SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JUNE 27, 2017

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Acosta, P.J., Mazzarelli, Moskowitz, Manzanet-Daniels, JJ.

13242 The People of the State of New York, Respondent, Ind. 4092/07

-against-

Marcos Manon,
Defendant-Appellant.

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

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

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Judgment, Supreme Court, New York County (Renee A. White, J. at plea, Ronald A. Zweibel, J. at sentencing; Maxwell Wiley, J. at hearing after remand), rendered July 23, 2009, convicting defendant of criminal sale of a controlled substance in the fifth degree, and sentencing him, as a second felony drug offender, to a term of 1½ years, unanimously affirmed.

When this appeal was initially heard (123 AD3d 467 [1st Dept 2014]), defendant argued that because the trial court did not advise him of the deportation consequences of his guilty plea, he was entitled to a remand of the matter for a hearing on the issue of whether he would have proceeded to trial had he been aware of

those consequences (*see People v Peque*, 22 NY3d 168 [2013, *cert denied sub nom.* 574 US __, 135 S Ct 90 [2014]). This Court held the appeal in abeyance and remanded for further proceedings pursuant to *Peque*. We now affirm the conviction.

On remand, the hearing court correctly determined that defendant failed to show a reasonable probability that he would not have pleaded guilty had the court advised him of the possibility of deportation. There is no basis for disturbing the court's credibility determinations. In determining whether a defendant has been prejudiced by a court's failure to warn of the deportation consequences of a guilty plea, factors to consider include "the favorability of the plea, the potential consequences the defendant might face upon a conviction after trial, the strength of the People's case against the defendant, the defendant's ties to the United States and the defendant's receipt of any advice from counsel regarding potential deportation" (*Peque*, 22 NY3d at 198-199).

Here, although defendant characterizes the People's case as "untested," there is every indication that a conviction was very likely, and defendant's attorney advised defendant accordingly. Defendant had a lengthy criminal record, with five prior drug felony convictions, and the plea offer was extremely favorable under all the circumstances. While defendant had significant

family ties to this country, that factor does not outweigh the favorability of the disposition offered. Although defendant's trial counsel testified at the *Peque* hearing that he had not discussed immigration issues at the time of the plea, defendant, who had previously been deported after a felony drug conviction, was presumably aware from his personal experience that deportation could result from his plea. In any event, defendant was convicted in federal court of illegal re-entry and thereafter deported, independent of drug conviction at issue on this appeal.

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

ENTERED: JUNE 27, 2017

CLERK

Acosta, P.J., Renwick, Andrias, Moskowitz, JJ.

16603-
16604 The People of the State of New York,
Respondent,

-against

Giovanni Corporan, also known as
Angel Santiago,
Defendant-Appellant.

SCI 63/02
1162N/05

_____

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

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

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Judgments, Supreme Court, New York County (Laura A. Ward, J.), rendered November 14, 2012, convicting defendant, upon his peas of guilty, of attempted criminal possession of a controlled substance in the third degree and criminal possession of a controlled substance in the third degree, and sentencing him to concurrent terms of 5 ½ and 6 years, respectively, unanimously affirmed.

We previously held this appeal in abeyance (135 AD3d 485 [1st Dept 2016]) in order to afford defendant the opportunity to demonstrate a "reasonable probability" that he would not have pleaded guilty had he been made aware of the deportation consequences of his plea (*see People y Peque*, 22 NY3d 168, 199 200 [2013], *cert denied sub nom. Thomas IT New York*, 574 US __,

135 S Ct 90 [2014]). Based upon the evidence adduced at the hearing, at which defendant, who has been deported, testified by videoconferencing, we find that defendant did not meet that burden. Initially, we find no basis for disturbing the court's credibility determinations.

By pleading guilty, defendant received a lenient disposition, which included a sentence of probation if he complied with all plea conditions. Defendant faced extensive prison terms if convicted after trial of the crimes that led to his 2002 and 2005 pleas, and acquittal of any of those crimes was unlikely. One of the two drug sales involved in the case resulting in the 2002 plea carried a potential life sentence, and the strength of the People's case regarding those sales was apparent from the felony complaint. The facts set forth in the complaint supported a compelling inference that, in both instances, defendant was a participant in a drug-selling operation. A defense that, on two separate days, defendant did nothing more than innocently direct the undercover buyer to a source of drugs offered little hope of success. Defendant failed to demonstrate that he had significant ties to the United States. The evidence showed that he had a daughter in the Dominican Republic, but no family in the United States, at the time of his 2002 plea. Defendant's claim of an impending marriage to a

United States citizen was undermined by the fact that he did not marry that person, despite ample opportunity to do so long before being incarcerated and deported.

Accordingly, we conclude that defendant failed to establish that he was prejudiced by the court's failure to warn him of the immigration consequences of his plea at the 2002 proceeding, or by any misleading immigration-related remarks by his counsel at the 2005 proceeding, where defendant again received a lenient disposition involving yet another serious drug charge.

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

ENTERED: JUNE 27, 2017

CLERK

Acosta, P.J., Renwick, Richter, Webber, JJ.

4229 The People of the State of New York, Respondent, Ind. 4106/14

-against-

Troy Simmons,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel) and Shriver & Jacobson LLP, New York (Alejandra Ávila of counsel), for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Edward J. McLaughlin, J. at suppression hearing; Neil E. Ross, J. at plea and sentencing), rendered May 20, 2015, convicting defendant of criminal possession of a weapon in the third degree, and sentencing him to a term of 30 days, held in abeyance, and the matter remanded to Supreme Court for determination, based upon the evidence presented at the suppression hearing, of the issues raised at the hearing but not determined therein.

The court erred in denying defendant's suppression motion on the ground that the officer recovered the gravity knife from defendant based on a "search incident to arrest." Although the record supports a finding that the officer had probable cause to arrest defendant for assault based on reliable information from

the assault victim, the People failed to meet their burden (*see People v Di Stefano*, 38 NY2d 640, 652 [1976]) of demonstrating that the officer intended to arrest defendant for the assault at the time he recovered the knife (*see People v Reid*, 24 NY3d 615, 620 [2014]; *People v Mangum*, 125 AD3d 401 [1st Dept 2015]). The officer's testimony, viewed as a whole, indicates that, when he noticed the knife upon approaching defendant and retrieved it from defendant's pocket, the officer's intent was to inquire about the assault in order to verify that defendant was indeed the man who had assaulted the victim. Further, it was not until after the officer had retrieved the knife and confirmed that it was a gravity knife that he asked about the assault.

