SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 25, 2018

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Renwick, Mazzarelli, Kahn, JJ.

2219 The People of the State of New York, Ind. 6304/08
Respondent,

-against-

Joseph R. Terry,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Carol Berkman, J. at motions; Charles H. Solomon, J. at jury trial and sentencing; Michael J. Obus, J. at postremand hearing), rendered July 20, 2010, convicting defendant of robbery in the first degree, two counts of robbery in the second degree, and two counts of criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 17 years, unanimously affirmed.

We previously held this appeal in abeyance and directed a

suppression hearing (144 AD3d 531 [1st Dept 2016]). The court conducted the hearing and correctly denied defendant's motion to suppress the fruits of an allegedly unlawful seizure. There is no basis for disturbing the court's credibility determinations, including its resolution of any claimed inconsistencies between trial and hearing testimony.

The hearing court correctly concluded that the investigating detective's initial questions to defendant and his accomplices constituted a request for information supported, at least, by an objective, credible reason (*see generally People v DeBour*, 40 NY2d 210, 223 [1976]), consisting of strong indications that this group was the same group of three persons suspected of a robbery in which a storekeeper was shot. The court also correctly found that the group's responses to questions, combined with the preexisting chain of information, established a very high likelihood that these were the persons the officer was looking for, and thus created reasonable suspicion authorizing a stop. Next, the court correctly determined that the handcuffing of defendant did not constitute an arrest, but rather a permissible intrusion pursuant to an investigatory detention involving a violent crime (*see People v Foster*, 85 NY2d 1012, 1014 [1995]; *People v Allen*, 73 NY2d 378, 379-380 [1989]). Finally, the

court correctly concluded that even if the use of handcuffs had established an arrest, suppression would not have been warranted because the recovery of a handgun from the accomplice – minutes after the handcuffing but before the statements and physical evidence at issue were obtained from defendant – provided intervening probable cause so that the evidence was not the fruit of an unlawful arrest (*see e.g. People v Garcia*, 281 AD2d 234 [1st Dept 2001], *lv denied* 96 NY2d 862 [2001]).

Turning to the remaining issues raised on the initial appeal, we first conclude that the verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Moreover, we find that the evidence was overwhelming. The inference of defendant's accessorial liability was inescapable, and the evidence, viewed as a whole, had no other reasonable explanation (*see e.g. Matter of Juan J.*, 81 NY2d 739 [1992]; *People v Allah*, 71 NY2d 830 [1988]).

The original motion court correctly determined that the search of defendant's home was based on a valid search warrant supported by probable cause. Under the totality of circumstances, the information supporting the warrant application was not stale. In any event, the cartridges found during the

search constituted a minor component of the People's case, and any error in admitting them was harmless in any event (*see People v Crimmins*, 36 NY2d 230 [1975]).

The trial court providently exercised its discretion in declining to provide an adverse inference instruction based on a lost page of an officer's notepad. "[N]onwillful, negligent loss or destruction of *Rosario* material does not mandate a sanction unless the defendant establishes prejudice" (*People v Martinez*, 22 NY3d 551, 567 [2014]), and here defendant made no such showing.

The trial court also providently exercised its discretion in admitting a photograph, taken after defendant's arrest, which showed him standing in front of a jail cell. This photograph had independent probative value because it showed defendant wearing a jacket that was relevant to the case (*see People v Washington*, 259 AD2d 365 [1st Dept 1999], *lv denied* 93 NY2d 1006 [1999]) and the jury was well aware that the photo was taken as a result of the instant arrest rather than an uncharged crime. Accordingly, its probative value outweighed any prejudice. In any event, any error was harmless in light of the overwhelming evidence of guilt.

Defendant's remaining contentions are unpreserved, and we

decline to review them in the interest of justice. As an alternative holding, we find that nothing in the prosecutor's summation warrants reversal, and that any error under *People v Gray* (84 NY2d 709 [1995]) was harmless.

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

ENTERED: OCTOBER 25, 2018

CLERK

Tom, J.P., Webber, Oing, Moulton, JJ.

6063-
6064 The People of the State of New York,
Respondent,

-against-

Ramon Lara,
Defendant-Appellant.

Ind. 2627/09

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

Ramon Lara, appellant pro se.

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

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered July 10, 2012, as amended July 16, 2012, convicting defendant, upon his plea of guilty, of murder in the second degree, and sentencing him to a term of 17 years to life, and order, same court (Kevin B. McGrath, J.), entered on or about April 7, 2017, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After considering the factors set forth in *People v Taranovich* (37 NY2d 442, 445 [1975]), we conclude that the court properly denied defendant's constitutional speedy trial motion. Although there was substantial delay, it was satisfactorily

explained, and relatively little of it was attributable to the People. Almost all of the delay is directly attributable to defendant, because he fled to the Dominican Republic shortly after committing the murder. Had he not done so, or had he terminated his flight, the prosecution would not have been required to take any steps to extradite him (*see People v Diaz*, 81 AD3d 516 [1st Dept 2011], *lv denied* 17 NY3d 794 [2011]; *see also People v Ortiz*, 60 AD3d 563 [1st Dept 2009], *lv denied* 12 NY3d 919 [2009]). In any event, at the time of defendant's flight, while the United States had an extradition treaty with the Dominican Republic, that nation's law forbade any extradition of its own citizens, such as defendant. Accordingly, the police acted reasonably and in good faith by continuing to investigate defendant's whereabouts, but operating under the assumption that he could not be extradited. This conclusion is not undermined by the fact that Dominican extradition law changed somewhat during the period of delay at issue. Furthermore, defendant has not demonstrated that his ability to defend himself was prejudiced by the delay, and we find that the remaining *Taranovich* factors weigh against dismissal.

The court providently exercised its discretion in denying defendant's CPL 440.10 motion (*see People v Samandarov*, 13 NY3d

433, 439-440 [2009]). Based on the submissions on the motion, as well as the trial record, we conclude that defendant received effective assistance under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]). We also find no need for a remand for an evidentiary hearing.

Defendant's claim that his attorney was ineffective in supposedly failing to investigate a valid justification defense was only supported by bare allegations and is contradicted by the record. In particular, just before defendant's guilty plea on June 12, 2012, counsel advised the court that after investigating a justification defense, and reviewing the forensic evidence, he concluded that a justification defense would be unsuccessful. Nor did defendant offer any reliable proof to support his claim of actual innocence.

We separately find that there was no violation of defendant's right to conflict-free representation. It appears that counsel originally intended to assert a justification defense, but advised the court, in the course of plea discussions where the court was not acting as a trier of fact, that he had advised his client to plead guilty because a justification defense would be unsuccessful. Defendant has not shown that

counsel thereby created a conflict or impaired defendant's free choice to plead guilty.

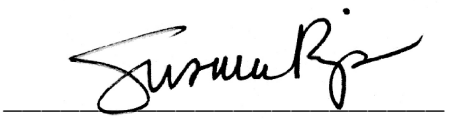
We have considered and rejected defendant's pro se claim regarding his assertion of actual innocence.

We perceive no basis for reducing the sentence.

The Decision and Order of this Court entered herein on August 16, 2018 is hereby recalled and vacated (*see* M-4247 decided simultaneously herewith).

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7455 The People of the State of New York, Ind. 2356/89
Respondent,

-against-

Elias Beltran,
Defendant-Appellant.

_____

Robert S. Dean, Center for Appellate Litigation, New York (Scott H. Henney of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Nicole Neckles of counsel), for respondent.

_____

Appeal from order, Supreme Court, Bronx County (Ethan Greenberg, J.), entered on or about March 30, 2017, which denied defendant's CPL 440.20 motion to set aside his sentence, unanimously dismissed, as moot.

Because defendant challenges only the aggregate minimum prison term of his two consecutive sentences of 15 years to life, his appeal was rendered moot by his release on parole on September 6, 2018 (after the briefs were filed). There is no

basis for applying the exception to the mootness doctrine (*see generally Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-15 [1980]). Furthermore, defendant's challenge to his sentence is procedurally barred (*see* CPL 440.20[2]).

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

ENTERED: OCTOBER 25, 2018

CLERK

Kapnick, J.P., Webber, Oing, Moulton, JJ.

7456 April McCormick, Index 306837/13
Plaintiff-Appellant,

-against-

City of New York,
Defendant,

Serafina Reda,
Defendant-Respondent.

_____

Sclar Law Group LLP, Bronx (Wesley M. Serra of counsel), for appellant.

D'Amato & Lynch, LLP, New York (Robert D. Lang of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Fernando Tapia, J.), entered on or about April 26, 2017, which granted the motion of defendant Serafina Reda for summary judgment dismissing the complaint as against her, unanimously reversed, on the law, without costs, and the motion denied.

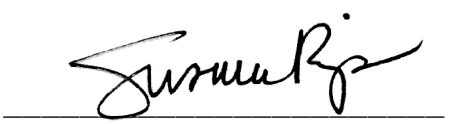
Plaintiff alleges that she tripped and fell over a gap between flagstones on a public sidewalk abutting property owned by Reda, and south of a bus shelter maintained by defendant City. Under Administrative Code of City of NY § 7-210, an abutting property owner has a duty to maintain the public sidewalk (*Bronfman v East Midtown Plaza Hous. Co., Inc.*, 151 AD3d 639 [1st

Dept 2017]), but the City continues to be responsible for maintaining any part of the sidewalk that is "within a designated bus stop location" (*Bednark v City of New York*, 127 AD3d 403, 404 [1st Dept 2015]; *see also Bednark v City of New York*, 162 AD3d 565 [1st Dept 2018]).

