SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

OCTOBER 28, 2014

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Acosta, DeGrasse, Freedman, Richter, JJ.

12954 Greystone Funding Corporation, Index 651926/13
Plaintiff-Appellant,

-against-

Ephraim Kutner, et al.,
Defendants-Respondents.

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Morrison Cohen LLP, New York (Y. David Scharf of counsel), for appellant.

Dechert LLP, New York (Andrew Joshua Levander of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered November 7, 2013, which, to the extent appealed from, granted defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion denied.

On January 1, 2010, defendant Ephraim Kutner entered into a two-year employment contract with plaintiff, Greystone Funding Corporation. He had been working at Greystone as an at-will employee for close to 10 years prior to execution of the

employment contract, and had risen within the company to become a senior mortgage originator and head of an office opened by Greystone in Lawrence, New York (5-10 minutes from his home). The employment contract ran from January 1, 2011 through January 1, 2013, and contained three restrictive covenants at issue in this dispute: a non-competition clause, a non-solicitation clause, and a confidentiality provision. The employment contract gave Ephraim responsibility to supervise his brother, defendant Jonathan Kutner, who served as the project manager for Ephraim's team in the Lawrence office.

The employment contract provided that it would automatically renew for an additional two-year term unless written notice of non-renewal was given 30 days before its expiration. On November 30, 2012, December 27, 2012, and January 23, 2013, Ephraim and Greystone entered into three letter agreements extending the "notice of non-renewal" of the contract to February 27, 2013, agreeing that: "[d]uring the period commencing on January 1, 2013 and ending on the earlier of (1) the termination date under the Employment Agreement and (2) March 27, 2013, the terms of the Employment Agreement shall govern ...."

On February 27, 2013, Ephraim sent Greystone an email that he contends constituted written notice that he would not be

renewing the employment agreement but he would continue in Greystone's employ on an at-will basis. On March 1, 2013, Greystone's general counsel responded by letter stating that it was unclear from Ephraim's email whether he was giving notice of non-renewal of the employment agreement or notice that he wanted to alter the terms of employment to at-will employment, an arrangement that was not acceptable to Greystone. The company asked Ephraim to advise it, by March 4, 2013, whether or not he wanted to renew the employment agreement. The March 1st letter stated that if Ephraim chose not to renew the employment agreement, the company would be "forced to terminate [his] employment, effective immediately." The parties do not dispute that Ephraim worked at Greystone until April 15, 2013.

The complaint alleges that by April 2013, Ephraim and Jonathan formed and began actively operating a mortgage banking business named Harborview in the area of their former practice, and that a number of the employees from Greystone's Lawrence office left their former employer to work for Ephraim and Jonathan, in direct competition with Greystone.

The complaint asserts claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and breach of fiduciary duty, along with tortious interference claims

against Jonathan and Harborview for facilitating Ephraim's breach of the employment contract.

Defendants moved to dismiss the complaint, pursuant to CPLR 3211. The motion does not indicate the subsection of CPLR 3211 under which it is brought. However, from the documentation supporting the motion, we can infer that defendants sought dismissal pursuant to either CPLR 3211(a)(1) [documentary evidence] or CPLR 3211(a)(7) [failure to state a claim]. Defendants argued that Greystone had terminated Ephraim without cause by its March 1, 2013 letter, rendering the restrictive covenants in the employment agreement invalid. As the restrictive covenants supported both the contract and tort claims, defendants contended that the termination without cause was fatal to the complaint. In opposition, Greystone argued that Ephraim terminated the employment contract by his email dated February 27, 2013, and that the restrictive covenants were operative for two years subsequent to his leaving Greystone on April 15, 2013.

After hearing oral argument, the motion court granted defendants' motion. The court determined that Greystone terminated Ephraim without cause on March 1, 2013, and, relying upon *Post v Merrill Lynch, Pierce, Fenner & Smith* (48 NY2d 84

[1979]), concluded that Ephraim's obligations arising from the restrictive covenants in the employment agreement therefore ended that day. In *Post*, the Court of Appeals observed that "[w]here the employer terminates the employment relationship without cause, . . . his action necessarily destroys the mutuality of obligation on which the covenant rests" (*id.* at 89).

The motion court reasoned that "[u]pon being informed of Ephraim's intention to not renew the [Employment] Agreement, Greystone could have allowed the Agreement to expire automatically after the last extension to March 27, 2013, thereby preserving the restrictive covenants it now seeks to enforce," but instead, on March 1, terminated Ephraim "effective immediately."

We reverse. Under CPLR 3211(a)(1) and (a)(7) the court is limited to examining the complaint (and, under [a][1], the proffered documentary evidence) to determine whether the complaint states a cause of action (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The law is also settled that "in assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts as alleged in the complaint to be true and afford the plaintiff the benefit of every possible inference" (*Landon v Kroll Lab.*

Specialists, Inc., 22 NY3d 1, 5 [2013] [internal quotation marks and brackets omitted]). "Whether the plaintiff will ultimately be successful in establishing [its] allegations is not part of the calculus" (*id.* at 6 [internal quotation marks omitted]).

According Greystone the benefit of every favorable inference to be drawn from its complaint, we cannot conclude that its contractual and tort claims lack any basis in law. The exchange that took place between Ephraim and Greystone in late February and early March was equivocal at best. In his February 27th email, Ephraim accepted Greystone's nonexistent suggestion that he work on an at-will basis without a contract. In its March 1st response, the company stated that it would not accept an at-will arrangement and asked Ephraim to advise it, by March 4, 2013, whether he wanted to renew the employment agreement for two years, or not to renew, in which case he would be fired "effective immediately." Following March 4th, Ephraim kept working at Greystone, without responding to its March 1st letter. At this point, it is not clear whether Greystone had accepted Ephraim's request to work at-will, or created an indefinite extension of the employment agreement. The parties also offer divergent narratives regarding Ephraim's motivation for leaving Greystone.

Given the procedural posture of the motion, and the uncertainty of the record as presently developed, we must conclude that the complaint withstands dismissal. There is a reasonable view of the pleading that would support Greystone's claims that Ephraim breached the restrictive covenants in the employment contract and that he, Jonathan and Harborview committed the ancillary tort claims. It is possible that the dispute may be amenable to resolution on a more developed record and exploratory motion for summary judgment, or after a full development of the facts after trial. However, the motion court's disposition of the case by summary dismissal under CPLR 3211 was, at the very least, premature.

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

ENTERED: OCTOBER 28, 2014

CLERK

Tom, J.P., Acosta, Moskowitz, Gische, Clark, JJ.

12474-
12475 Whitecap (US) Fund I, LP, et al.,
Plaintiffs-Appellants,

-against-

Siemens First Capital Commercial Finance LLC, et al.,
Defendants-Respondents,

Alarm Funding LLC, et al.,
Nominal Defendants-Respondents.

Index 650888/12

Johnson Gallagher Magliery LLC, New York (Steven Johnson of counsel), for appellants.

Katten Muchin Rosenman LLP, New York (Bruce M. Sabados of counsel), for Siemens First Capital Commercial Finance LLC, respondent.

Fox Rothschild LLP, New York (Ernest E. Badway of counsel), for James Fleet, Peter Giacalone, Daniel Dooley, Alarm Funding LLC, Castlerock Security Holdings, Inc., and Castlerock Security, Inc., respondents.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered February 27, 2013, which granted defendants James Fleet, Peter Giacalone and Daniel Dooley's (the defendant directors) motion to dismiss the second cause of action as against them, and defendant Siemens First Capital Commercial Finance LLC's motion to dismiss the first, third, fourth, fifth, sixth, and seventh causes of action as against it, unanimously

affirmed, without costs. Appeal from order, same court and Justice, entered February 25, 2013, unanimously dismissed, without costs, as academic.