The People argue, in the alternative, as they did at the hearing, that the officer's act of taking the knife from defendant's pocket, where the handle of the knife and its clip were in plain view, was permissible as a self-protective minimal intrusion (*see People v Miranda*, 19 NY3d 912, 914 [2012]). However, as the hearing court did not rule on this issue in denying the suppression motion, and therefore did not rule adversely against defendant on this point, we may not reach it on this appeal (CPL 470.15[1]; *People v LaFontaine*, 92 NY2d 470 [1998]).

We therefore hold the case in abeyance and remand for

determination, based on the hearing minutes, of the issues raised at the hearing but not decided (*see e.g. People v Washington*, 82 AD3d 570 [1st Dept 2011]). We reject defendant's argument that, rather than remanding for further proceedings, we should grant suppression and dismiss the indictment. As the Second Department has observed, "[W]here, as here, the alternative issue raised by the People on appeal has not been determined by the trial court, and the resolution of that issue could affect the determination of the suppression motion, we deem it appropriate to hold the defendant's appeal in abeyance and remit the matter for consideration of the alternative issue" (*People v Chazbani*, 144 AD3d 836 [2d Dept 2016]). This case does not involve a failure of the People to preserve the issue (*see People v Dodt*, 61 NY2d 408, 416 [1984]) or to present the necessary evidence (*see People v Havelka*, 45 NY2d 636, 642-645 [1978]). Accordingly, granting suppression in this procedural posture would give defendant an undeserved windfall.

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

ENTERED: JUNE 27, 2017

CLERK

CORRECTED ORDER - JUNE 29, 2017

Sweeny, J.P., Mazzarelli, Moskowitz, Kahn, JJ.

3362- Index 42064/12
3362A Myles Gonzalez,
Plaintiff-Appellant,

-against-

The City of New York,
Defendant-Respondent.

- - - - -

The City of New York,
Third-Party Plaintiff-Respondent,

-against-

Halcyon Construction Corp.,
Third-Party Defendant-Respondent.

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Pollack, Pollack, Isaac, & DeCicco, New York (Brian J. Isaac of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Elizabeth I. Freedman of counsel), for the City of New York, respondent.

McGaw, Alventosa & Zajac, Jericho (Andrew Zajac of counsel), for Halcyon Construction Corp., respondent.

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Judgment, Supreme Court, Bronx County (Mary Ann Brigantti, J.), entered July 17, 2015, in favor of defendant and third-party defendant, unanimously reversed, on the law, without costs, plaintiff's motion to set aside an order that had granted the motion of defendant the City of New York and third-party defendant Halcyon Construction Corp. for a directed verdict

granted, the judgment vacated, the complaint and third-party complaint reinstated, and the matter remitted for a new trial. Appeal from order, same court and Justice, entered June 22, 2015, which denied plaintiff's motion to set aside the court's decision granting the City's motion for a directed verdict, unanimously dismissed, without costs, as academic.

In this personal injury action, plaintiff alleged that he was on foot, crossing the east side of Mansion Street at its intersection with St. Lawrence Avenue in the Bronx, when he fell into a sinkhole. Plaintiff's theory of the case was that the City and its pavement restoration contractor, third-party defendant Halcyon Construction Corp., performed work that resulted in the creation of the sinkhole in which plaintiff fell.

According to plaintiff, the area inside the sinkhole was mushy and wet. The evidence at trial showed that two weeks earlier, a water main in the northwest corner of the intersection had burst. The City's Department of Environmental Protection repaired the water main; approximately one week later, Halcyon backfilled the hole and repaved the intersection.

The court precluded plaintiff from introducing into evidence photographs of the sinkhole, taken two weeks after the alleged accident, finding that they did not fairly and accurately depict the way the accident site looked on the date of the alleged

accident. Further, plaintiff sought to introduce highway specifications that the City had created and published through the Department of Transportation, arguing that introduction into evidence was proper because the specifications were incorporated into the contract between the City and Halcyon. The court, however, precluded plaintiff from introducing the specifications. In so doing, the court found that plaintiff failed to demonstrate that the specification were not inadmissible "internal rules," which would improperly create a standard of care higher than the one imposed by the common law. The court also would not permit plaintiff to have the specifications marked as a court exhibit.

Further, at trial, the court quashed two of plaintiff's subpoenas, the first issued to a Halcyon employee, who, according to plaintiff, was to offer testimony concerning Halcyon's contract with the City – specifically, that the contract renewed itself, and thus, that an earlier contract was the same as the contract in effect at the time of plaintiff's alleged accident. The other subpoena was issued to a City inspector, who purportedly was to testify about his first-hand observations of Halcyon's repairs to the site. In refusing to permit plaintiff to call those two witnesses, the trial court found that plaintiff was attempting to engage in post note of issue discovery.

After plaintiff rested his case, the City and Halcyon moved

separately for directed verdicts. The court granted the City's motion, and, although plaintiff had no direct claims against Halcyon, also granted Halcyon a directed verdict. In so doing, the court found insufficient evidence that defendants affirmatively created the condition. At any rate, the court found, even assuming for the sake of argument that there had been nonfeasance in making the repairs, that nonfeasance did not rise to the level of satisfying plaintiff's burden. The City did not object to the directed verdict in Halcyon's favor, and thus, its third-party complaint against Halcyon was effectively dismissed in accordance with the judgment.

Plaintiff then moved for an order setting aside the decision granting defendants' motion for a directed verdict. Among other things, plaintiff argued that the court wrongfully precluded him from moving the specifications into evidence, annexing to the motion the specifications that the trial court refused to mark as a court exhibit. The trial court denied plaintiff's motion on the ground that plaintiff failed to annex the transcript of his trial testimony, without which the court could not meaningfully review the evidentiary issues raised in the motion. The court further found that the specifications were inadmissible internal rules.