In support of her motion for summary judgment, Reda submitted evidence, including photographs showing where plaintiff fell near a bus shelter and next to a yellow-marked curb, and the City's admission that it owns the bus stop pole shown in a photograph. However, absent any applicable statute or any evidence defining the parameters of a bus stop, a triable issue of fact exists as to whether the part of the sidewalk where plaintiff fell is within a designated bus stop that the City is required to maintain (*see Munasca v Morrison Mgt. LLC*, 111 AD3d 564 [1st Dept 2013]; *compare Phillips v Atlantic-Hudson, Inc.*, 105 AD3d 639 [1st Dept 2013]).

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7457-
7457A In re Janaya T., and Others,

Children Under Eighteen Years
of Age, etc.,

Sarah T.,
Respondent-Appellant,

The New York Foundling Hospital,
Petitioner-Respondent.

_____

Carol L. Kahn, New York, for appellant.

Daniel Gartenstein, Long Island City, for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Riti P. Singh of counsel), attorney for the children.

_____

Orders of fact-finding and disposition, Family Court, New York County (Stewart H. Weinstein, J.), entered on or about August 29, 2017, which, upon a fact-finding determination that respondent mother permanently neglected the subject children, terminated respondent's parental rights to the children and committed the custody and guardianship of the children to petitioner hospital and the Commissioner of Social Services of the City of New York for the purpose of adoption, unanimously affirmed, without costs.

The finding of permanent neglect is supported by clear and

convincing evidence of respondent's failure to plan for the children's future, notwithstanding the agency's diligent efforts to encourage and strengthen the parental relationship (*see* Social Services Law § 384-b[7][a]; *Matter of Sheila G.*, 61 NY2d 368 [1984]). The evidence shows that the agency developed a plan tailored to respondent's needs, among other things, referring her for alcohol abuse treatment, mental health evaluation and domestic violence services, scheduling regular visitation, and meeting with her to review her service plan and discuss the importance of compliance (*see* Social Services Law § 384-b[7][f]; *Matter of Star Leslie W.*, 63 NY2d 136, 142 [1984]; *Matter of Aisha C.*, 58 AD3d 471, 471-72 [1st Dept 2009], *lv denied* 12 NY3d 706 [2009]). However, respondent was uncooperative. She failed to follow up on repeated, multiple referrals for required services, visited the children sporadically, and avoided arranging an agency visit to her home when she moved back in with her mother. Respondent failed to take responsibility for the conditions that led to the children's removal, and failed to gain insight into the reasons, which include alcohol abuse, for the children's placement into foster care (*see Matter of Nathaniel T.*, 67 NY2d 838, 842 [1986]; *Matter of Ashley R. [Latarsha R.]*, 103 AD3d 573 [1st Dept 2013], *lv denied* 21 NY3d 857 [2013]).

The finding that termination of respondent's parental rights is in the children's best interests is supported by a preponderance of the evidence, which shows that the children have remained in the same pre-adoptive kinship foster home for several years, where they are well cared for, and that the foster mother wishes to adopt them (*see Matter of Christina Jeanette C.*, 168 AD2d 351 [1st Dept 1990]). As there is no evidence that any additional delay would alter the situation, a suspended judgment is not warranted (*see Matter of Alexandria D. [Brenda D.]*, 136 AD3d 604 [1st Dept 2016]).

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

ENTERED: OCTOBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7458 Alec Stais, et al., Index 652980/16
Plaintiffs-Appellants,

-against-

Kerry Wellington,
Defendant-Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Nancy Bannon, J.), entered on or about September 18, 2017,

And said appeal having been withdrawn before argument by counsel for the respective parties; and upon the stipulation of the parties hereto dated October 2, 2018,

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

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

ENTERED: OCTOBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7459 Jay Howell, etc., Index 16006/06
Plaintiff-Appellant,

James Howell, et al.,
Plaintiffs,

-against-

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

_____

Law Offices of Daniel A. Thomas, P.C., New York (Daniel A. Thomas of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Jane L. Gordon, of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered on or about April 13, 2017, which denied plaintiff Jay Howell's motion for leave to enter judgment for, in effect, interest from decision to judgment, pursuant to CPLR 5002, sua sponte vacated its decision (denominated an order), entered January 30, 2015 and its order entered April 7, 2015, and sua sponte reinstated a judgment entered January 24, 2014, unanimously modified, on the law, to delete the provisions vacating the decision entered January 30, 2015 and the order entered April 7, 2015 and reinstating the judgment entered January 24, 2014, and, as so modified, affirmed, without costs.

Initially, we agree with plaintiff that Supreme Court exceeded its authority in sua sponte vacating its prior decision and prior order and reinstating the 2014 judgment. "[A] trial court has no revisory or appellate jurisdiction, sua sponte, to vacate its own order or judgment" (*Adams v Fellingham*, 52 AD3d 443, 444 [2d Dept 2008]). Although "a court may grant relief[] pursuant to a general prayer contained in the notice of motion . . . " (*Carter v Johnson*, 110 AD3d 656, 658 [2d Dept 2013] [internal quotation marks omitted]), no such clause was contained in plaintiff's notice of motion. In the absence of any cross motion from the defendants, or any other kind of request for vacatur of the court's prior order decision and prior order and reinstatement of the prior judgment, the court erred in doing so on its own initiative.

Nonetheless, we agree that plaintiff is not entitled to pre-judgment interest. Once defendants failed to timely pay all sums due to plaintiff within ninety days of his tender of the requisite settlement documents (*see* CPLR 5003-a[b]), plaintiff was entitled to a judgment "for the amount set forth in the release, together with costs and lawful disbursements, and interest on the amount set forth in the release from the date that the release and stipulation discontinuing action were

tendered" (CPLR 5003-a[e]). The parties no longer dispute that defendants did not timely pay plaintiff, they have stipulated to the amount of costs, disbursements, and interest plaintiff is due, and defendants have paid plaintiff that sum. Plaintiff is therefore not entitled to any further relief or monetary award.

Further, CPLR 5003-a(e) is specific about what may be contained in a judgment against a settling defendant who has not timely paid a plaintiff his settlement proceeds. Given the absence in that provision of any reference to prejudgment interest, there is no basis for departing from the "irrefutable inference ... that what is omitted or not included was intended to be omitted or excluded" (McKinney's Cons Laws of NY, Book 1, Statutes § 240).

We reject plaintiff's argument that the term "interest," as used in the stipulation of settlement, is unclear. Given that plaintiff was not entitled to postjudgment interest - or, for that matter, a judgment - at the time that he executed the stipulation of settlement, "interest" could not have referred to anything other than prejudgment interest. Coupled with his allocution to the settlement and the subsequent stipulation that no further costs or sanctions would be sought, we find that plaintiff unambiguously waived any right he may have had to pre-

judgment interest.

Finally, since the parties have already stipulated that any judgment plaintiff was authorized by CPLR 5003-a(e) to enter has already been satisfied, and the record and briefs confirm that plaintiff has been paid all monies due to him, there is no need to grant plaintiff leave to enter a new judgment in place of the 2014 judgment.

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: OCTOBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7460 The People of the State of New York, Ind. 5435/03
Respondent,

-against-

Joseph Giardala,
Defendant-Appellant.

_____

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

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

_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 3, 2016, as amended August 8, 2016, convicting defendant, after a jury trial, of rape in the first degree, sodomy in the first degree, sexual abuse in the first degree (two counts) and robbery in the first degree, and sentencing him to an aggregate term of 22⅔ to 50 years, unanimously affirmed, without costs.

The court properly denied defendant's motion to dismiss the indictment as time-barred. The applicable five-year statute of limitations was tolled (*see* CPL 30.10[4][a][ii]) because defendant's identity and whereabouts were unknown and unascertainable by the exercise of reasonable diligence (*see People v Quinto*, 18 NY3d 409, 419 [2012]; *People v Seda*, 93 NY2d

307, 311 [1999]). After this 1995 crime, law enforcement authorities exhausted all reasonable investigative possibilities, and were not required to keep repeating the same futile steps. Years later, when DNA technology provided the ability to identify the perpetrator by matching DNA, this case was one of thousands of similar cases awaiting DNA comparison, and this reasonably accounts for any additional delay (*see e.g. People v Lloyd*, 23 AD3d 296, 297 [1st Dept 2005], *lv denied* 6 NY3d 755 [2005]). We also note, in any event, defendant did not raise any challenge to the People's delay in 2002 in proceeding with the prosecution.

Defendant did not preserve his claim that the court improperly granted the People's motion to amend a John Doe DNA indictment to add defendant's name, and we decline to review it in the interest of justice. As an alternative holding, we reject his claim on the merits (*see People v Martinez*, 52 AD3d 68 [1st Dept 2008], *lv denied* 11 NY3d 791 [2008]).