Plaintiffs Whitecap (US) Fund I, LP, Whitecap (Offshore Fund) Fund I, Ltd. and Whitecap (Offshore) Fund II, Ltd. (collectively, Whitecap) are in the business of providing project funding to small businesses and entrepreneurs. In 2005, Whitecap launched a business venture with nonparty Security Associates International, Inc. (SAI), an entity in the business of monitoring residential security alarm systems. In that venture, Whitecap agreed to buy large blocks of alarm service contracts and SAI agreed that it would service those contracts in exchange for fees. Whitecap created nominal defendant Alarm Funding LLC (Alarm Funding) for the purpose of buying and owning the service contracts for the joint venture.[1]

From 2005 until 2007, Whitecap extended around $78 million in loans to Alarm Funding; Alarm Funding used the loans to buy alarm service contracts. Whitecap then sought an outside lender to help finance the purchase of more service contracts, and

[1] Unless otherwise noted, we refer to the borrowers Alarm Funding, CastleRock Security, Inc., and CastleRock Security Holdings, Inc. collectively as the "Alarm Funding Companies."

eventually chose First Capital Commercial Finance (First Capital). On May 25, 2007, the Alarm Funding Companies and First Capital, as an agent for other lenders, entered into an agreement providing the Alarm Funding Companies with a $40 million revolving credit line – later raised to $100 million – for the primary purpose of acquiring new alarm service contracts (the credit agreement).

The credit agreement contained a list of "events of default," the occurrence of which would entitle First Capital to exercise certain contractual remedies set forth in the credit agreement and in the related pledge agreements. In the pledge agreements, Whitecap agreed that its ownership interests in the Alarm Funding Companies would serve as pledged collateral for the loan.[2] Accordingly, through the pledge agreements, First Capital obtained the right to foreclose on the Alarm Funding Companies' ownership interest or to exercise all of the Alarm Funding Companies' accompanying voting rights after and during an event of default.

The credit agreement further reserved First Capital's

[2] Nonparty Full Circle Partners LP also had an ownership interest in Alarm Funding, although Full Circle is not a party to this action.

enforcement rights under the agreement and the related credit documents, regardless of delay, and provided that failure to exercise any right did not constitute a waiver of that right:

> "No course of dealing and *no delay or failure of Agent or any Lender in exercising any right, power, remedy or privilege under any Credit Document shall affect any other or future exercise thereof or operate as a waiver thereof*, nor shall any single or partial exercise thereof or any abandonment or discontinuance of steps to enforce such a right, power, remedy or privilege preclude any further exercise thereof or of any other right, power, remedy or privilege" (emphasis added).

The credit agreement's terms also prohibited modification except in writing:

> "Any waiver, permit, consent or approval of any kind or character on the part of any Lender of any breach or default under this Agreement or any such waiver of any provision or condition of this Agreement must be in writing and shall be effective *only to the extent specifically set forth in such writing*" (emphasis added).

Defendant Siemens First Capital Commercial Finance LLC (Siemens) funded most of the credit line, and eventually became First Capital's successor-in-interest under the credit agreement.

The Alarm Funding Companies drew down on the line of credit to repay $30 million of debt to Whitecap, and for general corporate and working capital purposes. However, customers whose alarm contracts SAI was servicing began terminating their contracts or defaulting at an increased rate; these terminations

and defaults, in turn, triggered an "event of default" under the credit agreement.

The Alarm Funding Companies offered Siemens certain concessions in return for a waiver of default, including allocating 100% of their net revenue to repayment of the loan balance under the credit agreement. Nonetheless, despite forbearance agreements with Siemens in November 2007, January 2008 and February 2008, the Alarm Funding Companies could not cure the customer attrition rate. As a result, Siemens suspended further advances under the line of credit.

In or around November 2008, Alarm Funding formed nominal defendant CastleRock Security, Inc. (CastleRock Security) to acquire SAI's assets and take over its operations. Over the course of two years, the Alarm Funding Companies repaid around $47 million to Siemens. Nonetheless, from November 2007 to September 2010, the Alarm Funding Companies were in violation of the credit agreement's leverage ratio and the attrition covenants, as well as other nonfinancial covenants in the credit agreement. Siemens waived the defaults and the parties restructured the loans over the course of several amendments to the credit agreement.

All told, the Alarm Funding Companies sustained net losses

of $13.9 million in 2008, $26.1 million in 2009, and $22.5 million in the first nine months of 2010. As a result, Whitecap alleges, the Alarm Funding Companies needed to buy a large block of new contracts to replace the many it had lost.

Thus, in early- to mid-2010, Whitecap approached Siemens with a proposal to have the Alarm Funding Companies raise up to $20 million in additional capital so that business might improve. Siemens agreed in October 2010 that Whitecap could seek to raise additional capital for the Alarm Funding Companies through one or more public or private offerings. The parties memorialized this agreement in a signed writing, the third amendment to the credit agreement. The third amendment created nominal defendant CastleRock Security Holdings, Inc. (CSH) to conduct an "Equity Raise" – that is, an IPO – of stock in a new combined entity comprising Alarm Funding and CastleRock Security.[3]

One condition of the third amendment, set forth in a new section, was that "contemporaneously with the closing of the Equity Raise," the Alarm Funding Companies would deposit the proceeds into two Siemens accounts, comprising the "Restricted

[3] Alarm Funding agreed to transfer all its assets, including its ownership interest in CastleRock Security, Inc., to CSH, in exchange for shares of CSH.

Proceeds" and the "Remaining Proceeds." The third amendment also provided that if the IPO did not take place by March 1, 2011, CSH would immediately take all actions necessary to convert into a single-purpose entity (SPE) on March 2, 2011 in order to facilitate a sale of its assets. Further, the third amendment provided, "[n]o later than two weeks following the Third Amendment Effective Date [October 20, 2010], [the Alarm Funding Companies] shall deliver to [Siemens's] either (x) executed commitment letters with respect to a private Equity Raise (including from Whitecap or any of its Affiliates) or (y) evidence of the filing of an S-1 [with the Securities and Exchange Commission (SEC)] with respect to a public Equity Raise."[4]

On November 2, 2010, soon before the deadline for Whitecap and the Alarm Funding Companies to deliver evidence of an S-1 registration filing with the SEC or executed commitment letters, the Alarm Funding Companies and Siemens entered into a fourth amendment to the credit agreement. The fourth amendment created a new event of default provision in the credit agreement; that new provision would become effective if Whitecap did not deliver

[4] A Form S-1 registration statement is the form that companies must file when issuing new securities.

the S-1 by November 5, 2010. The fourth amendment did not, however, amend the March 2011 deadlines for depositing proceeds from the IPO or converting to an SPE.

By November 2010, the Alarm Funding Companies had filed an initial S-1 registration statement with the SEC, and by the end of 2010, they were awaiting a response from the SEC on six outstanding issues with the registration statement. According to the allegations in the complaint, Whitecap spent several million dollars working with lawyers, investment bankers and underwriters to advance the IPO in reliance on Siemens's "express contractual consent," and by the end of 2010, independent appraisers valued the Alarm Funding Companies at $47.6 million. Further, according to the complaint, the delay was attributable, in part, to Siemens's delay in providing comments that the Alarm Funding Companies had requested regarding financial statements. Whitecap alleged that it notified Siemens in December 2010 or early January 2011 that the IPO would be delayed until mid-April; Whitecap maintains that Siemens never objected or insisted that the IPO be completed by March 1.

On January 18, 2011, the Alarm Funding Companies and Siemens executed a fifth amendment to the credit agreement. The fifth amendment specifically retained the March 2011 deadlines for

depositing proceeds from the IPO or converting to an SPE.