The trial court erred in granting defendants' motions for a

directed verdict, as there was evidence sufficient to support a reasonable jury's finding that the City and Halcyon were affirmatively negligent in failing to properly maintain the street in a safe condition or in creating the sinkhole into which plaintiff allegedly fell, or both (*see Ryals v New York City Tr. Auth.*, 79 AD3d 597 [1st Dept 2010]; *see also Brito v Stratford Five Realty, LLC*, 118 AD3d 472 [1st Dept 2014]).

To begin, the trial court erred in precluding pictures of the accident site (*see Saporito v City of New York*, 14 NY2d 474, 476-477 [1964]). Plaintiff authenticated the photographs at his deposition, and further testimony at trial could have explained how and why the scene depicted in the photos did or did not differed from the scene on the day of the accident (*see Saporito*, 14 NY2d at 476-477). Exclusion of the photographs meant that plaintiff was unable to show the jury the hole into which he allegedly fell.

Nor should the court have precluded the City's specifications incorporated into its contract with Halcyon. The specifications were expressly incorporated into the contract between Halcyon and the City; thus, they applied not only to the City itself, but also to third parties. Therefore, they were admissible as potential evidence of defendants' negligence (see *generally Diaz v Vasques*, 17 AD3d 134 [1st Dept 2005], *lv denied*

5 NY3d 706 [2005]), and indeed, the City failed to show how the specifications transcended the duty of reasonable care. The trial court's exclusion of this evidence regarding the specifications hobbled plaintiff's ability to prove that the City had engaged in affirmative negligence – the very basis upon which the trial court granted the directed verdict.

Likewise, the court erred in quashing the subpoenas directed to the City's onsite inspector and a principal of Halcyon (*General Elec. Co. v Rabin*, 184 AD2d 391, 392 [1st Dept 1992]). Although plaintiff did not formally name the City's onsite inspector and the principal of Halcyon as witnesses, nothing in the CPLR requires a party to generate a trial witness list, nor does the record indicate that the individual court rules required him to do so (*see Hunter v Tryzbinski*, 278 AD2d 844 [4th Dept 2000]). Indeed, there is no requirement that a party depose a witness in order to call him or her as a witness at trial.

Taken together, these errors warrant reversal, as they deprived plaintiff of the opportunity to prove that the City or Halcyon, or both, were affirmatively negligent.

In light of our decision, we need not consider the parties' remaining contentions.

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

ENTERED: JUNE 27, 2017

CLERK

Sweeny, J.P., Gische, Kahn, Gesmer, JJ.

3898 J.P. Morgan Securities Inc., et al., Plaintiffs-Respondents, Index 600979/09

-against-

Vigilant Insurance Company, et al., Defendants-Appellants.

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DLA Piper LLP (US), New York (Joseph G. Finnerty III of counsel), for Vigilant Insurance Company and Federal Insurance Company, appellants.

Drinker Biddle & Reath LLP, New York (David F. Albernethy of counsel), for Travelers Indemity Company, appellant.

Kaufman Borgeest & Ryan LLP, New York (Scott A. Schechter of counsel), for Liberty Mutal Insurance Company, appellant.

Clyde & Co. US LLP, New York (Edward J. Kirk of counsel), for Certain Underwriters at Lloyd's London, appellant.

D'Amato & Lynch LLP, New York (Luke D. Lynch, Jr. of counsel), for National Union Fire Insurance Company of Pittsburgh, Pa., appellant.

Proskauer Rose LLP, New York (Steve E. Obus of counsel), for respondents.

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Order, Supreme Court, New York County (Charles E. Ramos, J.), entered on or about July 7, 2016, which granted plaintiffs' motion for summary judgment to the extent of dismissing the affirmative defenses of breach of the contractual obligations to cooperate and to obtain defendants' consent to settle, and denied defendants' cross motion for summary judgment dismissing the

complaint, unanimously affirmed, with costs.

Defendants' unreasonable delay in dealing with plaintiffs' claims under the insurance contracts, consistently stated position that the various regulatory investigations and civil actions concerning plaintiffs' alleged late trading and marketing-timing transactions did not constitute claims under the contracts, and insistence that in any event disgorgement payments such as those demanded by the regulators were not insurable as a matter of law constitute a denial of liability under the contracts that justifies plaintiffs' settlement of those claims without defendants' consent (*see Isadore Rosen & Sons v Security Mut. Ins. Co. of N.Y.*, 31 NY2d 342 [1972]). The record does not support defendants' contention that plaintiffs breached their obligation to cooperate, but in any event defendants' repudiation of liability for plaintiffs' claims also excuses plaintiffs from performance of that obligation (*see Lentini Bros. Moving & Stor.*

Co. v New York Prop. Ins. Underwriting Assn., 53 NY2d 835 [1981]). The "reservation of rights" language in defendants' letters to plaintiffs does not change this result (*see QBE Ins. Corp. v Jinx-Proof Inc.*, 22 NY3d 1105, 1107 [2014]).

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4358 The People of the State of New York, Respondent, Ind. 1078/14

-against-

Keith King, Defendant-Appellant.

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Rosemary Herbert, Office of the Appellate Defender, New York (Matthew A. Wasserman of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered December 9, 2014, convicting defendant, after a jury trial, of criminal sale of a controlled substance in the third degree and criminal possession of a controlled substance in the seventh degree, and sentencing him, as a second felony drug offender, to an aggregate term of six years, unanimously affirmed.

The court properly denied defendant's request for an agency charge. There was no reasonable view of the evidence, viewed most favorably to defendant, that he acted solely on behalf of the buyer (*see People v Echevarria*, 21 NY3d 1, 20 [2013]; *People v Lam Lek Chong*, 45 NY2d 64, 74-75 [1978], *cert denied* 439 US 935 [1978]; *People v Vaughan*, 300 AD2d 104 [2002], lv denied 99 NY2d 633 [2003]). Defendant's behavior was completely consistent with

that of a participant in a drug-selling enterprise. There was no evidence he was doing "a favor for a friend" (*Lam Lek Chong*, 45 NY2d at 74), or "of any conversation between defendant and the undercover purchaser as to why the latter needed or wanted to be represented by an 'agent' instead of simply buying his own drugs" (*Vaughan*, 300 AD2d at 104). The fact that the undercover officer initiated the transaction by asking defendant if he could "get" him some drugs was not even slight evidence to support an agency defense, because there was no reasonable basis for the jury to view this as anything but a customer asking a salesperson to "get" him some merchandise.