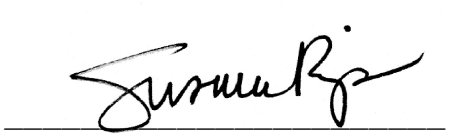
The court properly denied defendant's constitutional speedy trial motion. The delay was caused, as discussed above, by the inability of the police to ascertain the identity of the perpetrator until after advances in DNA science, and then by the backlog of DNA samples that required testing. Given the seriousness of the charges and the DNA evidence that conclusively

established his guilt, we find no infringement of defendant's constitutional rights (*see People v Taranovich*, 37 NY2d 442 [1975]).

We perceive no basis for reducing the sentence.

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

ENTERED: OCTOBER 25, 2018



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Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7461 The People of the State of New York, Ind. 1029/16
Respondent,

-against-

Javier Echavarria,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Susan Epstein of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (John T. Hughes of counsel), for respondent.

_____

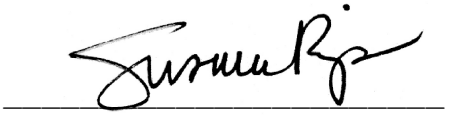
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Melissa Jackson, J.), rendered July 7, 2016,

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

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

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

ENTERED: OCTOBER 25, 2018



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

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7462 Staffan Ahrenberg, et al., Index 653687/15
Plaintiffs-Appellants,

-against-

Patrick Liotard-Vogt, et al.,
Defendants,

ASW Capital AG,
Defendant-Respondent.

_____

Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellants.

Pepper Hamilton, LLP, New York (Lindsay D. Breedlove of counsel), for respondent.

_____

Order, Supreme Court, New York County (Anil C. Singh, J.), entered April 6, 2017, which, to the extent appealed from, denied plaintiffs' motion for leave to amend the complaint to assert claims against defendant ASW Capital for aiding and abetting fraud and breach of fiduciary duty, unanimously affirmed, with costs.

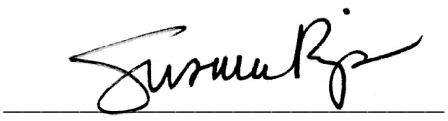
The motion court was correct in denying leave to amend since plaintiffs did not show that they could plead the "substantial assistance" element of a cause of action for aiding and abetting breach of fiduciary duty and fraud (*see Stanfield Offshore Leveraged Assets, Ltd. v Metropolitan Life Ins. Co.*, 64 AD3d 472,

476 [1st Dept 2009], *lv denied* 13 NY3d 709 [2009]*; Kaufman v Cohen*, 307 AD2d 113, 125 [1st Dept 2003]). ASW Capital was not a party to and did not participate in the transactions that plaintiffs allege were improper, namely, the actual merger accomplished by ASW Media Consult Corporation and the valuation process in connection with the merger.

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

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

ENTERED: OCTOBER 25, 2018



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Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7463 The People of the State of New York, Ind. 99006/17
Respondent,

-against-

Aquiles Guzman,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Lauren Stephens-Davidowitz of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Raymond L. Bruce, J.), entered on or about March 10, 2017, which adjudicated defendant a level one sexually violent offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

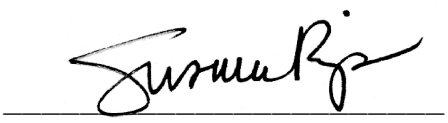
Although the People failed to provide written notice, 10 days in advance of the proceeding, of their intention to seek a sexually violent offender designation, which the Board of Examiners of Sex Offenders had omitted from its recommendation, the court provided an appropriate remedy by adjourning the proceedings (*see* Correction Law §§ 168-k[2], 168-n[3]; *People v Lucas*, 118 AD3d 415 [1st Dept 2014]). Defendant does not dispute that his out-of-state conviction automatically qualified as an

enumerated sexually violent offense, "leaving nothing to litigate in this regard" (*People v Bryant*, 147 AD3d 412, 412 [1st Dept 2017], *lv denied* 29 NY3d 910 [2017]; *see also People v McLean*, 144 AD3d 423 [1st Dept 2016]). Moreover, defense counsel acknowledged that the adjournment gave her adequate time to prepare and stated that she did not seek to challenge the merits of defendant's sexually violent offender designation.

Defendant notes that the adjournment required him to take time to make an additional appearance in court. However, under these circumstances, we do not find that requirement so burdensome or prejudicial that defendant "should receive undeserved relief from his legally mandated sexually violent offender status" (*Bryant*, 147 AD3d at 412).

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

ENTERED: OCTOBER 25, 2018



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Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7464 In re Jaiden M., etc., and Others,

Children Under Eighteen Years
of Age, etc.,

Jeffrey R.,
Respondent-Appellant,

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

_____

Law Offices of Randall S. Carmel, Jericho (Randall S. Carmel of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Yasmin Zainulbhai of counsel), for respondent.

Dawne A. Mitchell, The Legal Aid Society, New York (Claire V. Merkine of counsel), attorney for the children.

_____

Order of fact-finding and disposition, Family Court, New York County (Jane Pearl, J.), entered on or about February 2, 2017, which, to the extent appealed from as limited by the briefs, determined, following a hearing, that respondent is a person legally responsible for one of the subject children, and that he neglected that child and two of his biological children, unanimously affirmed, without costs.

The evidence adduced at the fact-finding hearing supports Family Court's findings that respondent, who had known the

subject children's mother for 10 years and was the father of the two youngest subject children, was a person legally responsible for the mother's eldest child within the meaning of Family Court Act § 1012(g). The mother's and the caseworker's undisputed testimony established that respondent provided financial support for the eldest child, whom respondent, by his own testimony admitted he considered to be his son, and that the eldest child often referred to respondent as "daddy" (*see Matter of Yolanda D.*, 88 NY2d 790, 797 [1996]; *Matter of Devin W. [Devonne W.]*, 154 AD3d 723, 724 [2d Dept 2017]; *Matter of Keoni Daquan A. [Brandon W.—April A.]*, 91 AD3d 414, 415 [1st Dept 2012]; *Matter of Alexandria X. [Ronald X.]*, 80 AD3d 1096, 1098 [3d Dept 2011]). The mother also testified that respondent would arrange for the eldest child to spend weekends with him, and that respondent would occasionally spend the night at her home, which permits an inference of substantial familiarity between the eldest child and respondent (*see Matter of Kevin N. [Richard D.]*, 113 AD3d 524, 524 [1st Dept 2014]).

In addition, a preponderance of the evidence establishes that on July 21, 2016, respondent neglected the children by committing an act of domestic violence against the mother while the children were present (*see* Family Ct Act §§ 1012[f][i][B];

1046[b][i]; *Matter of Andru G. (Jasmine C.]*, 156 AD3d 456, 457 [1st Dept 2017]; *Matter of Moises G. [Luis G.]*, 135 AD3d 527, 527 [1st Dept 2016]; *Matter of Cherish C. [Shanikwa C.]*, 102 AD3d 597, 598 [1st Dept 2013]). It is undisputed that the mother's medical records established that she was bruised when she went to the hospital immediately after the choking incident occurred.

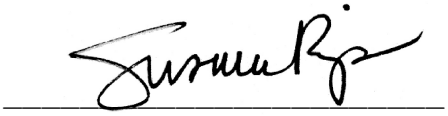
Contrary to respondent's contention, the caseworker's testimony established that the middle child had witnessed the July 21, 2016 incident (*see Matter of Kaila A. [Reginald A.-Lovely A.]*, 95 AD3d 421, 421 [1st Dept 2012]). The caseworker's and the mother's testimony also established that the eldest child and youngest child were in imminent danger of physical harm due to their close proximity to the potentially deadly violence that occurred (*see Matter of Isabella S. [Robert T.]*, 154 AD3d 606, 607 [1st Dept 2017]).

The Family Court properly drew a negative inference against respondent for failing to testify at the fact-finding hearing, even though a related criminal proceeding was pending against him at the time of the hearing (*see Matter of Rachel S.D. [Luis N.]*, 113 AD3d 450 [1st Dept 2014]). There is no basis for disturbing

the court's findings of fact and credibility determinations, which are supported by the record (*see Matter of Davion A. [Marcel A.]*, 68 AD3d 406 [1st Dept 2009]).

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7465 Ferro Fabricators, Inc., doing business as Greg's Iron Works, Inc., Plaintiff-Respondent, Index 155201/12

-against-

1807-1811 Park Avenue Development Corp., et al., Defendants-Appellants,

Country Bank, et al., Defendants.

_____

Sheats & Baily, PLLC, Liverpool (Edward J. Sheats of counsel), for appellant.

Malvina Lin, P.C., Brooklyn (Malvina Lin of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ellen M. Coin, J.), entered October 30, 2017, which, insofar as appealed from as limited by the briefs, denied the cross motion of defendants 1807-1811 Park Avenue Development Corp. and ESF Property, Inc. (collectively defendants) for summary judgment on their counterclaims for breach of contract and willful exaggeration of a mechanic's lien, unanimously affirmed, with costs.

Defendants are not entitled to summary judgment on the their breach of contract counterclaim. The record establishes that any defective work performed by plaintiff had been remediated, and

that plaintiff's steel structural work had been satisfactorily completed. Thus, the dispositive issue is whether the contract was breached due to plaintiff's delayed completion of work. However, the affidavits and deposition testimony submitted by both sides raise issues of fact as to whether plaintiff was provided with a schedule of when the work was to be completed, and if so, whether plaintiff failed to comply with it.