In mid-February 2011, Whitecap sent Siemens a draft sixth amendment to the credit agreement, reflecting the mid-April time line for completing the IPO. According to the complaint, Siemens agreed to respond to the draft sixth amendment without suggesting that the schedule was problematic.

On March 8, 2011 Siemens wrote to the Alarm Funding Companies, stating, among other things, that Siemens was reserving all its rights and remedies but that, upon certain conditions, it would agree to extend the date for the deposit of IPO proceeds until April 15 and would also extend the date for conversion to an SPE. Among the conditions were that Whitecap would fund the Alarm Funding Companies with $800,000, the credit documents would be amended to include a confession of judgment, a new officer and independent director from lists provided by Siemens would be appointed to the Alarm Funding Companies, and irrevocable stock proxies would be delivered to the new officer to be effective upon either failure of the IPO and deposit of its proceeds by April 15, 2011 or another event of default. In the letter, Siemens stated that time was of the essence.

By email the next day, March 9, 2011, Whitecap rejected Siemens's conditions, stating that many of them would render it

impossible for the Alarm Funding Companies to raise the equity they sought. Attached to the email were, among other things, a "draft sixth amendment to the loan agreement," which Whitecap stated "reflect[ed] the terms and conditions [it was] prepared to accept" and a memorandum projecting increased attrition above previous forecasts. The email did not contest that Whitecap was in default.

On March 15, 2011, six days after Whitecap rejected Siemens's conditions, Siemens removed the Alarm Funding Companies' officers and directors and replaced them with the defendant directors in keeping with its rights under the pledge agreement to take voting control of the Alarm Funding Companies. According to the complaint, Siemens offered the next day to rescind its actions and allow the Alarm Funding Companies to pursue an IPO if Whitecap made an immediate payment of $12 to $14 million, but Whitecap refused that offer. Further, according to the complaint, on the same day, one of the defendant directors informed Alarm Funding's auditor that the new management was cancelling the IPO.

Whitecap commenced this action directly and derivatively on behalf of the Alarm Funding Companies. In the first five counts of the seven-count complaint, Whitecap interposed derivative

claims on the Alarm Funding Companies' behalf. Specifically, in the first and second causes of action, Whitecap asserted causes of action for breach of fiduciary duty derivatively against both Siemens and the director defendants, respectively. In the third and fourth causes of action, Whitecap interposed derivative claims against Siemens for breach of the credit agreement and breach of the pledge agreements, and, in the fifth cause of action, Whitecap interposed derivative claims against Siemens for breach of the implied duty of good faith and fair dealing.

In the sixth cause of action, Whitecap interposed a claim directly against Siemens for breach of the pledge agreements, and in the seventh cause of action, Whitecap interposed a claim directly against Siemens for breach of the implied duty of good faith and fair dealing.

The defendant directors and Siemens moved under CPLR 3211(a)(1) and (7) to dismiss the complaint as against them. We now affirm the dismissal of the complaint against both the director defendants and Siemens.

The motion court properly dismissed the five derivative claims, because Whitecap failed adequately to allege demand futility. Demand futility in this case is governed by the laws of Delaware, where the Alarm Funding Companies are incorporated

(*Hart v General Motors Corp.*, 129 AD2d 179, 182 [1st Dept 1987], *lv denied* 70 NY2d 608 [1987]). Under Delaware law, where, as here, no demand has been made on corporate directors to bring a lawsuit, a derivative action may be brought on the corporation's behalf only where the complaint alleged particularized facts that such a demand would have been futile (*Aronson v Lewis*, 473 A2d 805, 807-808 [Del Sup Ct 1984], *overruled on other grounds by Brehm v Eisner*, 746 A2d 244 [Del Sup Ct 2000]). To allege demand futility, the complaint must set forth particularized facts sufficient to raise a reasonable doubt that either (1) the directors are disinterested and independent, or (2) the challenged transaction was the result of a protected business judgment (473 A2d at 814).

In the first *Aronson* prong, a director is interested if she appears involved on both sides of a transaction or expects to receive a personal financial benefit from self-dealing beyond the benefit accruing to the corporation and its other stockholders (*Orman v Cullman*, 794 A2d 5, 23 [Del Ch Ct 2002]). A director is not independent if influenced by extraneous considerations such as control by another (*id.* at 24).

Here, Whitecap alleges no facts in the complaint from which it can be inferred that a demand on the corporations' board of

directors to bring the action would have been futile. Because the complaint alleges no facts that the directors of the Alarm Funding Companies appeared involved on both sides of the decision to abandon the IPO, or that they expected material benefits from self-dealing, the complaint fails to allege that they were interested. Moreover, the complaint makes no allegation that the director defendants were not independent, other than that Siemens appointed them. This allegation is insufficient to raise a reasonable doubt as to independence; on the contrary, appointment at the behest of those controlling the outcome of a corporate election "is the usual way a person becomes a corporate director" (*Aronson*, 473 A2d at 816). Thus, the complaint fails to allege facts sufficient to meet the first *Aronson* prong for demand futility.

Similarly, Whitecap failed to allege facts sufficient to raise a doubt that the defendant directors' decision to abandon the IPO was taken honestly and in good faith or that the director defendants were adequately informed in making their decision, as necessary to satisfy the second *Aronson* prong (*In re J.P. Morgan Chase & Co. Shareholder Litig.*, 906 A2d 808, 824 [Del Ch Ct 2005], *affd* 906 A2d 766 [Del Sup Ct 2006]). The complaint simply alleges in a conclusory manner that the decision to abandon the

IPO was not a valid business judgment because it was made within a day after the defendant directors assumed their posts, and without obtaining information from the Alarm Funding Companies' lawyers, underwriters and former management who had been working on the planned IPO. However, other than the allegation that the defendant directors had "little or no knowledge of the IPO or the Alarm Funding Companies' operations," the complaint makes no allegations regarding what specific knowledge the director defendants did or did not possess when making the decision (*id.*).

Moreover, Whitecap offered the motion court no explanation as to how canceling the IPO constituted an invalid business decision, other than to assert that because the IPO was essential to the Alarm Funding Companies' ability to continue as a going concern, the decision to cancel it was "irrational on its face." This argument, however, begs the question, for the substance of the decision cannot be used as evidence of its impropriety without second guessing the directors' actions – the very act that the business judgment rule forecloses (*In re Walt Disney Co. Derivative Litig.*, 907 A2d 693, 749-750 [Del Ch Ct 2005], *affd* 906 A2d 27 [Del Sup Ct 2006]).

The sixth cause of action alleges breach of contract directly against Siemens. Whitecap asserts in the complaint that

the closing dates were not of the essence, and therefore, that the failure to strictly comply with them did not trigger an event of default. We disagree. In an action at law for breach of contract damages, when the parties have specified a time for performance, there is a presumption that the parties agreed that time is of the essence unless they have used contrary language in the agreement (*Cooper-Rutter Assoc. v Anchor Natl. Life Ins. Co.*, 193 AD2d 944, 945 [3d Dept 1993]).

Here, a reading of the record reveals that when the parties wished to change certain interim dates, they did so by amending the relevant dates in the amendments to the credit agreement. Despite those various changes, however, there was one date the parties never changed: the March 1, 2011 deadline for depositing the proceeds of the IPO. Indeed, the third amendment stated that if the Alarm Funding Companies did not deposit the restricted proceeds and the remaining proceeds by March 1, 2011, their failure to do so would constitute an event of default. The third amendment also stated that if the IPO were not completed by March 2, 2011, Whitecap was obliged to convert CSH into an SPE. Likewise, the fifth amendment explicitly stated that the Alarm Funding Companies would be in default for failing to deposit proceeds from an IPO by March 1. By agreeing to this language in

both the third and the fifth amendments, the parties effectively agreed that time was of the essence (*see Parker Hannifin Corp v N. Sound Properties*, 2013 WL 1932109, *6, [2013 US Dist LEXIS 67026, *16-19 [SD NY, May 8, 2013, No. 10-CV-6359 (MHD)]; *Cooper-Rutter Assoc.*, 193 AD2d at 945; *cf. Lusker v Tannen*, 90 AD2d 118, 124 [1st Dept 1982] [general rule is that in an executory contract, time is of the essence unless the parties state a contrary intent, although in real estate contracts, courts follow the converse rule that time is *not* of the essence unless the parties state a contrary intent]).