The court properly denied defendant's application pursuant to *Batson v Kentucky* (476 US 79 [1986]). Initially, we note that defendant expressly withdrew his *Batson* claim as to one of the two prospective jurors at issue on appeal, rendering any ruling as to that panelist superfluous. In any event, the prosecutor explained that she challenged the panelists because they did not appear to be "engaged in the process" or "paying attention," which was a single, race-neutral reason based both on the panelists' recorded responses and their demeanor. The record supports the court's finding that this reason was not pretextual, and this finding is entitled to great deference (*see People v Hernandez*, 75 NY2d 350 [1990], *affd* 500 US 352 [1991]).

Defendant's claims that the prosecutor did not challenge panelists who were similarly situated and that the court failed to make specific findings regarding demeanor are unpreserved, and we decline to review them in the interest of justice. As an alternative holding, we reject them on the merits. Defense counsel did not dispute the prosecutor's description of the panelists' demeanor, and no express finding by the court was required under the circumstances (*see Thaler v Haynes*, 559 US 43, 48-49 [2010]). The record fails to support defendant's claim of disparate treatment.

The evidence at a *Hinton* hearing established an overriding interest that warranted a limited closure of the courtroom (*see Waller v Georgia*, 467 US 39 [1984]; *People v Echevarria*, 21 NY3d at 12-14). The undercover officer gave testimony of a type that "has consistently been held to demonstrate a substantial probability that the officer's undercover status and safety would be jeopardized by testifying in an open courtroom" (*People v Gonzalez*, 145 AD3d 586 [1st Dept 2016], *lv denied* 28 NY3d 1184 [2017]), and it satisfied the requirement of a particularized showing. The record also sufficiently shows that the court fulfilled its obligation to consider alternatives to closure, and "it can be implied that the . . . court . . . determined that no

lesser alternative" would suffice (*see Echevarria*, 21 NY3d at 15). We perceive no basis for reducing the sentence.

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4359-
4360 Dan Gropper,
Plaintiff-Respondent,

-against-

200 Fifth Owner LLC, et al.,
Defendants-Appellants.

Index 155437/15

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Wilson Elser Moskowitz Edelman & Dicker LLP, New York (John B. Martin of counsel), for appellants.

Parker Hanski LLC, New York (Glen H. Parker of counsel), for respondent.

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Orders, Supreme Court, New York County (Shlomo S. Hagler, J.), entered March 14, 2016, which denied defendants' motions to dismiss the complaint, unanimously reversed, on the law, without costs, the motions granted, and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Plaintiff's state claims are barred by the doctrine of res judicata (regardless of whether the state or federal tests are applied), as he agreed to a dismissal with prejudice of the prior federal action alleging the same state claims (*see EDP Med. Computer Sys., Inc. v United States*, 480 F3d 621, 624 [2d Cir 2007]; *Insurance Co. of State of Pa. v HSBC Bank USA*, 10 NY3d 32, 38, n3 [2008]; *see also Matter of Josey v Goord*, 9 NY3d 386, 389-390 [2007]; *Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 5-

6 [1st Dept 2000]). Plaintiff sought a voluntary dismissal on the eve of trial. The federal court noted that there had been a year of litigation prior to dismissal, including motions and depositions. A voluntary dismissal with prejudice is an adjudication on the merits for res judicata purposes (*EMI Blackwood Music Inc. v KTS Karaoke, Inc.*, 655 Fed Appx 37, 40 [2d Cir 2016]; *Carter v Inc. Vil. of Ocean Beach*, 759 F3d 159, 165-166 [2d Cir 2014]; *see also Nemaizer v Baker*, 793 F2d 58, 60-61 [2d Cir 1986]). "Res judicata does not require the precluded claim to actually have been litigated; its concern, rather, is that the party against whom the doctrine is asserted had a full and fair opportunity to litigate the claim" (*EDP Med. Computer Sys.*, 480 F3d at 626).

Plaintiff purports to allege "new" claims in the instant state action that consist of "continuing violations" of the state disability discrimination claims alleged in federal court (*see e.g.* Executive Law § 296[2]; Administrative Code of City of NY § 8-107[4]). The state complaint alleges that defendants "continue" to discriminate against the disabled, such as by locking a wheelchair accessible door on an unspecified date. Such allegations do not constitute a new claim (*Mudholkar v Univ. of Rochester*, 261 Fed Appx 320, 322 [2d Cir 2008], *cert denied* 553 US 1080 [2008]); rather, they are merely "additional

instances of what was previously asserted," which he had a full and fair opportunity to litigate (*Waldman v Village of Kiryas Joel*, 207 F3d 105, 113 [2d Cir 2000]).

The state complaint also contains "new" allegations regarding issues of accessibility to and in the rooftop restaurant. Plaintiff was aware of such issues during the federal action, and could have raised them in the federal action.

Finally, the federal court gave plaintiff an opportunity to seek attorney's fees as a prevailing party under a "catalyst" theory under the New York City Human Rights Law (Administrative Code § 8-502[g]), but plaintiff chose to forgo that opportunity. He cannot now pursue a separate cause of action solely for such fees (*Burke v Crosson*, 85 NY2d 10, 17-18 [1995]; *La Porta v Alacra, Inc.*, 142 AD3d 851, 853 [1st Dept 2016]).

Accordingly, the complaint should have been dismissed in its entirety.

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4361-
4362-
4363 In re Sean M.,

A Child Under Eighteen Years of Age, etc.,

Yanny M.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner.

- - - - -

Giskan Solotaroff & Anderson LLP, Her Justice, Immigrant Defense Project, Lansner and Kubitschek, Legal Services, NYC, MFY Legal Services, My Sister's Place, New York Civil Liberties Union, New York State Defenders Association, and National Association of Criminal Defense Lawyers & New York State Association of Criminal Defense Lawyers,
Amici Curiae.

- - - - -

In re Tameya H., and Another,

Children Under Eighteen Years of Age, etc.,

Justine D.,
Respondent-Appellant,

Administration for Children's Services,
Petitioner.