Defendants are also not entitled to summary judgment on their counterclaim for willful exaggeration of the mechanic's lien (*see* Lien Law §§ 39, 39-a). Defendants rely on the seventh and most recent requisition that they received from plaintiff in arguing that only 78% of the work had been completed, and that plaintiff exaggerated the amount of the lien by $274,305.47. Plaintiff, however, produced an eighth requisition that it never submitted to defendants showing that it had completed 97% of the work. It further claims that it subsequently completed the remaining balance of the work totaling $27,810, and did not include that amount in the lien. Defendants do not specifically dispute that plaintiff performed work after the submission of the seventh requisition, but argue that the work reflected in the eighth one should not be included because it was never submitted. We find that the eighth requisition raises an issue of fact as to

the true extent of work that plaintiff had performed. Further, the affidavits submitted by the parties raise an issue of fact as to whether plaintiff knowingly included two unapproved change work orders in the amounts of $18,000 and $14,970.47 in the lien.

Because the record raises triable issues as to whether plaintiff breached the contract, and the extent of unpaid work performed by plaintiff, plaintiff is not entitled to summary judgment on its lien foreclosure and breach of contract claims. We may consider plaintiff's challenge to the court's denial of its motion for summary judgment on those claims, although plaintiff did not cross-appeal (*see Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 110-112 [1984]). However, we will not address its challenge to the court's denial of its request to reject defendants' cross motion as untimely and the dismissal of its quantum meruit and unjust enrichment claims.

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

ENTERED: OCTOBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7466 Amnon Shiboleth, et al., Index 600350/98
Plaintiffs-Respondents,

-against-

Joseph Yerushalmi, et al.,
Defendants-Appellants,

N.S.N. International Industries,
et al.,
Defendants.

_____

Meltzer, Lippe, Goldstein & Breitstone, LLP, West Islip (Thomas J. McGowan of counsel), for appellants.

Tarter Krinsky & Drogin LLP, New York (Richard A. Williamson of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered December 11, 2017, which awarded $830,532 of the Phoenix fee to plaintiff Yerushalmi, Shiboleth, Yisraeli & Roberts, LLP (YSYR) and $70,750 to defendant Joseph Yerushalmi, unanimously reversed, on the facts and in the exercise of discretion, with costs, and Yerushalmi awarded $126,664.35 and YSYR $774,667.65. The Clerk is directed to enter judgment accordingly.

In the previous appeal, we found that, in reapportioning the Phoenix fee, the Special Referee failed to take into consideration the fact that the payment to YSYR of $901,332, as

well as a payment of $197,238, was obtained "owing entirely to the Yerushalmi defendants' postdissolution efforts to recover monies owed to the firm that would otherwise not have been recovered" (*Shiboleth v Yerushalmi*, 143 AD3d 607, 608 [1st Dept 2016] ["*Shiboleth II*"). We instructed the Special Referee to reapportion the Phoenix fee "based upon equitable considerations that take into account the Yerushalmi defendants' efforts" (*id.*). On remand, in the order appealed from, while the Special Referee made mention of "equitable considerations regarding the post-dissolution efforts undertaken by the Yerushalmi defendants[]" he did not explain why this factor was worth $20,000.

Instead of remanding for a third time (*see Shiboleth v Yerushalmi*, 58 AD3d 407 [1st Dept 2009]; *Shiboleth II*, 143 AD3d at 608) in this action commenced 20 years ago, we will reapportion the Phoenix fee ourselves; the record is sufficient to permit this. Plaintiffs concede that $126,664.35 gives Yerushalmi credit for each entry in the invoices in the record that is even conceivably related to his collection efforts. We find that this adequately takes into account the relevant equitable considerations.

The Yerushalmi defendants' contention that they are entitled to 100% of the Phoenix fee due to their collection efforts is

unavailing. They made the same argument in *Shiboleth II*, and we did not accept it (*see* 143 AD3d at 608 ["We have considered the Yerushalmi defendants' remaining arguments and find them unavailing"]).

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

ENTERED: OCTOBER 25, 2018

CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7467 The People of the State of New York, Ind. 2345/15
Respondent,

-against-

Emanuel Burrowes,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Kami Lizarraga of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Meghan Callagee O'Brien of counsel), for respondent.

_____

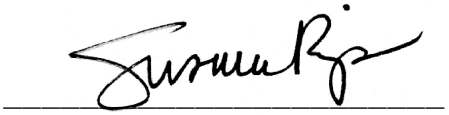
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Maxwell Wiley, J.), rendered May 6, 2016,

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

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

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

ENTERED: OCTOBER 25, 2018



CLERK

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

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7468 The People of the State of New York, Ind. 2687/15
Respondent,

-against-

Michael Schooler,
Defendant-Appellant.

_____

Christina A. Swarns, The Legal Aid Society, New York (David Billingsley of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Diana J. Lewis of counsel), for respondent.

_____

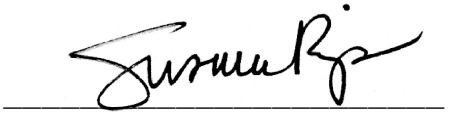
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, Bronx County (Miriam R. Best, J.), rendered April 25, 2016,

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

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

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

ENTERED: OCTOBER 25, 2018



CLERK

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

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7469 The People of the State of New York, Ind. 3692/15
Respondent,

-against-

Pierre Acosta,
Defendant-Appellant.

_____

Christina A. Swarns, Office of the Appellate Defender, New York (Stephen R. Strother of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Ronald Zweibel, J.), rendered September 8, 2016, unanimously affirmed.

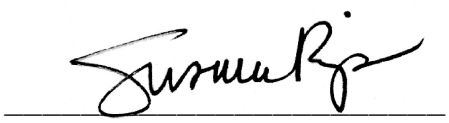
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7471 Marietta Small, etc., Index 403943/05
Plaintiff-Appellant,

-against-

St. Barnabas Hospital,
Defendant-Respondent,

City of New York, et al.,
Defendants.

_____

Arnold E. DiJoseph, P.C., New York (Arnold E. DiJoseph, III of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Antonella Karlin of counsel), for respondent.

_____

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered September 2, 2016, which granted defendant St. Barnabas Hospital's motion for partial summary judgment dismissing the claim alleging deliberate indifference to medical needs under 42 USC § 1983, unanimously affirmed, without costs.

In opposition to defendant's motion, plaintiff failed to show, as required by 42 USC § 1983, that the acts or omissions of St. Barnabas Hospital (St. Barnabas) in the course of its treatment of the decedent, were "sufficiently harmful to evidence deliberate indifference to serious medical needs" (*Estelle v Gamble*, 429 US 97, 105-06 [1976]; *accord Matter of Wooley v New*

York State Dept. of Correctional Servs., 15 NY3d 275, 282 [2010]).

St. Barnabas, having contracted with New York City to provide medical care to individuals at Manhattan House of Detention, where the decedent was incarcerated, is considered a municipality for purposes of 42 USC § 1983 analysis (*see West v Atkins*, 487 US 42, 56 [1988]). A municipal defendant is subject to statutory liability for deliberate indifference to medical needs under 42 USC § 1983 only where an injury results from the execution of an unconstitutional policy or practice (*see Monell v Department of Social Servs. of the City of New York*, 436 US 658, 694 [1978]; *De Lourdes Torres v Jones*, 26 NY3d 742, 768 [2016]).

This record is devoid of evidence that St. Barnabas had the alleged unconstitutional policy or practice of deterring or delaying access to off-premises medical care, either in its routing of requests for hospital treatment through its "Utilization" system, by providing care at a facility on Rikers Island called Urgicare, or by threatening physicians with disciplinary action for sending patients off-premises. Contrary to the allegations in the complaint, there is no record evidence that any physician was ever disciplined or threatened with discipline for sending patients off-site, or that Urgicare

deterred or delayed off-site care. Moreover, when the decedent's treating physician determined that emergent care was necessary, approval to transport him to a hospital was obtained from Urgicare expeditiously by phone. Plaintiff claims that defendant failed to schedule an offsite CT scan when it was first recommended, months prior to decedent's terminal aortic dissection. However, this failure, if deemed negligence, would still not be sufficient basis for a deliberate indifference claim (*see Darnell v Pineiro*, 849 F3d 17, 36 [2d Cir 2017]), and the record does not support the inference this or any other act or omission was the result of an institutional policy or practice of deliberate indifference (*see Monell*, 436 US at 694; *De Lourdes Torres*, 26 NY3d at 768).

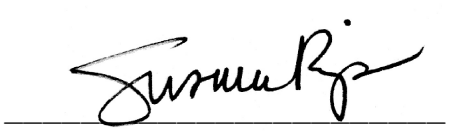
Contrary to plaintiff's claim, summary judgment is not premature, as plaintiff had ample time and opportunity in which

to conduct disclosure (*see Guarino v Mohawk Containers Co.*, 59 NY2d 753, 754 [1983]).

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

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7472 The People of the State of New York, Ind. 54/14
Respondent, 4281/13

-against-

Nicole Williams, also known as
Imani Evans,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Anita Aboagye-Agyeman of counsel), for appellant.