In fact, Whitecap acknowledged by its conduct that it had breached the credit agreement's terms when it sent Siemens the draft of the sixth amendment to the credit agreement, proposing a May 15 deadline. Siemens responded on March 8, setting forth the terms under which it would be willing to extend the deadline. Whitecap rejected those terms and proposed terms of its own; Siemens decided that those terms were not acceptable. Only then did Siemens exercise its rights under the credit agreement. Thus, the breach was never actually in dispute. As a result, because the Alarm Funding Companies failed to comply with the language in the third and fifth amendments, Siemens did not breach the credit agreement or pledge agreements by exercising

its rights under those agreements to vote Whitecap's shares and replace the directors.

Contrary to Whitecap's arguments, Siemens neither waived the March 1 deadline nor was estopped from enforcing it. To begin, in arguing that Siemens contributed to the delay in the IPO, Whitecap makes only conclusory allegations that the IPO would have gone forward before mid-April had Siemens only cooperated with Alarm Funding's request for comments. The only non conclusory allegations in the complaint refer to negotiations occurring before the third amendment, when the parties established the March 1 deadline; of course, those negotiations could not have contributed to the Alarm Funding Companies' inability to honor the deadline after it had been set.

Similarly, there is no merit to Whitecap's arguments that Siemens acquiesced in delaying the IPO, knowingly permitted the Alarm Funding Companies to continue to work on closing the IPO, and affirmatively continued to negotiate after the closing date. In fact, the record partly contradicts these allegations: on January 18, 2011, the Alarm Funding Companies, Whitecap and Siemens entered into a fifth amendment to the credit agreement, and, as noted above, that amendment specifically retained March 1 as the deadline for the Alarm Funding Companies to deposit

proceeds from an IPO.

Whitecap alleges, however, that Siemens agreed to comment on the draft proposed sixth amendment in mid-February 2011, and that Siemens's actions constituted a waiver. While courts may find a waiver where one party encourages another to continue to perform for the first party's benefit (*see e.g. Burgess Steel Prods. Corp v Modern Telecom.*, 205 AD2d 344, 346 [1st Dept 1994]), this case presents a different situation: the Alarm Funding Companies pursued the IPO for its own and Whitecap's benefit, not Siemens's. Indeed, as we have already noted, Whitecap itself states that the IPO was essential to the Alarm Funding Companies' ability to continue as a going concern.

At any rate, even assuming for the sake of argument that Siemens's actions could constitute a waiver, the credit agreement contained a no-waiver clause. Unfruitful negotiations to restructure or extend the terms of the third amendment to the credit agreement did not limit Siemens's rights under the third amendment, as the no-waiver clause protected those rights (*see Bercy Invs. v Sun*, 239 AD2d 161, 162 [1st Dept 1997]). We decline to find otherwise, as a contrary holding could have a chilling effect on parties' willingness to renegotiate mutually acceptable terms rather than simply foreclose on collateral or

resort to costly litigation.

The seventh cause of action, alleging breach of the implied duty of good faith and fair dealing directly against Siemens, duplicates the sixth cause of action (*see Netologic, Inc. v Goldman Sachs Group, Inc.*, 110 AD3d 433, 433-434 [1st Dept 2013]). Thus, the motion court properly dismissed this cause of action.

We have considered Whitecap's remaining contentions and find that they are without merit.

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13322 The People of the State of New York, Ind. 2521/08
Respondent,

-against-

Jaime Katz,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Yuval Simchi-Levi of counsel), for respondent.

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Order, Supreme Court, New York County (Renee A. White, J.), entered on or about March 19, 2013, which adjudicated defendant a level two sex offender under the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed defendant 20 points for the risk factor for relationship with victim. The People demonstrated by clear and convincing evidence that defendant established a relationship with the victim for the purpose of victimizing him (*see People v Carlton*, 307 AD2d 763 [4th Dept 2003]). The circumstances, including time factors, supported the inference that the relationship was formed for that purpose, and defendant's denials presented a credibility question that the court properly resolved against him.

The court properly exercised its discretion when it declined to grant a downward departure to risk level one (*see People v Gillotti*, 23 NY3d 841 [2014]). The alleged mitigating factors were outweighed by the seriousness of the underlying sex crime.

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Kapnick, JJ.

13323 In re Kenneth S.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about November 27, 2012, which adjudicated appellant a juvenile delinquent upon his admission that he committed an act that, if committed by an adult, would constitute unlawful possession of an air pistol, and placed him on probation for a period of 18 months, unanimously affirmed, without costs.

The court properly denied appellant's suppression motion. The police lawfully detained appellant as a suspected truant (*Matter of Shannon B.*, 70 NY2d 459 [1987]). In the course of this detention, the police lawfully patted down appellant's book bag, particularly since as appellant approached the police car, the bag hit the car, making a distinctive metallic sound that the

officer recognized as the sound of a firearm. In patting down the bag, an officer felt the distinctive shape of a pistol, including its grip and trigger guard. The warrantless search of the bag, after appellant had been handcuffed and placed in the police car, was justified by close spatial and temporal proximity, as well as by exigent circumstances (*see People v Jimenez*, 22 NY3d [2014]; *People v Wylie*, 244 AD2d 247 [1st Dept 1998], *lv denied* 91 NY2d 946 [1998]). These circumstances included the fact that defendant resisted arrest, the officers' knowledge that appellant was on probation in connection with a past robbery and that he had resisted arrest before, the officers' high level of certainty that the bag actually contained a weapon, and the danger of appellant reaching the bag, despite being handcuffed, while seated in the police car next to the officer who had the bag.

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, JJ.

13324 Barbara A. Galecki, Index 110771/07
Plaintiff-Appellant,

-against-

Omnicare Dental, et al.,
Defendants,

David Heering, D.M.D.,
Defendant-Respondent.

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Lutfy & Santora, Staten Island (James L. Lutfy of counsel), for appellant.

Adelman Matz, P.C., New York (Gary P. Adelman of counsel), for respondent.

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Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 25, 2013, which granted defendant David Heering D.M.D.'s motion for summary judgment dismissing the complaint as against him, unanimously affirmed, without costs.

Dismissal of the complaint was properly granted since the alleged malpractice occurred in 2001 and 2002 and the action was not commenced until August 2007, which was well beyond the 2 1/2-year statute of limitations (*see* CPLR 214-a). The continuous treatment doctrine does not apply to this case and therefore does not toll the statute of limitations, since Dr. Heering examined plaintiff's mouth on one occasion in January 2006, for reasons

unrelated to either of the original conditions for which she was treated in 2001 and 2002, which are the subjects of her complaint as against Heering (*see McManus v Lipton*, 107 AD3d 463 [1st Dept 2013]; *Marrone v Klein*, 33 AD3d 546 [1st Dept 2006]).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13325 The People of the State of New York, Ind. 183/11
Respondent,

-against-

Antoine G. Allen,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Brian R. Pouliot 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 (Bonnie G. Wittner, J.), rendered on or about January 24, 2012,

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

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

ENTERED: OCTOBER 28, 2014

CLERK

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

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13326 Alexandre Angé, Index 108196/08
Plaintiff-Appellant,

-against-

Sandra Holley-Angé, etc.,
Defendant-Respondent.