- - - - -

Giskan Solotaroff & Anderson LLP, Her Justice, Immigrant Defense Project, Lansner and Kubitschek, Legal Services, NYC, MFY Legal Services, My Sister's Place, New York Civil Liberties Union, New York State Defenders Association, and National Association of Criminal Defense Lawyers & New York State Association of Criminal Defense Lawyers,
Amici Curiae.

Simpson Thacher & Bartlett LLP, New York (David Elbaum of counsel), and The Bronx Defenders, Bronx (Saul Zipkin of cousel), for appellant.

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

Davida McGhee, New York, for Giskan Solotaroff & Anderson LLP, Her
Justice, Immigrant Defense Project, Lansner and Kubitschek, Legal Services, NYC, MFY Legal Services, and My Sister's Place, amici curiae.

New York Civil Liberties Union Foundation, New York (Robert Hodgson of counsel), for New York Civil Liberties Union, amicus curiae.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Matthew L. Conrad of counsel), for New York State Defenders Association, amicus curiae.

Schulte Roth & Zabel LLP, New York (Barry A. Bohrer of counsel), for National Association of Criminal Defense Lawyers & New York State Association of Criminal Defense Lawyers, amici curiae.

Order (denominated a decision), Family Court, Bronx County (Alma M. Gomez, J.), entered on or about October 3, 2016, and order (denominated a decision), same court (Michael R. Milsap, J.), entered on or about July 22, 2016, which denied the

respective motions of mothers Yanny M. and Justine D. for clarification as to whether each could share with her defense counsel in her respective, related criminal proceeding, Administration for Children's Services progress notes received in discovery in her respective neglect proceeding, unanimously reversed, on the law, without costs, to clarify that each may share the progress notes with her criminal defense counsel.

The courts' decisions affected the rights of the mothers to consult with fully informed criminal defense counsel and the mothers were aggrieved by the limitations the court placed on their ability to share information with their respective counsel.

The restrictions noted in Social Services Law § 422(4)(A) did not bar them from providing to their criminal defense counsel ACS records lawfully obtained in their neglect proceedings. Any other result would violate their First and Sixth Amendment rights (*see People v Knowles*, 88 NY2d 763, 766 [1996]).

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4365 The People of the State of New York, Respondent, Ind. 99010/16

-against-

Timothy McVey, Defendant-Appellant.

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Calhoun & Lawrence, LLP, White Plains (Clinton W. Calhoun, III of counsel), for appellant.

Darcel D. Clark, District Attorney, Bronx (Robert Mciver of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Efrain Alvarado, J.), entered on or about September 15, 2016, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly exercised its discretion in granting the People's request for an upward departure based on the egregiousness and extent of defendant's involvement with child pornography, which were not adequately accounted for in the risk assessment instrument, and which outweighed the mitigating factors cited by defendant (*see People v Velasquez*, 143 AD3d 583 [1st Dept 2016], *lv denied* 28 NY3d 914 [2017]). We reject defendant's argument that defendants in child pornography possession cases are inherently prejudiced by assessment under

the Risk Assessment Instrument, and the upward or downward departure protocol (*see People v Gillotti*, 23 NY3d 841, 855 [2014]; *People v Johnson*, 11 NY3d 416, 420-421 [2008]). We also reject defendant's assertion that the court improperly failed to take into account the "totality of the circumstances" when weighing the aggravating and mitigating circumstances of defendant's case (*see People v Gillotti*, 23 NY3d at 861).

We have considered and rejected defendant's remaining arguments.

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4366 New York Marine and General Insurance Company, Plaintiff-Appellant, Index 651152/14

-against-

Jorgensen & Company, et al., Defendants-Respondents,

Risk Avoidance Managers, Inc., Defendant.

_____

Carroll McNulty & Kull LLC, New York (Christopher R. Carroll of counsel), for appellant.

Clausen Miller P.C., New York (Kimbley A. Kearney of counsel), for Jorgensen & Company, respondent.

Lewis Brisbois Bisgaard & Smith LLP, New York (Mark K. Anesh of counsel), for Greenwich Insurance Company, respondent.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered April 4, 2016 which, to the extent appealed from as limited by the briefs, granted defendant Jorgensen & Company's motion to dismiss the claims for an injunction and the subrogation claims and to compel arbitration of the remaining claims against it, unanimously affirmed, without costs.

The court correctly determined that the claims asserted against defendant Jorgensen, which plaintiff describes as essentially alleging "fraud and intentionally dishonest conduct," are subject to arbitration pursuant to the broad arbitration

clause in the parties' Program Management Agreement (*see e.g. Szabados v Pepsi-Cola Bottling Co. of N.Y.*, 174 AD2d 342 [1st Dept 1991]). The complaint does not allege fraud in the inducement of the arbitration clause or fraud permeating the entire agreement (*see Matter of Silverman [Benmor Coats]*, 61 NY2d 299, 307-308 [1984]).

The court also correctly dismissed the disgorgement claim as subsumed within claims to be resolved by the arbitrator, and the claims for injunctive relief and subrogation are without merit.

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4367- Index 653656/13
4368 Lloyd A. Gelwan,
Plaintiff-Respondent-Appellant,

-against-

Youni Gems Corporation, et al.,
Defendants-Appellants-Respondents,

Sabharwal & Associates,
Nominal Defendant.

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Miller Law Offices, PLLC, Lawrence (Scott J. Farrell of counsel), for appellants-respondents.

Law Offices of Lloyd A. Gelwan, New York (Lloyd A. Gelwan of counsel), and Furman Kornfeld & Brennan LLP, New York (Andrew R. Jones of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Manuel J. Mendez, J.), entered March 19, 2015, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion to dismiss defendants' counterclaims, unanimously affirmed, without costs. Order, same court and Justice, entered August 12, 2014, which, to the extent appealed from, directed the parties to proceed to arbitration before the American Arbitration Association (AAA) of the first, sixth, seventh, eighth, and ninth causes of action, which were severed and dismissed from the action, unanimously modified, on the law, to dismiss, sever, and refer to arbitration before AAA the part of the eighth cause of action, which seeks a

charging lien, addressed to fees covered by the retainer agreement, and to reinstate the sixth cause of action, which seeks an account stated, and otherwise affirmed, without costs.