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

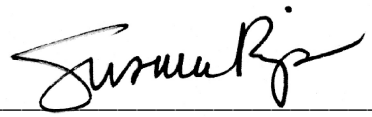
_____

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered September 15, 2014, convicting defendant, after a jury trial, of attempted robbery in the third degree, and sentencing her to five years' probation, unanimously affirmed.

The verdict was not against the weight of the evidence (*People v Danielson*, 9 NY3d 342 [2007]). The jury reasonably credited the testimony of the prosecution witnesses and discredited that of defendant.

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7473 The People of the State of New York, SCI 348N/15
Respondent,

-against-

Jyier Johnson,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Jonathan Garelick of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Eleanor J. Ostrow of counsel), for respondent.

_____

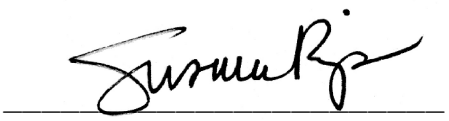
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard M. Weinberg, J.), rendered October 22, 2015,

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

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

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

ENTERED: OCTOBER 25, 2018



CLERK

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

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7474 The People of the State of New York, Ind. 4220/15
Respondent,

-against-

Jose Flores,
Defendant-Appellant.

_____

Seymour W. James, Jr., The Legal Aid Society, New York (Kristina Schwarz of counsel), for appellant.

_____

Judgment, Supreme Court, New York County (Charles H. Solomon, J.), rendered December 15, 2015, unanimously affirmed.

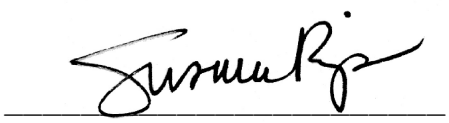
Application by defendant's counsel to withdraw as counsel is granted (*see Anders v California*, 386 US 738 [1967]; *People v Saunders*, 52 AD2d 833 [1st Dept 1976]). We have reviewed this record and agree with defendant's assigned counsel that there are no non-frivolous points which could be raised on this appeal.

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

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

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

ENTERED: OCTOBER 25, 2018



CLERK

Friedman, J.P., Kapnick, Webber, Oing, Moulton, JJ.

7475-
7476N Index 159142/15

Independent Chemical Corporation,
Plaintiff-Respondent,

-against-

Sujanan Thundel Puthanpurayil,
et al.,
Defendants-Appellants.

_____

Milman Labuda Law Group PLLC, Lake Success (Netanel Newberger of counsel), for appellants.

Tashlik Goldwyn Levy LLP, Great Neck (Jeffrey N. Levy of counsel), for respondent.

_____

Order, Supreme Court, New York County (Paul A. Goetz, J.), entered April 12, 2018, which, to the extent appealed from, ordered defendants to produce all information relating to their solicitation, sales and profits for customers in six prohibited states and for restricted customers, unanimously affirmed, without costs. Order, same court and Justice, entered April 13, 2018, which granted plaintiff's cross motion for reargument of defendants' motion to preclude production of certain customer information, and clarified that defendant Arcadia Chemical and Preservative, LLC is bound by the non-compete injunction, unanimously affirmed, without costs.

While defendants argue correctly that a motion for

reargument may not be based on new facts (*see* CPLR 2221[d][2]) or arguments different from those previously asserted (*see Matter of Setters v AI Props. & Devs. [USA] Corp.*, 139 AD3d 492 [1st Dept 2016]), they failed to identify any new facts or arguments in plaintiff's motion. The allegedly new facts were contained in affidavits previously submitted in the context of other motions. The legal arguments were either not new or not relied on by the court. Plaintiff's argument that defendants should have to produce documents concerning all sales and solicitations in violation of the injunction and the parties' Confidentiality, Non-Compete, Non-Solicitation Agreement and Restrictive Covenant (the Agreement) had been advanced previously in the litigation, including in an October 30, 2017 letter to the court.

Defendants are also correct that, in its argument that the injunction prohibited defendant Sujanan Thundel Puthanpurayil from making prohibited sales "individually or through an entity," plaintiff employs language different from that used in the Agreement, which prevents Sujanan from engaging in prohibited conduct "directly or indirectly." However, the court did not adopt plaintiff's formulation. It prohibited Sujanan from soliciting restricted customers "either directly or through defendant Arcadia," a formulation consistent with the terms of

the Agreement.

As defendants argue, the orders on appeal essentially reverse the relevant portions of the order, same court (Edwards, J.), entered April 11, 2017, that limited plaintiff's discovery on the ground that the injunction applied to Sujanan only and not to Arcadia. However, the conclusion that the injunction did not apply to Arcadia was based on an erroneously narrow reading of the scope of the prohibited conduct in the Agreement, which disregarded the "directly or indirectly" language therein.

Although plaintiff did not appeal from the April 2017 order or seek relief through reargument, in accordance with the parties' October 2017 so-ordered stipulation, in October 2017, plaintiff submitted its interpretation of the terms of the order, as defendants submitted theirs, and moved for reargument of an order dated December 29, 2017 (and entered January 30, 2018), which was issued in the apparent guise of clarifying the April 2017 order, within one month after the December 2017 order was entered (*cf. Ayala v S.S. Fortaleza*, 40 AD3d 440 [1st Dept 2007] [appellant left orders undisturbed for years and then attempted to persuade another Justice of the same court to nullify them]).

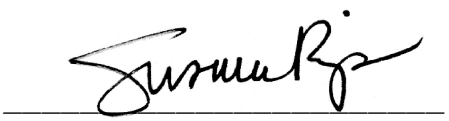
Nor does the doctrine of law of the case compel a different conclusion (*see People v Cummings*, 31 NY3d 204, 208-209 [2018]

[no absolute bar to successor justice seeking to rectify predecessor's errors]; *Foley v Roche*, 86 AD2d 887, 887 [2d Dept 1982] ["plain" error may warrant departure from doctrine], *lv denied* 56 NY2d 507 [1982]; *see also* 1 Carmody-Wait 2d § 2:367 [law of case rule is "discretionary"]). In any event, the doctrine has no binding force on appeal (*Wells Fargo Bank, N.A. v Zurich Am. Ins. Co.*, 59 AD3d 333, 335 [1st Dept 2009], *lv denied* 12 NY3d 713 [2009]).

Defendants argue that they will be irreparably harmed by the ordered disclosure of their entire customer list. However, they do not adequately explain why the Stipulation and Order for the Production and Exchange of Confidential Information, which they agreed to while represented by counsel, does not protect them, and their speculative claims about plaintiff's potential exploitation of information about their customers and suppliers are unsubstantiated by the record.

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

ENTERED: OCTOBER 25, 2018



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Dianne T. Renwick J.P.
Judith J. Gische
Barbara R. Kapnick
Ellen Gesmer
Cynthia S. Kern JJ.

6966
Index 656341/16

_____x

American International Specialty Lines Insurance Company,
Petitioner-Appellant,

-against-

Allied Capital Corporation, et al.,
Respondents-Respondents.

_____x

Petitioner appeals from an order and judgment (one paper), of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 3, 2018, which, to the extent appealed from as limited by the briefs, denied the petition to vacate a corrected partial final arbitration award dated August 18, 2016 and a final arbitration award dated April 6, 2017 and to confirm a partial final arbitration award dated March 8, 2016.

Gordon Rees Scully Mansukhani, LLP, Harrison (Lorraine Girolamo of counsel), and Gordon Rees Scully Mansukhani, LLP, Glastonbury, CT (Dennis O. Brown of the bar of the State of Connecticut, State of Michigan and State of Pennsylvania, admitted pro hac vice, and Greil I. Roberts of the bar of the State of Connecticut and Massachusetts, admitted pro hac vice, of counsel), for appellant.

Offit Kurman, New York (Joseph F. Fields of counsel), and McCarter & English, LLP, New York (Adam J. Budesheim of counsel), for respondents.

KERN, J.

Appellant American International Specialty Lines Insurance Company (AISLIC) appeals from a judgment denying its petition to confirm a partial final arbitration award and to vacate a subsequently rendered partial final arbitration award and a final arbitration award. As explained below, the subsequent partial final award and final award must be vacated on the ground that the arbitration panel exceeded its authority, based on the doctrine of functus officio, when it reconsidered a final liability award it had previously rendered.

This appeal arises out of the settlement of a separate litigation in which respondent Allied Capital Corporation (Allied) agreed to pay the government $10.1 million. Allied, which maintained two insurance policies with AISLIC, treated its payment of the $10.1 million as a "Loss" as that term is defined in the policies and sought defense and indemnification for same from AISLIC.

When AISLIC denied coverage, Allied filed for arbitration, alleging that AISLIC breached its obligations under the policies to defend and indemnify it against the claims raised in the litigation. JAMS was selected to act as arbitrators. The arbitration provisions in the insurance policies did not specify that JAMS Rules would apply to the arbitration. Moreover, the panel specifically held that "the JAMS Comprehensive Rules do not

govern the arbitration" and that the arbitration would be an ad hoc arbitration.