_____

Law Offices of Stephanie R. Cooper, P.C., New York (Stephanie R. Cooper of counsel), for appellant.

Millman Law Firm, White Plains (Paul M. Millman of counsel), for respondent.

_____

Order, Supreme Court, New York County (Milton A. Tingling, J.), entered April 26, 2013, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment on his claims for unjust enrichment, money had and received, and conversion, and granted defendant's cross motion for summary judgment dismissing those claims, unanimously affirmed, without costs.

Although we affirm Supreme Court's order, we do so on different grounds. As an initial matter, we reject defendant's contention that we are without subject matter jurisdiction to hear plaintiff's state law claims. Federal court jurisdiction over the issue of preemption under the Federal Employee Retirement Income Security Act (29 USC § 1001 *et seq.*) (ERISA) is

not exclusive, and New York State courts routinely determine whether a particular claim is preempted by ERISA (*see e.g. Kocourek v Booz Allen Hamilton Inc.*, 114 AD3d 567, 568 [1st Dept 2014]).

Plaintiff's claims were not preempted by ERISA, since plaintiff was neither a participant nor a beneficiary of an ERISA-regulated retirement plan, and thus lacked standing to assert his claims under § 502(a)(1)(B) of ERISA (*see e.g. Pascack Valley Hosp. v Local 464A UFCW Welfare Reimbursement Plan*, 388 F3d 393, 400 [3d Cir 2004], *cert denied* 546 US 813 [2005]). Further, plaintiff's claims did not seek "to remedy the denial of benefits under an ERISA-regulated pension plan" (*Kocourek*, 114 AD3d at 568), and did not relate to the structure or administration of an ERISA plan (*see Hayman-Chaffey v Landy*, 1996 WL 282051, *2, 1996 US Dist LEXIS 7245, *6 [SD NY, May 28, 1996, No. 96-Civ-1900(BSJ)]).

Plaintiff was not entitled to summary judgment on his claims for unjust enrichment or money had and received and those claims were correctly dismissed, since, among other things, defendant's failure to turn over to plaintiff the retirement benefits that she received as a surviving spouse of her deceased husband's estate was not against equity and good conscience (*see Mandarin*

Trading Ltd. v Wildenstein, 16 NY3d 173, 182 [2011]; *Matter of Witbeck*, 245 AD2d 848, 850 [3d Dept 1997]). Nor did plaintiff establish the merits of his claim for conversion, since he demonstrated no superior right of possession of the retirement benefits (*see Lucker v Bayside Cemetery*, 114 AD3d 162, 174 [1st Dept 2013], *lv denied* __ NY __, 2014 NY Slip Op 82425 [2014]).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13327 Clement Petrocelli, Index 651605/13
Petitioner-Respondent,

-against-

Petrocelli Electric Co., Inc., et al.,
Respondents-Appellants,

Allan Briteway Electrical
Services, Inc., etc.,
Transferee-Appellant.

_____

Davidoff Hutcher & Citron LLP, New York (Michael Wexelbaum of counsel), for appellants.

Anderson Kill P.C., New York (Rachel Kierych of counsel), for respondent.

_____

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 5, 2013, which, to the extent appealed from as limited by the briefs, in this proceeding under CPLR article 52, directed that the judgment debtors would have the burden of proof at the turnover hearing, unanimously reversed, on the law, without costs, to direct that petitioner judgment creditor will have the burden of proof.

The burden of proof in a turnover proceeding rests with the judgment creditor to establish that contested transfers were without adequate consideration or otherwise fraudulent (*see National Communications Corp. v Bloch*, 259 AD2d 427 [1st Dept

1999]). Nevertheless, petitioner is entitled to broad discovery to assist in prosecuting the claims, particularly since the evidence is largely within the possession of the judgment debtors and the transferees (*see id.*; *Gryphon Dom. VI, LLC v GBR Info. Servs., Inc.*, 29 AD3d 392 [1st Dept 2006]; CPLR 5223).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13329- Ind. 4826/10
13330-
13331 The People of the State of New York,
Respondent,

-against-

Pierre Appolon,
Defendant-Appellant.
- - - - -
The People of the State of New York,
Respondent,

-against-

Antonio Barnaby,
Defendant-Appellant.
- - - - -
The People of the State of New York,
Respondent,

-against-

Wynne Burgos,
Defendant-Appellant.

_____

Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice Lee of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Justin Santolli of counsel), for Pierre Appolon, appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Svetlana M. Kornfeind of counsel), and Davis Polk & Wardwell LLP, New York (J. Stan Barrett of counsel), for Antonio Barnaby, appellant.

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

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

Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered June 16, 2011, convicting defendant Appolon, after a jury trial, of assault in the third degree and sentencing him to a term of 1 year, unanimously affirmed. Judgment, same court and Justice, rendered June 7, 2011, convicting defendant Barnaby, after a jury trial, of assault in the third degree, and sentencing him to a term of 8 months, unanimously affirmed. Judgment, same court and Justice, rendered June 7, 2011, as amended June 9, 2011, convicting defendant Burgos, after a jury trial, of assault in the third degree and endangering the welfare of a child (two counts), and sentencing her to concurrent terms of 1 year, unanimously affirmed.

Viewed "as a whole" (*People v Adams*, 69 NY2d 805, 806 [1987]), the court's jury charge on reasonable doubt conveyed the proper standard and was not constitutionally defective (*see People v Alcindor*, 118 AD3d 621 [1st Dept 2014]). The language at issue was substantially similar to the Criminal Jury Instructions.

All of defendants' procedural and substantive claims concerning the court's responses to two jury notes stating that the jury was deadlocked are unpreserved. We reject defendants'

arguments regarding preservation, and we decline to review these unpreserved claims in the interest of justice. As alternative holdings, we find that the supplemental charges were proper and noncoercive in encouraging the jury to continue deliberating (*see People v Ford*, 78 NY2d 878 [1991]), and that the court did not abuse its discretion in declining to grant a mistrial (*see Matter of Plummer v Rothwax*, 63 NY2d 243 [1984]).

Burgos did not preserve her claim that the evidence was legally insufficient, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also reject her claim that the verdict against her was against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348 [2007]). The evidence supports the inference that Burgos intended to injure the particular victim at issue. Burgos's contention that the third-degree assault count should not have been submitted to the jury as a lesser included offense is waived and unpreserved (*see People v Richardson*, 88 NY2d 1049 [1996]; *People v Ford*, 62 NY2d 275 [1984]), and we decline to review it in the interest of justice.

Appolon's *Rosario* claim is unpreserved, and we decline to review it in the interest of justice. As an alternative holding,

we reject it on the merits, since the records at issue were in the possession and control of a nonparty outside the People's control, and thus did not constitute *Rosario* materials (*see People v Kelly*, 88 NY2d 248 [1996]).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13332 In re Masao Yonamine, Index 108310/11
Petitioner-Appellant,

-against-

New York City Police Department, et al.,
Respondents-Respondents.

_____

Masao Yonamine, appellant pro se.

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

_____

Order, Supreme Court, New York County (Martin Schoenfeld, J.), entered January 28, 2013, which denied petitioner's motion to hold respondents in civil contempt for disobedience of an order, same court and Justice, entered January 20, 2012, which, inter alia, required respondents to certify that they had disclosed all documents responsive to petitioner's Freedom of Information Law (FOIL) request and that a diligent search had been conducted for documents that could not be located, unanimously affirmed, without costs.