Plaintiff seeks to recover legal fees and costs relating to his successful representation of defendants in an action involving a joint venture enterprise called Bassco Creations, pursuant to a contingency fee retainer agreement that contained an arbitration provision, and for work performed outside of the retainer agreement.

The motion court correctly found that defendants' counterclaims do not allege conduct sufficiently egregious to support a Judiciary Law § 487 claim (*see Kaminsky v Herrick, Feinstein LLP*, 59 AD3d 1, 13 [1st Dept 2008], *lv denied* 12 NY3d 715 [2009]).

To the extent the eighth cause of action, which seeks a charging lien, addresses services covered by the retainer agreement, the arbitration clause in the retainer agreement must be enforced, despite the consequent bifurcation of the litigation (*see Deephaven Distressed Opportunities Trading, Ltd. v 3V Capital Master Fund Ltd.*, 72 AD3d 562, 563 [1st Dept 2010]). The sixth cause of action, which seeks an account stated, should be reinstated, since it was not shown to be related to work performed pursuant to the retainer agreement.

In light of the broad arbitration provision, which was drafted by plaintiff and the nominal defendant and does not identify an arbitral forum or a procedure for selecting one, and the absence of any stated basis for plaintiff's objection to AAA, the court properly granted defendant's request to refer the arbitration to that forum (*see Matter of Kingsbrook Jewish Med. Ctr. v Katz, Waisman, Weber, Strauss, Blumenkrans, Bernhard*, 37 AD2d 518, 519 [1st Dept 1971], *affd* 29 NY2d 854 [1971]).

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4370 The People of the State of New York, Respondent, Ind. 3780/14

-against-

Rafael Escobar, Defendant-Appellant.

Seymour W. James, Jr., The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Judgment, Supreme Court, Bronx County (Marc Whiten, J.), rendered April 2, 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: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4371 Liliane Bronfman, Index 158561/13
Plaintiff-Respondent,

-against-

East Midtown Plaza Housing Company, Inc.,
Defendant-Appellant.

- - - - -

East Midtown Plaza Housing Company, Inc.,
Third-Party Plaintiff-Appellant,

-against-

The City of New York,
Third-Party Defendant-Respondent.

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Mauro Lilling Naparty LLP, Woodbury (Gregory A. Cascino of counsel), for appellant.

Hoffmaier & Hoffmaier, P.C., New York (Neva Hoffmaier of counsel), for Liliane Bronfman, respondent.

Zachary W. Carter, Corporation Counsel, New York (John Moore of counsel), for the City of New York, respondent.

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Order, Supreme Court, New York County (Margaret A. Chan, J.), entered on or about December 21, 2016, which, to the extent appealed from as limited by the briefs, denied defendant's motion for summary judgment dismissing the complaint and granted third-party defendant City of New York's motion for summary judgment dismissing the third-party action, unanimously affirmed, without costs.

Plaintiff tripped and fell upon a cement mound around the

stump of a signpost, on a sidewalk located in a pedestrian plaza that was a sidewalk easement granted to the City for the benefit of pedestrians. Defendant, the owner and operator of premises adjacent to the defective sidewalk, asserted that the stump was the remnant of a sign that the City had installed.

The motion court correctly denied defendant's motion for summary judgment dismissing the complaint. Defendant as the abutting property owner, had a duty to maintain the sidewalk pursuant to Administrative Code of the City of New York § 7-210. Even assuming that the signpost belonged to the City, and was therefore not part of the "sidewalk" for purposes of the statute (*Smith v 125th St. Gateway Ventures, LLC*, 75 AD3d 425, 425 [1st Dept 2010]), defendant still had a duty under the statute to maintain the sidewalk around the signpost stump.

The motion court correctly granted the City's motion for summary judgment dismissing the third-party action. The City established that it had no prior written notice of the defect (Administrative Code § 7-201[c][2]; *see Schwartz v Turken*, 115 Misc 2d 829 [Sup Ct, Kings County 1982]), and defendant failed to raise a triable issue of fact as to the City's affirmative

negligence (*Yarborough v City of New York*, 10 NY3d 726, 728 [2008]).

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

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4373- Ind. 2484/14
4374 The People of the State of New York,
Respondent,

-against-

Antonio Lopez,
Defendant-Appellant.

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

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

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

ENTERED: JUNE 27, 2017

CLERK

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

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4376 The People of the State of New York, Respondent, Ind. 5195N/12

-against-

Dominique Boyd, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Samuel E. Steinbock-Pratt of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered July 18, 2014, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree, attempted assault in the first degree, reckless endangerment in the second degree, and two counts of conspiracy in the fourth degree, and sentencing him to an aggregate term of 7½ years, unanimously affirmed.

The court providently exercised its discretion in permitting three officers who were familiar with defendant, but were not eyewitnesses, to give lay opinion testimony, as an aid to the jury's identification process, that defendant was the man depicted in surveillance videotapes firing a handgun. This testimony "served to aid the jury in making an independent assessment regarding whether the man in the [videos] was indeed

the defendant" (*People v Russell*, 79 NY2d 1024, 1025 [1992]), because there was "some basis for concluding that the witness[es] [were] more likely to correctly identify the defendant from the [videos] than [was] the jury" (*People v Sanchez*, 95 AD3d 241, 249 [1st Dept 2012], *affd* 21 NY3d 216 [2013]). The videos were of marginal quality and the police officers' narration of the videos, as persons familiar with defendant and his personal characteristics, most notably a distinctive manner of walking, was helpful both in identifying him and explaining to the jury the rapid-paced and fleeting images of persons running back and forth in footage drawn from three video cameras depicting three overlapping areas around the scene of the shooting. Furthermore, such testimony is "commonly allowed in cases where the defendant has changed his or her appearance since being photographed or taped, and the witness knew the defendant before that change of appearance" (*People v Coleman*, 78 AD3d 457, 458 [1st Dept 2010], *lv denied* 16 NY3d 829 [2011]), and in this case there was some evidence of a change in defendant's appearance. We thus find it unnecessary to decide whether such evidence is an indispensable prerequisite to the admission of the type of testimony at issue. The court also providently exercised its discretion under the circumstances in permitting testimony on this subject from three officers, and defendant's argument regarding cumulativeness is

unavailing.