Both sides filed summary disposition motions. Allied sought a determination that it was covered under the policies for any "Loss" incurred in the other litigation, including indemnification for the $10.1 million settlement and $1.4 million in defense costs incurred in that action. AISLIC sought a determination that it was not obligated under the policies to provide coverage for the alleged losses and that there were numerous factual issues regarding Allied's alleged defense costs which warranted a hearing.

During the arbitration proceeding, the parties agreed that the panel would issue an immediate determination as to AISLIC's liability under the policies and that a separate evidentiary hearing would be ordered as to the calculation of the amount of defense costs to which Allied would be entitled in the event the panel determined that AISLIC was liable to Allied under the policies for the claims made in the other litigation. Specifically, Allied stated in its brief in opposition to AISLIC's motion that "the quantum of attorneys' fees need not be decided on this motion, but could be subject to a separate evidentiary process in the event coverage is found." At the dispositive motion hearing, Allied's counsel stated that the amount awarded as defense costs "would be the topic for a

separate proceeding . . . like an inquest to prove up what was done and how much was done." Counsel for AISLIC did not disagree.

On March 8, 2016, the panel, in a 2-1 decision, issued a partial final award (the PFA) which found that the other litigation alleged covered claims against Allied and thus, Allied was entitled to defense and indemnification from AISLIC. However, the panel found that the $10.1 million that Allied paid to settle the other litigation did not amount to a "Loss" under the policies and thus, AISLIC did not have to indemnify Allied for that amount. As requested by Allied and agreed to by AISLIC, the panel ordered an evidentiary hearing solely to determine the amount Allied should be awarded in defense costs unless the parties resolved the issue on their own. Specifically, with regard to the defense costs, the panel stated:

> "We find that the questions raised by the parties regarding defense costs properly reimbursable cannot be decided on motions for summary disposition. Claimants recognize this, stating that 'the quantum of attorneys' fees need not be decided on this motion, but could be the subject of a separate evidentiary process in the event coverage is found' and the parties are unable to resolve the matter among themselves. We agree."

Thereafter, Allied requested reconsideration of the PFA on the basis, among others, that the majority of the panel erred in finding that Allied did not suffer a "Loss" as that term was used in one of the policies. AISLIC opposed Allied's request for reconsideration on both procedural and substantive grounds,

including that the JAMS Rules applied to the arbitration and barred reconsideration of the PFA and that the panel lacked the power to reconsider or modify the PFA based on the common law doctrine of functus officio.

On August 18, 2016, after a hearing, the panel issued a "Corrected" partial final award (the corrected PFA) which concluded, inter alia, that the panel had the authority to reconsider the PFA because it had not issued a final award as the amount of defense costs to which Allied was entitled remained an open issue, that the proceeding was never bifurcated, that the panel was not functus officio with respect to the PFA and could thus correct errors and reconsider the findings made in the PFA, that the JAMS Rules did not apply because the parties had opted to proceed under an ad hoc arbitration, that the $10.1 million paid by Allied to settle the other litigation amounted to a "Loss" under the policies and that damages would be revised.

Thereafter, AISLIC commenced the proceeding giving rise to this appeal, seeking to vacate the corrected PFA and to confirm the PFA as written. Allied moved to dismiss the petition arguing that it was not ripe as the panel had yet to issue a final award. As AISLIC's petition was pending, the panel heard oral argument on the quantification of damages.

On April 6, 2017, the panel issued a final award granting Allied $7,509,144.91 in damages plus interest at the rate of 9%

in the amount of $4,356,744.16 calculated from November 29, 2010. Thereafter, AISLIC filed an amended petition in the proceeding seeking to vacate the corrected PFA and final award and to confirm the PFA. AISLIC argued, inter alia, that the panel exceeded its authority in finding that the JAMS Rules did not govern the arbitration and by reconsidering the PFA based on the doctrine of functus officio. The court denied the petition to vacate, deferring to the determination of the panel that the PFA was not final and that the JAMS Rules did not apply to the proceeding.

The corrected PFA and final award should be vacated and the PFA should be confirmed on the ground that the panel exceeded its authority when it reconsidered the PFA. "Vacatur of an arbitrator's award is statutorily limited to occasions involving fraud, corruption or bias . . . or occasions when the arbitrator exceeded his or her power, or so imperfectly executed it so that a final and definite award was not made" (*Matter of Curley [State Farm Ins. Co.]*, 269 AD2d 240, 241-242 [1st Dept 2000]; *see also* CPLR 7511[b]).

Here, when the panel reconsidered the PFA, it exceeded its authority based on the common law doctrine of functus officio. The doctrine of functus officio provides that absent an agreement to the contrary, after an arbitrator renders a final award, the arbitrator may not entertain an application to change the award,

"except ... to correct a deficiency of form or a miscalculation of figures or to eliminate matter not submitted" (*Matter of Wolff & Munier [Diesel Constr. Co.]*, 41 AD2d 618, 618 [1st Dept 1973]; *see also Levine v Klein*, 70 AD2d 532 [1st Dept 1979]; CPLR 7509; CPLR 7511[c]). "In order to be 'final,' an arbitration award must be intended by the arbitrators to be their complete determination of all claims submitted to them" (*Michaels v Mariforum Shipping, S.A.*, 624 F2d 411, 413 [2d Cir 1980]). "Generally, in order for a claim to be completely determined, the arbitrators must have decided not only the issue of liability of a party on the claim, but also the issue of damages" (*id.* at 414).

However, "the submission by the parties determines the scope of the arbitrators' authority" (*Trade & Transport, Inc. v Natural Petroleum Charterers Inc.*, 931 F2d 191, 195 [2d Cir 1991]). Thus, "if the parties agree that the [arbitration] panel is to make a final decision as to part of the dispute, the arbitrators have the authority and responsibility to do so . . . [and] once [the] arbitrators have finally decided the submitted issues, they are, in common-law parlance, 'functus officio,' meaning that their authority over those questions is ended" (*id.* at 195).

In *Trade & Transport, Inc.*, a case cited by the panel and on which both sides rely, the Second Circuit found the arbitration award to be final notwithstanding the fact that the award decided

only the issue of liability. The parties had agreed that the arbitration panel should make an immediate determination as to liability, acknowledging that the calculation of damages would be left for a later time. The Second Circuit held that the arbitrators were functus officio with respect to the award deciding liability based on the parties' and the panel's intent that the award as to liability would be final, reasoning as follows:

> "[I]f the parties have asked the arbitrators to make a final partial award as to a particular issue and the arbitrators have done so, the arbitrators have no further authority, absent agreement by the parties, to redetermine that issue. . . .
>
> [The parties] asked the panel to decide the issue of liability immediately . . . The panel understood that this was to be a final decision as to liability. Thus, its announcement of the [arbitration award] stated that the award was a 'partial final award.' Neither party disputed this characterization when the decision was rendered" (*id.* at 195).

In this case, the panel was functus officio with respect to the PFA and thus, the panel's reconsideration of the PFA on substantive grounds was improper and exceeded its authority. During the arbitration proceeding, AISLIC and Allied agreed that the panel was to make an immediate, final determination as to the issue of AISLIC's liability under the policies, including whether Allied had suffered an insurable "Loss" and whether Allied was entitled to defense costs, and that the issue of the amount of defense costs would be determined at a separate evidentiary

hearing if it was found that the claims made in the other litigation were covered under the policies. Indeed, Allied stated in its brief in opposition to AISLIC's motion that "the quantum of attorneys' fees need not be decided on this motion, but could be subject to a separate evidentiary process in the event coverage is found." At the dispositive motion hearing, Allied's counsel stated that the amount awarded as defense costs "would be the topic for a separate proceeding . . . like an inquest to prove up what was done and how much was done." Counsel for AISLIC did not disagree. Thus, the panel had the authority and responsibility to determine the issue of AISLIC's liability under the policies and once the panel made such determination, the panel was functus officio, meaning that its authority over such issue was ended.[1]

Moreover, the record establishes that the panel and the parties understood that the PFA would be a final award with respect to the issue of AISLIC's liability under the policies. Indeed, the panel indicated as much when it called the award the "partial *final* award" as it was final with respect to such issue

[1]The New York State cases relied upon by Allied, namely, *Matter of Adelstein v Thomas J. Manzo, Inc.*, 61 AD2d 933 (1st Dept 1978) and *Matter of Jett v Kidder Peabody & Co.* (176 Misc 2d 280 [Sup Ct, New York County 1997, Diamond, J.]), are distinguishable because in those cases, there is no evidence that the parties requested that the arbitrator make an immediate determination as to liability and leave the calculation of damages for a later time.

(emphasis added). Additionally, the fact that Allied requested, and AISLIC agreed to, an immediate determination on the liability issue, leaving the calculation of damages for a later time, indicates that the parties were seeking a final determination on the issue of AISLIC's liability under the policies.

This court is not bound by the panel's statements in the corrected PFA that the PFA was not final and that the parties did not bifurcate the proceedings. By that logic, an arbitrator could avoid exceeding his or her authority when reconsidering a partial final award as long as the arbitrator stated that the parties did not bifurcate the proceedings or that the arbitrator did not intend for the award to be final as to a particular issue. However, there is no support for such theory in the relevant case law.

Additionally, although the parties initially submitted both issues of liability and calculation of defense costs to the panel for a determination, there is no question that during the arbitration proceedings, the parties agreed to an immediate determination solely as to liability, which they expected would be final, and Allied fails to provide any support for its theory that parties to an arbitration may only seek bifurcation in their initial submission to the arbitrator or not at all.

