] [college admission]). Since defendant did not accept plaintiff's application, no contract arose for which an action for breach can be maintained.

The Protocol's use of the term "satisfied" indicates that the assessment of an applicant's likelihood of winning the America's Cup Defender Series is to be made in the exercise of defendant's unfettered judgment (*see Fursmidt v Hotel Abbey Holding Corp.*, 10 AD2d 447, 449-450 [1st Dept 1960]). As the *Fursmidt* Court stated, "The performance here called for is much removed from that involving mechanical fitness, utility or marketability," which is subject to some "positive, objective standard" (*id.* at 450 [internal quotation marks omitted]). Rather, "in cases involving taste and judgment such standards of reasonableness cannot be established" (*id.*). Thus, even assuming a valid contract, the determination whether to utilize plaintiff's services as a competitor in its regatta is a matter relegated to the exercise of defendant's judgment and is not subject to judicial interference.

There is no merit to plaintiff's suggestion that the assessment of a prospective Defender Candidate implicates defendant's fiduciary duties, irrespective of the recitation under Article 3 of the Protocol that "GGYC (in its capacity as

trustee), Challenger of Record (in its capacity as Challenger of Record) [and others involved in the regatta] . . . shall: (i) act in the best interests of all Competitors collectively . . . and (ii) not unreasonably favor the interests of any Competitor over another." These provisions clearly make reference, and pertain, to Defender Candidates (and Challenger Candidates) *as competitors*. This language has no application to plaintiff, which is not a "Competitor" (defined in the Protocol as "a Defender Candidate or a Challenger") since its application to compete in the contemplated regatta as a Defender Candidate has not been accepted. Merely reciting defendant's capacity as Defender in the Protocol does not implicate defendant's fiduciary duties under the Deed of Gift. In that regard, it should be noted that the Deed of Gift expressly governs only the *match* between Defender and Challenger (*see Mercury Bay Boating Club*, 76 NY2d at 267 ["the deed ensures a "match" which will be a one-on-one competition"]), with the proviso that the contestants "may, by mutual consent," depart from "any and all other conditions of the match." The Deed of Gift is silent about such preliminaries as how the defending yacht is to be chosen, except to require that the selection be made by race time. Thus, the Defender and Challenger are free to contract as they deem appropriate with respect to the manner in which the competing vessels are

designated. Since defendant's obligations with respect to the selection of contestants are, by contract, subject to its own satisfaction, defendant was entitled to accept or reject plaintiff's application as it saw fit.

To support its contention that a binding contract was formed, plaintiff relies on *Sargent v New York Daily News, L.P.*, 42 AD3d 491 [2d Dept 2007]), for the proposition "'that the rules of a contest constitute a contract offer and that the participant's [entry into] the contest constitute[s] an acceptance of that offer'" (at 493, quoting *Diop v Daily News, L.P.*, 11 Misc 3d 1083[A], 2006 NY Slip Op 50671[U], *3 [2006]), which plaintiff advances as a general principal of law. Thus, plaintiff reasons, merely by submitting to defendant its application to be a participant in the racing events with the required fee provided in the Protocol, a binding contract was formed, imposing upon defendant the obligation to exercise good faith in the selection of Defender Candidates.

There is no question that under certain circumstances the mere participation in a contest imposes a contractual obligation on the sponsor. In *Sargent*, the use of a daily game card by the plaintiff was held to constitute the acceptance of an offer to join the contest, binding the plaintiff to the rules printed on the reverse side (*see also Fujishima v Games Mgt. Servs.*, 110

Misc 2d 970 [Sup Ct, Queens County 1971]). The matter before this Court, however, is readily distinguishable from such contests, since it involves considerably more than a claim to winnings under circumstances where participation is limited to the purchase, or even the mere use, of a game card. The process at issue is not, by analogy, the mere purchase of a game card; rather, the applicant must first be approved by the Defender and then participate in a series of yacht races with the objective of winning the America's Cup Defender Series. Notably, the game card cases and others cited by plaintiff involve winners or asserted winners of a contest. To consider plaintiff's submission of an application comparable to the presentation of a winning ticket would accord overly expansive scope to Woody Allen's observation, "Eighty percent of success is showing up." Here, plaintiff's application was rejected as unsatisfactory before the contest had even begun.