To the extent defendant is making a legal sufficiency claim, it is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits. We also find that the verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). In this case where defendant appears on the above-discussed videos to be firing a pistol, but no weapon was recovered, defendant challenges his weapon possession conviction on the ground that the evidence failed to establish that he fired an operable firearm, loaded with live ammunition. However, there was ample circumstantial evidence in that regard (*see People v Samba*, 97 AD3d 411, 414 [1st Dept 2012], *lv denied*, 20 NY3d 1065 [2013]). In addition to extensive background information demonstrating that this incident was a gunfight between defendant and a member of a rival gang, the videotape shows a pistol being fired three times, an officer heard gunshots, and the police recovered three cartridge cases at the scene. Defendant's far-

fetched hypotheses about his having fired, unwittingly or otherwise, an inoperable pistol or blank cartridges are without merit (*see People v Dixon*, 192 AD2d 338 [1st Dept 1993], *lv denied* 81 NY2d 1013 [1993]).

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4379N In re Capital Enterprises Co., Index 653961/16
Petitioner-Appellant,

-against-

Alvin Dworman,
Respondent-Respondent.

_____

Morrison Cohen LLP, New York (Alvin C. Lin of counsel), for appellant.

Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., New York (Christopher J. Sullivan of counsel), for respondent.

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Order, Supreme Court, New York County (Shirley Werner Kornreich, J.), entered March 3, 2017, which, to the extent appealed from as limited by the briefs, upon reargument, adhered to the original determination denying petitioner Capital Enterprises Co.'s motion to compel the arbitration of its partnership dissolution claim (including the distribution of assets), unanimously reversed, on the law, without costs, and the motion to compel granted.

Since the alleged oral agreement to sell or transfer partnership assets attempts to modify several substantive provisions of petitioner's partnership agreement concerning the distribution of partnership assets, the broad arbitration provision of the partnership agreement controls the parties' dispute (*see Matter of Helmsley [Wien]*, 173 AD2d 280 [1st Dept

1991]). The merits of the claims, such as the applicability of the statute of frauds, should be determined by the arbitrator (*see* CPLR 7501; *Matter of Praetorian Realty Corp. [Presidential Towers Residence]*, 40 NY2d 897, 898 [1976]).

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

ENTERED: JUNE 27, 2017

CLERK

Friedman, J.P., Webber, Gesmer, Kern, JJ.

4380 In re Oliver Douce, etc., Dkt. 67166/15
[M-1559] Petitioner,

-against-

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

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Oliver Douce, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Charles F. Sanders of counsel), for the Judges of the Criminal Court of the City of New York, New York County, respondents.

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

Now, upon reading and filing the papers in said proceeding, 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.

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

ENTERED: JUNE 27, 2017

CLERK

Sweeny, J.P., Mazzarelli, Moskowitz, Manzanet-Daniels, Kapnick, JJ.

4165 Sprint Communications Company, L.P., Plaintiff-Appellant, Index 154499/14

-against-

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

_____

Morrison & Foerster LLP, New York (Hollis L. Hyans of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kevin R. Harkins of counsel), for respondents.

_____

Order, Supreme Court, New York County (Lynn R. Kotler, J.), entered April 27, 2016, affirmed, with costs.

Opinion by Sweeny, J.P. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

John W. Sweeny, Jr., J.P.
Angela M. Mazzarelli
Karla Moskowitz
Sallie Manzanet-Daniels
Barbara R. Kapnick, JJ.

4165
Index 154499/14

_____x

Sprint Communications Company, L.P.,
Plaintiff-Appellant,

-against-

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

Plaintiff appeals from an order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered April 27, 2016, which denied its motion for summary judgment declaring that it is subject to the supervision of the New York State Department of Public Service and is therefore liable for the City utility tax and not the City unincorporated business income tax, and granted defendants' motion for summary judgment declaring that plaintiff is not a utility within the meaning of the City utility tax code and is therefore liable for both the utility tax and the unincorporated business income tax.

Morrison & Foerster LLP, New York (Hollis L. Hyans and Michael J. Hilkin of counsel), for appellant.

Zachary W. Carter, Corporation Counsel, New York (Kevin R. Harkins, Vincent D'Orazio, Andrew G. Lipkin and Andrea M. Chan of counsel), for respondents.

SWEENY, J.

In this appeal we are called upon to interpret the words of the New York City Administrative Code provisions relating to the taxation of communications companies. For the reasons that follow, we conclude that plaintiff is not a utility within the meaning of the Administrative Code and is therefore not exempt from the unincorporated business income tax.

The Administrative Code of City of New York (Admin Code) provisions under consideration are title 11, ch 11 (the Utility Tax) and Admin Code title 11, ch 5 (the Unincorporated Business Income Tax). Admin Code § 11-1102(a) provides that every utility and every vendor of utility services shall pay an excise tax based upon a percentage of its gross income. Section 11-1101(6) defines a "utility" as "[e]very person subject to the supervision of the department of public service." The Code further defines a "[v]endor of utility services" as "[e]very person not subject to the supervision of the department of public service, and not otherwise a utility as defined in [§ 11-1101(6)], who furnishes or sells . . . telecommunication services" (§ 11-1101[7]).

The Unincorporated Business Income Tax (UBT), in contrast to the Utility Tax, is based upon "taxable income" (Admin Code § 11-505). A "utility" subject to the Utility Tax is exempt from the UBT (§ 11-502[a]). Conversely, a "vendor of utility services" is

liable under both the Utility Tax and the UBT (*see id.*).

The Public Service Commission (PSC) is the part of the Department of Public Service (*see* Public Service Law § 4) that has jurisdiction over "telephone corporations" (*see* §§ 5{1][d]; 2[17]). This includes "every telephone line which lies wholly within the state and that part within the state of New York of every telephone line which lies partly within and partly without the state and to the persons or corporations owning, leasing or operating any such telephone" (Public Service Law § 5[1][d]).