Petitioner failed to demonstrate by clear and convincing evidence that respondents disobeyed the January 2012 order, as

required for a finding of civil contempt (*see McCain v Dinkins*, 84 NY2d 216, 226 [1994]; *Tener v Cremer*, 89 AD3d 75, 78 [1st Dept 2011]; Judiciary Law § 753). Respondent police department complied with the order by submitting an affirmation by its counsel that counsel had reviewed the Detective Squad's folders maintained in the precinct for information relating to the 1986 homicide investigation that culminated in petitioner's conviction that would be responsive to petitioner's FOIL request, and that those folders were the only places where such records might reasonably have been located. Counsel affirmed that no additional documents were located pursuant to her search, except for one additional page of questionable responsiveness, which was produced. This affirmation and the search complied with the January 2012 order, which merely required respondents to comply with FOIL (*see* Public Officers Law § 89[3]; *Matter of Rattley v New York City Police Dept.*, 96 NY2d 873 [2001]; *Matter of Franklin v Schwartz*, 57 AD3d 338 [1st Dept 2008], *lv dismissed* 12 NY3d 880 [2009]).

A hearing was not required because petitioner did not request one and his submission raised no factual dispute warranting a hearing (*see Cashman v Rosenthal*, 261 AD2d 287 [1st Dept 1999]). Supreme Court properly considered the contempt

petition, rather than transferring the matter to this Court, because petitioner did not seek substantial evidence review of a determination made "as a result of a hearing held, and at which evidence was taken, pursuant to direction by law" (CPLR 7803[4]; 7804(g); *see e.g. Matter of Storman v New York City Dept. of Educ.*, 95 AD3d 776 [1st Dept 2012], *appeal dismissed* 9 NY3d 1023 [2012]).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13333 The People of the State of New York, Ind. 3763/10
Respondent,

-against-

Martin Garcia,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Adrienne M. Gantt of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Ryan Gee 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 (Charles Solomon, J.), rendered on or about February 10, 2011,

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

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

ENTERED: OCTOBER 28, 2014

CLERK

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

Renwick, J.P., Manzanet-Daniels, Feinman, Kapnick, JJ.

13334 Reginald Randolph, Index 17379/07
Plaintiff-Appellant,

-against-

Rite Aid of New York, Inc.,
Defendant-Respondent,

Luis Zuniga,
Defendant.

_____

Ofodile & Associates, P.C., Brooklyn (Anthony C. Ofodile of counsel), for appellant.

Raven & Kolbe, LLP, New York (Ryan E. Dempsey of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Sharon A.M. Aarons, J.), entered on or about January 8, 2013, which granted defendant Rite Aid of New York, Inc.'s motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

In this action seeking recovery for personal injuries, plaintiff alleges that on October 13, 2004, after being caught shoplifting at one of defendant's stores in Manhattan, he was assaulted by a security guard. Plaintiff's first cause of action, the only one at issue on appeal, asserts that defendant's employees were directly negligent in failing to protect him from the security guard, who was armed with a baseball bat, and that

defendant is vicariously liable for its employees' negligence. There is no indication that the alleged assault by the security guard, who had no history of violence, was foreseeable (*N.X. v Cabrini Med. Ctr.*, 97 NY2d 247, 252 [2002]). Accordingly, the duty to protect was not triggered. Absent an opportunity and duty to protect, there can be no liability for negligence (*id.* at 253-255).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13335 Lydia Mojica, Index 109805/11
Plaintiff-Respondent,

-against-

Metro-North Commuter Railroad Company,
Defendant-Appellant,

Metropolitan Transportation
Authority, et al.,
Defendants.

_____

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for appellant.

Seiden & Kaufman, Carle Place (Steven J. Seiden of counsel), for respondent.

_____

Order, Supreme Court, New York County (Kathryn E. Freed, J.), entered October 21, 2013, which, insofar as appealed from, denied the motion of defendant Metro-North Commuter Railroad Company (Metro North) for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Metro North did not establish its entitlement to judgment as a matter of law, in this action where plaintiff was injured when she allegedly slipped and fell on a patch of ice located inside a pedestrian tunnel underneath the railroad overpass owned and maintained by Metro North. The evidence submitted by Metro North failed to demonstrate that it lacked actual or constructive

notice of the hazardous icy condition. Indeed, Metro North's annual inspection reports since the summer of 2008 show that it was aware that precipitation would result in water seeping through the overpass and leaking into the tunnel from the ceiling and walls. Accordingly, a jury could conclude that the allegedly negligent maintenance of the structure by Metro North caused the condition at issue (*see Lebron v Napa Realty Corp.*, 65 AD3d 436 [1st Dept 2009]).

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

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13337 The People of the State of New York, Ind. 4005/10
Respondent,

-against-

Dwayne Vega,
Defendant-Appellant.

_____

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

_____

Judgment, Supreme Court, New York County (Charles Solomon, J.), rendered on or about March 8, 2011, unanimously affirmed.

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

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

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

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13338 Loretta Cron, Index 114535/11
Plaintiff-Respondent,

-against-

City of New York,
Defendant-Appellant,

Consolidated Edison Company
of New York, Inc.,
Defendant-Respondent,

Empire City Subway Company,
Defendant.

_____

Morris Duffy Alonso & Faley, New York (Arjay G. Yao of counsel), for appellant.

Levine and Wiss, PLLC, West Hempstead (Anthony A. Ferrante of counsel), for Loretta Cron, respondent.

David M. Santoro, New York (Stephen T. Brewi of counsel), for Consolidated Edison Company of New York, Inc., respondent.

_____

Order, Supreme Court, New York County (Donna M. Mills, J.), entered June 25, 2013, which, to the extent appealed from as limited by the briefs, denied defendant City's motion to dismiss the complaint and all cross claims as against it for failure to comply with the notice of claim requirement of General Municipal Law §50-e, unanimously affirmed, without costs.

The motion court properly determined that the original notice of claim, together with plaintiff's testimony at the 50-h

hearing, sufficiently set forth the location of her accident to satisfy the requirements of General Municipal Law § 50-e(2), since it provided "information sufficient to enable the city to investigate" (*Brown v City of New York*, 95 NY2d 389, 393 [2000]; *see D'Alessandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]). The amended notice of claim, which clarified the location of the alleged accident, was proper pursuant to General Municipal Law § 50-e(6), since the City did not demonstrate any prejudice or contend that plaintiff acted in bad faith (*see Goodwin v New York City Hous. Auth.*, 42 AD3d 63, 66 [1st Dept 2007]).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13340 The People of the State of New York, ex rel. Rodney Rush, Petitioner-Appellant, Index 340526/12

-against-

Warden, Rikers Island Correctional Facility, et al., Respondents-Respondents.

_____

Rodney Rush, appellant pro se.

Eric T. Schneiderman, Attorney General, New York (David Lawrence III of counsel), for respondents.

_____

Appeal from order, Supreme Court, Bronx County (Seth L. Marvin, J.), entered March 4, 2013, which granted petitioner's motion to reargue the court's prior decision dismissing the petition for a writ of habeas corpus, and upon reargument, granted the writ to the extent of ordering a new preliminary hearing, unanimously dismissed, without costs, as moot.

The Attorney General has informed the Court that petitioner has reached the maximum expiration date of his sentence and thus,

the appeal is moot (*see e.g. People ex rel. Allen v Dalsheim*, 48 NY2d 971 [1979]; *People ex rel. Kato v Warden, Rikers Is. Correctional Facility*, 52 AD3d 320 [1st Dept 2008]).

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13341 The People of the State of New York, Ind. 421/11
Respondent,

-against-

Angel Rodriguez,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

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

_____

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered September 6, 2011, convicting defendant, upon his plea of guilty, of grand larceny in the fourth degree, and sentencing him to a term of one year, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for youthful offender treatment (*see*

generally People v Drayton, 39 NY2d 580 [1976]), in light of the fact that, while awaiting sentencing in this case, defendant was arrested on robbery charges and pleaded guilty to second-degree robbery.