Plaintiff cites *Robertson v United States* (343 US 711, 713 [1952]) for the proposition that "acceptance by the contestants of the offer tendered by the sponsor of the contest creates an enforceable contract." Unlike plaintiff, however, the contestant in *Robertson* had actually won the musical competition in question. Moreover, the narrow issue decided was whether, for tax classification purposes, the payment of winnings by a sponsor

of a contest comprises the discharge of a contractual obligation, rather than a gift (*id.* at 713). Since the *Robertson* Court was not confronted with an executory contract but one that had been fully performed, the issue of formation – particularly whether the sponsor of the musical competition had made an offer that the winning contestant could accept – was not before it. Likewise, *Dalton v Educational Testing Serv.* (87 NY2d 384, 389 [1995]) sheds no light on the question whether the submission of an application to participate in a sporting event constitutes an acceptance of an offer to participate. In *Dalton*, the Court of Appeals did not discuss formation, but simply stated that "[b]y accepting [Educational Testing Service]'s standardized form agreement . . . Dalton entered into a contract with ETS." It should also be noted that, in marked contrast to the matter at bar, *Dalton* does not involve qualifications that an applicant must meet in order to participate in the testing process.

The law imposes no obligation on an organization to exercise its judgment to select any particular applicant for a particular function, no matter how qualified; rather, it is expected that an organization will act in its own best interests, which would not be served by rejecting qualified candidates. Here, defendant points out that plaintiff does not allege that a proposed team member of plaintiff has ever competed in an America's Cup race or

that the plaintiff team has ever competed together on the same boat in a regatta. It is further noted that plaintiff's ability to raise capital and secure the services of an expert boat designer appears to depend on defendant's granting its application. Even assuming, arguendo, that there were a contractual right to be enforced, which clearly there is not, plaintiff's limited experience as a competitive sailing organization and its questionable ability to raise capital, retain an expert boat designer and assemble a competitive, financially backed team that could successfully compete in the Defender Series undermine its claim of bad faith.

The majority's holding deprives defendant of its contractual right under the Protocol to decide what is in its best interests in promoting the America's Cup Defender Series, a duty it was charged with as Defender under the trust instrument, and substitutes some ad hoc standard to be judicially formulated at trial. As the Second Department noted in *Matter of Pollak* (276 App Div at 437-438), the courts are ill equipped to devise the criteria for assessing a candidate's qualifications or to administer the organization's application of those criteria, a sentiment that finds particular application in the context of such a high-level sailing event.

Finally, plaintiff's claim must be rejected as a matter of

policy. To permit a contract action to be maintained by any person or group that has been denied the right to participate in an athletic event would subject the courts to a potentially enormous volume of litigation and involve them in the assessment of athletic abilities, an area in which they lack expertise. It is simply not the province of the courts to decide, for instance, whether any particular applicant should be accorded the right to participate in the New York City Marathon or whether a promising player should be selected to play for a professional sports team or, for that matter, whether a particular seventh-grader should be permitted to play on a local high school tennis team (*see Sitomer*, 133 AD2d at 748).

Whether plaintiff has the necessary qualifications "to have a reasonable chance of winning the America's Cup Defender Series" and so to be selected as a Defender Candidate, as the Protocol provides, "'is a knotty point, and should have been submitted to the arbitration of sportsmen'" (*Mercury Bay Boating Club*, 150 AD2d at 101 [Rubin, J., concurring], quoting *Pierson v Post*, 3 Caines 175, 180 [1805] [Livingston, J., dissenting]). The substance of the complaint, with its emphasis on defendant's asserted failure to exercise "good faith," is that defendant has been treated unfairly in the selection process. As stated in *Pierson* and reiterated in *Mercury Bay*, in the absence of

fiduciary or equitable considerations, the function of the courts is to decide what is within the bounds of the law, an assessment that does not embrace determining what is fair in the context of a sporting event.

Accordingly, the order should be affirmed.

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

ENTERED: JUNE 25, 2013

CLERK