The policy behind the functus officio doctrine lends further support to our finding that the panel was functus officio with

respect to the PFA. "Functus officio" means "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished" (Black's Law Dictionary 787 [10th ed 2014]). The doctrine "presumes that an arbitrator's final decision on an issue strips him of authority to consider that issue further" (*Employers' Surplus Lines Ins. Co. v Global Reins. Corp.-U.S. Branch*, 2008 WL 337317 *4 [SD NY 2008]). Indeed, under this doctrine, when parties request that an arbitrator finally determine an issue and the arbitrator has done so, the parties must be confident that the determination cannot and will not be revisited by the arbitrator and that the award determining such issue is final. Here, the panel finally determined the issue of AISLIC's liability under the policies and determined that Allied was entitled to defense costs. There is nothing in the record that remotely suggests that the parties or the panel believed that the PFA would be anything less than a final determination of such issues and under the functus officio doctrine, it would be improper and in excess of the panel's authority for such final determination to be revisited.

With regard to AISLIC's other argument on appeal, namely, that the panel exceeded its authority in not applying the JAMS Rules to the arbitration proceeding, the record establishes that the panel did not exceed its authority as the JAMS Rules were

inapplicable to the arbitration proceeding. The panel expressly decided that "the JAMS Comprehensive Rules do not govern the arbitration," the arbitration was an ad hoc arbitration and the parties' arbitration agreement does not require the application of the JAMS Rules. Further, there is no basis for AISLIC's assertion that the JAMS Rules apply by default.

Accordingly, the order and judgment (one paper) of the Supreme Court, New York County (Barbara Jaffe, J.), entered January 3, 2018, which, to the extent appealed from as limited by the briefs, denied the petition to vacate a corrected partial final arbitration award dated August 18, 2016 and a final arbitration award dated April 6, 2017, and to confirm a partial final arbitration award dated March 8, 2016, should be reversed, on the law, without costs, the petition granted, the awards dated August 18, 2016 and April 6, 2017 vacated, and the partial final award dated March 8, 2016 confirmed.

All concur except Gische, J. who dissents in an Opinion.

GISCHE, J. (dissenting)

I disagree with my colleagues' conclusion that the arbitrators were precluded by application of the common law doctrine of functus officio from reconsidering issues before they made their final arbitration determination. Consequently, the arbitrators' decision to reconsider the disputes submitted to them and reach a different conclusion about whether respondent had suffered a loss under the relevant insurance policy, made before they finally determined the arbitration, was not in excess of their authority and did not require vacature under CPLR 7511. I would vote to affirm Supreme Court's judgment confirming the final arbitration award and dismissing the petition to vacate.

Most of the operative facts are not in dispute. Pursuant to the terms of insurance policies issued by petitioner American International Specialty Lines Insurance Company (AISLIC) to respondent Allied Capital Corporation (Allied), the parties were engaged in binding arbitration concerning AISLIC's decision to deny coverage for Allied's role in a separate litigation (Brickman action). Brickman was a qui tam action brought on behalf of the United States Government. Allied and its wholly owned subsidiary, Ciena Capital LLC (Ciena), were defendants in the Brickman action. Ciena was an underwriter for small business loans guaranteed by the Small Business Administration (SBA). The Brickman action alleged that, in violation of the Federal False

Claims Act (31 USC § 3729 *et seq*.), Ciena submitted false information to the SBA in order to obtain loan guarantees from the SBA. Allied was alleged answerable in damages as the alter ego of Ciena. Ciena declared bankruptcy shortly after the Brickman action was filed. Subsequently, an agreement to settle the Brickman action was reached, requiring that Ciena pay the United States Government $10.1 million. The settlement amount, however, was subordinate to Allied's $320 million secured debt against Ciena, which debt greatly exceeded Ciena's assets. Consequently, the settlement was funded by Allied irrevocably releasing $10.1 million dollars of its secured debt in the bankruptcy action and obtaining a line of credit for Ciena so that the government could actually be paid.

From its inception, the following issues were put before the arbitrators: whether AISLIC properly denied coverage for Allied's claim, whether Allied's funding of the Brickman settlement constituted a covered loss, whether Allied's defense costs in the Brickman action constituted a covered loss and, if so, in what amount.

Allied sought summary disposition of all issues raised in arbitration. AISLIC opposed summary disposition in Allied's favor, insisting that some issues should be decided summarily in its favor, and other issues involved factual disputes that could not be disposed of summarily. In reply Allied posited that the

"quantum of legal fees could be the subject of a separate evidentiary process." All issues raised by the parties, however, including the quantum of legal fees, were submitted to the arbitrators as part of the requests for summary adjudication.

On March 8, 2016, the three person arbitration panel issued a decision, with one arbitrator dissenting, entitled a "Partial Final Award" (PFA). The majority concluded that Allied was entitled to indemnification, but that the $10.1 million settlement did not amount to a "loss" as that term was defined under the policy. They further concluded that although AISLIC should have provided Allied with a defense in the Brickman action, the amount owed for defense costs could not be disposed of by summary adjudication, necessitating an evidentiary hearing. Allied moved for reconsideration of the original PFA, alleging both factual and legal errors. AISLIC opposed, arguing, in relevant part, that the panel was barred from any reconsideration of its original PFA both under applicable JAMS rules and the common law doctrine of functus officio.

In a written decision dated August 18, 2016, a divided panel granted reconsideration, issuing a corrected PFA that, in part, expressly addressed the gateway issue of whether it had authority to reconsider the original PFA. The majority concluded that the JAMS rules did not apply and functus officio did not bar reconsideration of the original PFA, which was not a final award.

It also concluded that there was no express or implied agreement by the parties to bifurcate issues, which would otherwise render the original PFA a final award for purposes of functus officio. The panel went on to provide its decision concerning why Allied's participation in the Brickman settlement constituted a covered loss, which was contrary to the conclusion it reached in its earlier decision. The gravamen of the parties' dispute on this appeal is whether the arbitration panel acted in excess of its authority when, before finally resolving all of the issues raised in the arbitration, it reconsidered and changed the conclusions it reached in the original PFA.

Consistent with public policy in favor of arbitration, grounds for vacating an award are few in number and are narrowly applied (*see* CPLR 7511; *Matter of Goldfinger v Lisker*, 68 NY2d 225, 231 [1986]). "Absent a statutory basis for vacatur, none exists and vacatur is unauthorized" (*Matter of Curley [State Farm Ins. Co.]*, 269 AD2d 240, 242 [1st Dept 2000]). CPLR 7511(b)(1)(iii) provides that one basis for vacating an award is that the arbitrators have exceeded their power. In general, an arbitrator will be found to have exceeded his or her power only when the arbitrator has clearly exceeded a specifically enumerated limitation on his/her authority (*Matter of Kowaleski v New York State Depart. of Correctional Serv.*, 16 NY3d 85, 90 [2010]; *Matter of Falzone [New York Cent. Mut. Fire Ins. Co.]*, 15

NY3d 530, 534 [2010]; *Matter of New York State Correctional Officers & Police Benevolent Assn., Inc. v State of New York*, 94 NY2d 321, 326 [1999]). An arbitrator's award will not be set aside based upon an error of law or fact or misapplication of the substantive law (94 NY2d at 326). Where, as here, the arbitrators are operating under a broadly worded arbitration clause, the excess of power category rarely provides a successful basis for vacatur (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C7511:5).

I agree with the majority's conclusion that the panel correctly decided that it was not prohibited under JAMS rules from reconsideration of the original PFA because the JAMS rules do not apply to this arbitration proceeding. I also agree with the majority that there is no basis for AISLIC's assertion the JAMS rules apply by default. I reject, however, AISLIC's argument, adopted by the majority, that because the parties implicitly agreed to bifurcate issues before the arbitrators, the doctrine of functus officio precluded reconsideration of the issues determined in the original PFA. As more fully explained below, the doctrine of functus officio supports a conclusion that the arbitrators retained authority to revisit issues considered in the original PFA until such time as they issued their final arbitration award. The doctrine generally prohibits arbitrators from revisiting a matter only after a final award is made. The

record also supports the arbitrators' conclusion that there was no agreement by the parties to bifurcate issues, which agreement could arguably have prohibited the arbitrators from reconsidering their interlocutory ruling. It is conceded by the parties that they had no express agreement to bifurcate issues. The arbitrators, after considering the proceedings before them, concluded that there was no implicit agreement either. Our court is bound by this factual finding by the arbitrators (*Wein & Malkin, LLP v Helmsley Spear, Inc.*, 6 NY3d 471, 483 [2006], *cert dismissed* 548 US 940 [2006]; *New York State Correctional Officers,* 94 NY2d at 326).