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

ENTERED: OCTOBER 28, 2014

CLERK

Renwick, J.P., Manzanet-Daniels, Feinman, Kapnick, JJ.

13342N Aaron J. Broder, et al., Index 100952/10
Plaintiffs-Respondents,

-against-

Robert Ritch, M.D., et al.,
Defendants-Appellants,

Nathan Radcliffe, M.D., et al.,
Defendants.
- - - - -
Jonathan C. Reiter,
Nonparty Respondent.

_____

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Alice Schlesinger, J.), entered on or about November 8, 2013,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 15, 2014,

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

ENTERED: OCTOBER 28, 2014

CLERK

Friedman, J.P., Renwick, Manzanet-Daniels, Feinman, Kapnick, JJ.

13343 In re Robert Adrian, Ind. 2684/11
[M-4275 Petitioner,

-against-

Hon. Bruce Allen,
Respondent.

_____

Robert Adrian, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for respondent.

_____

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

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

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

ENTERED: OCTOBER 28, 2014

CLERK

Tom, J.P., Renwick, Andrias, Freedman, Clark, JJ.

12637 OneBeacon America Insurance Company, Index 651193/11
Plaintiff,

-against-

Colgate-Palmolive Company, et al.,
Defendants.
- - - - - -
Colgate-Palmolive Company,
Counterclaim Plaintiff-Respondent,

-against-

OneBeacon America Insurance Company,
Counterclaim Defendant,

National Indemnity Company, et al.,
Counterclaim Defendants-Appellants.

_____

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey of counsel), for appellants.

Anderson Kill P.C., New York (William G. Passannante of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered November 4, 2013, as amended by order, same court and Justice, entered November 20, 2013, reversed, on the law, without costs, the motion granted, and the claims dismissed. The Clerk is directed to enter judgment in favor of the counterclaim defendants-appellants.

Opinion by Freedman, J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Dianne T. Renwick
Richard T. Andrias
Helen E. Freedman
Darcel D. Clark, JJ.

12637
Index 651193/11

_____x

OneBeacon America Insurance Company,
Plaintiff,

-against-

Colgate-Palmolive Company, et al.,
Defendants.

- - - - -

Colgate-Palmolive Company,
Counterclaim Plaintiff-Respondent,

-against-

OneBeacon America Insurance Company,
Counterclaim Defendant,

National Indemnity Company, et al.,
Counterclaim Defendants-Appellants.

_____x

Counterclaim defendants National Indemnity Company and Resolute Management, Inc. (NICO) appeal from the order of the Supreme Court, New York County (Carol R. Edmead, J.), entered November 4, 2013, as amended by the order of the same court and Justice, entered November 20, 2013, which, to the extent appealed from, denied so much of their motion as sought to

dismiss the first, fifth and ninth counterclaims as against Resolute and the third and seventh counterclaims as against NICO.

Simpson Thacher & Bartlett LLP, New York (Michael J. Garvey, Bryce L. Friedman, Mary Beth Forshaw and Summer Craig of counsel), for appellants.

Anderson Kill P.C., New York (William G. Passannante of counsel), for respondent.

FREEDMAN, J.

In this dispute between plaintiff OneBeacon America Insurance Company (OneBeacon) and its insured, defendant counterclaim plaintiff Colgate-Palmolive Company (Colgate), counterclaim defendant National Indemnity Company (NICO), OneBeacon's reinsurer, and its affiliated claims adjuster, counterclaim defendant Resolute Management, Inc. (Resolute), appeal from an order partially denying their motion to dismiss all of the counterclaims asserted against them pursuant to CPLR 3211(a)(7). Based on the total absence of a contractual relationship between Colgate and the counterclaim defendants, we reverse and dismiss the remaining counterclaims.

The underlying dispute between Colgate and OneBeacon arose over OneBeacon's right, under the more than 50 primary and excess liability policies it issued to Colgate (the Policies),[1] to control Colgate's defense against more than 20 lawsuits alleging personal injury caused by exposure to Colgate's talc products, which allegedly contained asbestos (the Talc Cases.) OneBeacon alleges that Colgate has not allowed it to control the defense of these cases, rejected the defense counsel and strategy that OneBeacon selected, and insisted on selecting its own independent

[1]The Policies are not in the record.

counsel.

In March 2013, OneBeacon filed this action, seeking, among other things, a declaration that under the Policies at issue, OneBeacon has the exclusive right to control Colgate's defense and choose its counsel. OneBeacon further seeks a declaration that it is not obligated to indemnify Colgate in any Talc Cases that Colgate defends, settles, or tries without OneBeacon's consent.

Colgate counterclaimed against OneBeacon and joined NICO and Resolute as counterclaim defendants. Only the counterclaims against NICO and Resolute are before us.[2] Colgate alleges that OneBeacon's contractual relationship with NICO and Resolute created a conflict of interest because they serve a dual role as both the reinsurer of OneBeacon's liability under the Policies and the claims adjuster under those Policies. Colgate asserts, among other things, that although it wants to vigorously defend the Talc Cases to deter copycat lawsuits, NICO and Resolute want to settle the cases to minimize the legal expenses.

The relevant, undisputed facts are as follows: During an extended period ending in 1983, the Policies were either purchased directly from OneBeacon or from two of its

[2]OneBeacon has filed a separate appeal but the counterclaims against the insurer are not before us.

predecessors.[3] In 2001, OneBeacon and NICO entered into an Aggregate Loss Portfolio Reinsurance Agreement (the Reinsurance Agreement) and a related Administrative Services Agreement (the Services Agreement). Under the Reinsurance Agreement, in exchange for a $1.25 billion premium, NICO agreed to provide OneBeacon with $2.5 billion of reinsurance coverage for the carrier's liability under the Policies. The coverage encompassed OneBeacon's liability for Colgate's "asbestos related losses."

The Reinsurance Agreement further provided that, in accordance with the Services Agreement, OneBeacon appointed NICO "to perform all administrative services" connected with the Policies, including the settlement or payment of the reinsured claims. Finally, the Reinsurance Agreement stated that it was an indemnity insurance agreement solely between OneBeacon and NICO, and that no one other than those two parties had any rights under the contract.

In 2004, NICO and Resolute entered into an Intercompany Service Agreement (Intercompany Agreement), under which Resolute agreed, while acting as NICO's agent, to adjust Colgate's claims under the Policies. The Intercompany Agreement also provided that it could not be assigned and that NICO and Resolute did not

[3]Henceforth the two predecessors will also be referred to collectively as OneBeacon.

intend the contract to confer any rights on third parties.

In 2008, the first Talc Case was filed in Supreme Court, New York County. After Colgate notified OneBeacon about the lawsuit, Resolute responded to Colgate by letter stating that it was handling the coverage claims on OneBeacon's behalf. Colgate objected and engaged counsel without consulting OneBeacon. Thereafter, OneBeacon commenced this action and Colgate counterclaimed.

On appeal, five of Colgate's counterclaims are before us: a counterclaim against Resolute for a declaration that it is entitled to independent counsel and that Resolute is prohibited from obstructing its defense of the Talc Cases (first counterclaim); a breach of contract claim against NICO (third); a claim for tortious interference with contract against Resolute (fifth); a claim for breach of the implied covenant of good faith and fair dealing against NICO (seventh); and a statutory claim against Resolute for violation of Massachusetts General Law c. 93A (ninth).[4]

We find that none of these counterclaims states a cause of action. Turning to the breach of contract counterclaim against NICO, Colgate alleges that, by entering into the Reinsurance

[4]Colgate also asserts the first and ninth counterclaims as against OneBeacon, which, as noted, has filed a separate appeal.