Functus officio is a common law doctrine that proscribes the power of an official to amend or alter a decision once it has been *rendered* (*Bayne v Morris*, 68 US 97, 99 [1863]). It reflects the concept that once an official has fully performed the tasks assigned, s/he is without authority to do anything more (Black's Law Dictionary 787 [10th ed 2014]). In the context of arbitration, functus officio bars an arbitrator from revisiting the merits of an award once it has been finally issued (*see Kalyanaram v New York Inst. of Tech.,* 91 AD3d 532 [1st Dept 2012]; *Matter of Wolff & Munier [Diesel Constr. Co.]*, 41 AD2d 618 [1st Dept 1973]). Precluding arbitrators from reconsidering the merits of their own decisions arose, in part, from judicial skepticism that arbitrators could be free from outside influences

in rendering their decisions (*see Office & Professional Empls. Intl. Union, Local No. 471 v Brownsville Gen. Hosp.*, 186 F3d 326, 331 [3rd Cir 1999]; *Glass Molders, Pottery, Plastics & Allied Workers Intl. Union, AFL-CIO 182B v Excelsior Foundry Co.*, 56 F3d 844, 847-848 [7th Cir 1995]). As arbitration became a more widely accepted dispute resolution practice, case law clarified that the doctrine of functus officio is far from absolute (2 Domke on Com Arb § 26.2). There are now widely recognized narrow exceptions to the application of the doctrine, applied to ameliorate its harsh application (*see Glass Molders* at 846 *et seq.*). These exceptions generally include the right of an arbitrator to revisit an award that is incomplete, ambiguous, or on its face incorrect (CPLR 7509; 7511[c]).

In its most strict application, however, functus officio requires finality. It follows that if an arbitration is not finally decided, the arbitrator retains the authority to revisit issues put before it. This proposition is also consistent with well established legal precedent that a court has no authority to review a nonfinal arbitration order (*Mobil Oil Indonesia v Asamera Oil [Indonesia]*, 43 NY2d 276 [1977]). If a nonfinal award is presented for article 75 review, the court considers the arbitrators' powers imperfectly executed and the award will be vacated and the matter remanded back to the arbitrator to finally resolve all issues (CPLR 7511[d]; *Matter of Andrews v County of*

Rockland, 120 AD3d 1227 [2d Dept 2014], *lv dismissed* 24 NY2d 1090 [2015]; *Jones v Welwood*, 71 NY 208 [1877]). Alternatively, petitions seeking review of interlocutory arbitration determinations can be dismissed outright, as having been brought prematurely (*see Michaels v Mariforum Shipping, S.A.,* 624 F2d 411 [2d Cir 1980]). The finality requirement to determine whether an award is ripe for judicial review is the same finality requirement to determine whether an arbitrator is functus officio (*Employers' Surplus Lines Ins. Co. v Global Reins. Corp.-U.S. Branch*, 2008 WL 337317, *4 [SDNY 2008]).

In order for an arbitration award to be final, it must be "[i]ntended by the arbitrators to be their complete determination of all claims submitted to them," and for a claim to be completely determined the arbitrators must generally decide both liability and damages (*see Michaels,* 624 F2d 411, 413). Where an arbitrator retains jurisdiction solely to calculate damages due, the arbitrator's award remains interlocutory (*Matter of Adelstein v Thomas J. Manzo, Inc.*, 61 AD2d 933 [1st Dept 1978]).

The interplay of bifurcation of the issues in arbitration proceedings, the authority of an arbitrator to reconsider its decision and the application of the functus officio doctrine, is an evolving area of law (*see* James M. Gaitis, J: *Reexamining Finality: How to Revise Institutional Practice Rules to Allow for Reconsideration of Reasoned Arbitration Awards*, 23 Alternatives

to the High Cost of Litig. 113 [July/August 2005]). These concepts pit the goals of arbitration as a fast and cost efficient dispute resolution mechanism against concerns that arbitration decisions, subject only to narrow court review, could be subject to undue outside influence. There is no binding New York State authority on the effect bifurcation has on the application of functus officio. The majority opinion in this case is the first reported New York decision ever to recognize a bifurcation exception to functus officio. Even if such an exception is adopted, it does not apply to the facts of this case.

Looking to federal authority[1], in *Trade and Transport, Inc. v Natural Petroleum Charterers, Inc.* (931 F2d 191 [2d Cir 1991]), a case arising under the FAA, the parties agreed to bifurcate a limited issue of liability from the remaining issues of both liability and damages. The arbitration panel issued a partial final award on the agreed upon limited issue. In rejecting appellant's argument that the determination was not final for purposes of applying the functus officio doctrine, the court held that "...[where] the parties have asked the arbitrators to make a

[1]Given the similarities between the New York Arbitration Act and the Federal Arbitration Act and the jurisprudence on arbitration issues, New York may look to federal authority for guidance (*see The Hartbridge,* 57 F2d 672 [2d Cir 1932], *cert denied* 288 US 601 [1933]; *Island Territory of Curacao v Solitron Devices, Inc.*, 356 F Supp 1, 11-12 (SDNY 1973), *affd* 489 F2d 1313 [2d Cir 1973], *cert denied* 416 US 986 [1974].

final partial award as to a particular issue and the arbitrators have done so, the arbitrators have no further authority, absent agreement by the parties, to redetermine that issue" (*id.* at 195). Following *Trade and Transport, Inc.*, federal cases recognized that parties can, by their agreement to bifurcate, alter the finality requirement (*see Doreen v Building Met Local Union*, 250 F Supp 2d 107, 112 [EDNY 2003]; *Goldman v Architectural Iron Co*, 2001 WL 1705117, *4 [SDNY 2001]). In distinction, in *Employers Surplus Lines v Global Reins. Corp.*, the court found no impropriety in the arbitrator revising his liability finding even after he had issued a Partial Final Award (2008 WL 337317, *4). The court recognized that in the absence of an agreement or complete severability of issues, there was no prohibition against an arbitrator revisiting the merits of any nonfinal order (*see also Marathon Oil Company v ARCO*, 972 P2d 595 [Sup Ct Alaska 1999]).

Applying these general principles to the arbitration at bar, there is no basis to conclude that the arbitrators exceeded their authority by revisiting the issue of whether the Brickman settlement was a covered loss under the relevant policy. Allied demanded arbitration on three claims: first, Allied claimed damages for breach of contract for failure to pay its expenses for the Brickman action; second, Allied claimed damages for failure to pay the settlement or judgment in the Brickman

actions; and third, Allied sought indemnification (declaratory relief) for its settlement or judgment and defense costs of the Brickman action. All three claims were submitted to the arbitrators in the parties' summary disposition motions. The original PFA did not resolve all the submitted issues, expressly finding the "questions raised by the parties regarding defense costs properly reimbursable cannot be decided on motions for summary disposition." Final determination of defense costs, representing damages, was left for an evidentiary hearing. Because the amount of damages was not determined, the award was not final and functus officio did not apply to bar reconsideration of issues.

Although the parties could have agreed to bifurcate the proceedings so that the issue of liability resolved in the original PFA was final, they did not do so. It is conceded by the parties that there was no express agreement to bifurcate issues. AISLIC argues that an agreement can be inferred from Allied's representations before the arbitrators at the time the parties were pressing their arguments for summary adjudication. AISLIC argues that Allied's representations at the time the summary disposition motions were submitted, that the quantum of attorney's fees need not be decided as part of the motion, but could be subject to a separate evidentiary process, requires a conclusion that the parties had implicitly agreed to bifurcate

the arbitration issues. Allied's representations, however, were no more than an acknowledgment that disputes about the amount of defense costs may not be disposable by a summary adjudication. Indeed, the damages issue was still submitted as part of the original request for a summary adjudication. The "bifurcation" was only a consequence of the arbitrators' conclusion that an evidentiary hearing was still needed. It was not an implicit agreement to bifurcate the liability and damages issues.

In addition, the arbitrators, in reviewing Allied's prior representations as part of the request for reargument, expressly, factually concluded that they did not constitute an implicit agreement to bifurcate. This factual finding is entitled to deference (*Wein & Malkin, LLP*, 6 NY3d at 483; *New York State Correctional Officers,* 94 NY2d at 326). Although denominating the original award as a "Partial Final Award" might suggest that bifurcation had occurred, the label ascribed to the arbitrator's award is not controlling in the face of evidence to the contrary.

Nor may AISLIC rely on the separability doctrine to sustain its claim that the original PFA was final for purposes of functus officio. The separability doctrine provides that if a partial final award fully disposes of a separate and independent claim, it may be considered final for adjudicatory purposes. Separability applies only if the issue resolved in the original PFA is wholly separate from the remaining issues (*Employers*

Surplus Lines, 2008 WL at 337317, *6; *Jones v Welwood*, 71 NY 208, 217). The resolved claim must be separate and independent and not subject to abatement or set-off. A partial award is generally only separable if it disposes of both liability and damages (2008 WL at 337317, *6). The original PFA which only resolved liability would not qualify as final under the separability doctrine.

Accordingly, I believe the Supreme Court correctly denied the petition to vacate the corrected partial final arbitration award and confirmed the final arbitration award.

Order and judgment (one paper), Supreme Court, New York County (Barbara Jaffe, J.), entered January 3, 2018, reversed, on the law, without costs, the petition granted, the awards dated August 18, 2016 and April 6, 2017 vacated, and the partial final award dated March 8, 2016 confirmed.

Opinion by Kern, J. All concur except Gische, J. who dissents in an Opinion.

Renwick, J.P., Gische, Kapnick, Gesmer, Kern, JJ.

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

ENTERED: OCTOBER 25, 2018

CLERK