Agreement, OneBeacon either assigned its rights and obligations under the Policies to NICO, or NICO assumed those rights and obligations. According to Colgate, NICO thereby became contractually obligated to it as the insured and NICO breached its contractual obligations by refusing to acknowledge Colgate's choice of counsel and refusing to pay the legal fees.

Colgate's claims raise the issue of whether an insurance policyholder has rights against its carrier's reinsurer, if the reinsurer administers the insured's claims under the policy. In a typical reinsurance arrangement, where the carrier administers claims and the reinsurer merely indemnifies it in accordance with the "follow the fortunes" doctrine (*see United States Fid. & Guar. Co. v American Re-Ins. Co.*, 93 AD3d 14, 23 [1st Dept 2012], *mod* 20 NY3d 407 [2013]), the insured can only state viable claims against the reinsurer in specific circumstances that do not pertain here. In this case, Colgate only holds the Policies with OneBeacon. The carrier's reinsurer, NICO, and its affiliate, Resolute, both adjust Colgate's Policy claims and indemnify OneBeacon for claim payouts. NICO's and Resolute's dual role does not, however, give rise to any liability to Colgate because Colgate lacks contractual privity with NICO and Resolute. In the absence of privity, Colgate's breach of contract claims against NICO and Resolute fail.

The Reinsurance Agreement, which is a contract only between NICO and OneBeacon, is separate and distinct from the underlying Policies (*see Unigard Sec. Ins. Co. v North River Ins. Co.*, 79 NY2d 576, 582 [1992]). Colgate lacks standing to state a claim against NICO for breach of the underlying Policies because NICO is not a party to those contracts (*see id.* at 583; *Aces Mech. Corp. v Cohen Bros. Realty & Constr. Corp.*, 136 AD2d 503, 504 [1st Dept 1988] [finding "no basis for holding the . . . defendant liable for the breach of a contract to which it was not a party"]).

Colgate claims that NICO is liable under the Policies because either OneBeacon "assigned" contractual rights and obligations under the Policies to NICO, or NICO assumed obligations under the Policies. But nothing in the Reinsurance Agreement suggests an assignment or assumption. Rather, the contract indicates OneBeacon's appointment of NICO as its claims administrator for the Policies. In turn, under the Intercompany Agreement, NICO engaged Resolute to perform services for it, delegating to Resolute the obligation to fulfill its duties to OneBeacon. If Resolute, while acting for NICO on behalf of OneBeacon, breached the Policies while acting within the scope of its authority, only OneBeacon would be liable to Colgate for breach of contract. OneBeacon remains fully and solely

responsible for the performance of its obligations under the Policies even if NICO and Resolute are performing those obligations on its behalf.

Moreover, without language in a reinsurance agreement indicating that the reinsurer intends to be directly liable to the insured, the reinsurer has no obligation to the original insured (*Matter of Union Indem. Ins. Co. Of N.Y.*, 200 AD2d 99, 107 [1st Dept 1994], *affd* 89 NY2d 94 [1996]). Here, the Reinsurance Agreement contains language specifically providing that, except in the case of OneBeacon's insolvency (not the case here), no third party has any rights under the contract.

Colgate argues that, because NICO administers claims under the Policies, it can sue NICO directly as its primary insurer under *Klockner Stadler Hurter, Ltd. v Insurance Co. of Pa.* (785 F Supp 1130 [SD NY 1990][*Klockner I*]) and *Klockner Stadler Hurter, Ltd. v Ins. Co. of Pa.* (780 F Supp 148 [SD NY 1991][*Klockner II*]). However, *Klockner* is distinguishable. In the *Klockner* cases, the insurer assigned the right to directly sue the reinsurers to the policyholder (*Klockner I*, 785 F Supp at 1134; *see also Klockner II*, 780 F Supp at 154). For this reason, the court declined to grant the reinsurer's motion for dismissal (*Klockner I*, 785 F Supp at 1134). In the absence of any special circumstances such as those in *Klockner*, a reinsurer is not

directly liable to a policyholder merely because the reinsurer administers the policyholder's claims or makes payment under those claims (*see e.g. USX Corp. v Adriatic Ins. Co.*, 64 F Supp 2d 469, 477 [WD Pa 1998]; *Millennium Petrochemicals, Inc. v C.G.* Jago, 50 F Supp 2d 654, 659-660 [WD Ky 1999]; *Pyun v Paul Revere Life Ins. Co.*, 768 F Supp 2d 1157, 1176-177 [ND Ala 2011]; *Allendale Mut. Ins. Co. v Crist* 731 F Supp 928, 933 [WD Mo 1989]).

Given the absence of a contract between NICO and Colgate, the claim that NICO breached the implied covenant of good faith and fair dealing also fails. Colgate argues that it adequately pleaded a separate implied covenant claim because it alleges that NICO refuses to communicate with its chosen counsel, to appoint local counsel, or to agree to confidentiality provisions in connection with disclosures about counsel's work. However, these allegations merely constitute a description of how NICO refuses to acknowledge Colgate's choice of independent counsel, which refusal is the subject of Colgate's breach of contract counterclaim against OneBeacon.

The remaining claims against Resolute should also be dismissed. No claim for tortious interference is stated because, in performing the complained-of acts, Resolute acted as a designated agent, and no action for tortious interference can lie

against an agent acting within the scope of its duties on behalf of the principal (*Devash LLC v German Am. Capital Corp.*, 104 AD3d 71, 78-79 [1st Dept 2013], *lv denied* 21 NY3d 863 [2013]). An agency relationship existed because NICO is OneBeacon's agent with respect to the Policies and, under the Services Agreement, OneBeacon authorized NICO to appoint agents to perform NICO's obligations under the contract. Thus NICO appointed Resolute as OneBeacon's agent (*see Manley v AmBase Corp.*, 121 F Supp 2d 758, 772 [SD NY 2000]).

Colgate also invokes Massachusetts General Law c 93A § 11, which provides for a private right of action to those suffering monetary losses from unfair deceptive conduct in commercial dealings. The Massachusetts statute, however, does not apply when another jurisdiction's laws govern the underlying breach of contract claims (*Northeast Data Sys., Inc. v McDonnell Douglas Computer Sys. Co.*, 986 F2d 607, 609-610 [1st Cir 1993]). While OneBeacon is domiciled in Massachusetts, the parties do not dispute that New York law governs the contracts here although none of the Policies are in the record. Colgate argues, however, that its statutory claim against Resolute is not predicated on contract-based claims. Nevertheless, the documentary evidence shows that Colgate bases its claim on Resolute's alleged duties "under the [Policies]." Accordingly, the Massachusetts statute

is inapplicable.

Finally, Colgate's counterclaim for a declaratory judgment against Resolute is dismissed for failure to state a claim. Colgate contends that it seeks a declaration of its common law, extra-contractual rights to independent counsel and to defend the Talc Cases free from Resolute's interference and tortious conduct. Colgate's claim for declaratory relief is predicated on Resolute's alleged duty to Colgate as a third-party beneficiary under the Intercompany Agreement. That contract, however, explicitly provides that NICO and Resolute did not intend the contract to confer any rights on third parties.

Accordingly, the order of the Supreme Court, New York County (Carol R. Edmead, J.) entered November 4, 2013, as amended by the order of the same court and Justice, entered November 20, 2013, which, to the extent appealed from, denied so much of counterclaim defendants NICO and Resolute's motion as sought to dismiss the first, fifth and ninth counterclaims as against Resolute and the third and seventh counterclaims as against NICO, should be reversed, on the law, without costs, the motion

granted, and the claims dismissed. The Clerk is directed to enter judgment in favor of the counterclaim defendants-appellants.

All concur.

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

ENTERED: OCTOBER 28, 2014

CLERK