Beginning in 1998, plaintiff's predecessor, a provider of local and long distance telephone and data services, began filing UBT returns as a vendor of utility services. At some point, plaintiff concluded that it was operating "subject to the supervision" of the PSC, and that, as a result, it was a "utility" as defined in Admin Code § 11-1101(6)and was therefore exempt from the UBT. It sought a refund of UBT taxes paid for tax years 2008-2010. Defendant Department of Finance (DOF) refunded amounts for tax years 2008 and 2009, but subsequently issued Notices of Deficiency to recover those sums, plus interest. DOF denied plaintiff's request for a refund of UBT taxes paid for tax year 2010. Its position on the Notices of Deficiency and denial of plaintiff's refund request for tax year 2010 was that plaintiff was not a "utility" as defined by statute

and hence was subject to the UBT.

Plaintiff then brought this action pursuant to CPLR 3001 seeking a declaration that it should be classified as a utility subject only to the Utility Tax. Plaintiff contends that since it paid the UBT as well as the Utility Tax for the tax years 2008-2010, it is entitled to a refund of taxes paid pursuant to the UBT for those years.

Defendants opposed the motion and cross-moved for summary judgment, arguing that plaintiff is not "supervised" by the PSC within the meaning of the Admin Code's Utility Tax provisions. Defendants contended that plaintiff is only subject to "light regulation" by the PSC, a designation reserved for companies subject to market-driven competition and is therefore subject to both the Utility Tax and the UBT.

The motion court denied plaintiff's motion and granted defendants' cross motion, declaring that plaintiff is not "subject to the supervision" of the PSC and is not a "utility" within the meaning of the code and, as a result, is subject to both the Utility Tax and the UBT.

The key issue in this case is whether plaintiff, an unincorporated business, is a vendor of utility services subject to both the Utility Tax and UBT, or a utility subject to the Utility Tax but exempt from the UBT. The resolution of this

issue rests on the interpretation of the language in the relevant taxing statutes.

The first issue raised is which party has the burden of proof in this matter. In determining whether "property, income, a transaction or event" is subject to taxation, a statute that levies a tax is construed most strongly against the government and in favor of the citizen (*see Matter of Grace v New York State Tax Commn.*, 37 NY2d 193, 196 [1975]). This implies that the burden of proof on the applicability of the tax is on defendants. However, although plaintiff argues in essence that the issue is a choice between two mutually exclusive taxing schemes, we agree with defendants that the language of the statutes is not mutually exclusive, but creates an exemption from the UBT if the entity is classified as a "utility." It is clear that the UBT applies to plaintiff in the absence of an exemption because its scope includes all unincorporated businesses within the City. Whether plaintiff is exempt from the UBT because it should be classified as a utility is the issue before us. Tax exclusions are never presumed or preferred, and before a taxpayer may have the benefit of one, the taxpayer must establish that it comes within the language of the exclusion. Further, the taxpayer must identify a provision of law plainly creating the exemption (*see Matter of Charter Dev. Co., L.L.C. v City of Buffalo*, 6 NY3d 578, 582

[2006]; *Matter of Mobil Oil Corp. v Finance Adm'r. of City of N.Y.*, 58 NY2d 95, 99 [1983]).

Thus, a taxpayer claiming an exclusion or exemption bears a heavy burden of establishing that clear and unambiguous statutory language creates such an entitlement (*Astoria Fed. Sav. & Loan Assn. v State of New York*, 222 AD2d 36, 42 [2d Dept 1996], *lv denied* 89 NY2d 807 [1997], *cert denied* 522 US 808 [1997]).

Since the issue here is whether plaintiff is an entity subject to a statutory exemption, the burden is on plaintiff to prove that it is entitled to the exemption.

We now turn to the question whether plaintiff falls within the Administrative Code's definition of a "utility." Plaintiff contends that the only conclusion that can be derived from the plain and ordinary language of the relevant statutory language is that it is a "utility," and thus exempt from the UBT. Plaintiff further argues that there is no need to look beyond the statutory language and that it was error for the motion court to do so.

The Utility Tax draws a distinction between a utility, defined as "[e]very person subject to the supervision of the department of public service" (Admin Code § 11-1101[6]) and a vendor of utility services, defined as "[e]very person not subject to the supervision of the department of public service .

. . who furnishes or sells . . . telecommunications services" (§ 11-1101[7]). The phrase "subject to the supervision of the department of public service" (i.e., the PSC), which is not further defined in the statute, is the key to the resolution of this case. Simply put, if plaintiff is "subject to the supervision" of the PSC, it is a utility exempt from the UBT; if it is not so supervised, it is a "vendor of utility services" not exempt from the UBT.

It order to demonstrate that it is "subject to the supervision" of the PSC, plaintiff alleges that, among other things, it is a telephone corporation required to comply with telecommunications regulations; it is subject to safety regulation by the PSC; it is required by PSC rules to provide services to hearing-and-speech impaired residents; it is required to file tariffs for local and long distance access based on PSC directives; it is required to comply with PSC orders concerning complaints and disputes; and it is required to file annual reports of gross operating revenues with the PSC. These examples, however, fall short of the type of supervision envisioned by the statute.

Although the language of the respective statutes appears at first glance to be unambiguous, it is nevertheless appropriate to review the legislative history behind their adoption. "The

primary consideration of courts in interpreting a statute is to 'ascertain and give effect to the intention of the Legislature'" (*Riley v County of Broome*, 95 NY2d 455, 463 [2000], quoting McKinney's Cons Laws of NY, Book 1, Statutes § 92[a], at 177). Generally, the clear words of a statute alone may be evidence of the Legislature's intent (*see Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 565 [1984]). Nevertheless, the legislative history may be relevant in a statute's interpretation and "is not to be ignored, even if words be clear" (McKinney's Cons Law of NY, Book 1, Statutes § 124, at 252). In such cases, there is no "rule of law" that prohibits a court from using legislative history in construing a statute, no matter how clear the words may appear on "superficial examination" (*New York State Bankers Assn. v Albright*, 38 NY2d 430, 437 [1975][internal quotation marks omitted]). Among other things to be considered are "the history of the times, the circumstances surrounding the statute's passage, and . . . attempted amendments" (McKinney's Cons Law of NY, Book 1, Statutes § 124, at 253 [footnotes omitted]).

The Court of Appeals has provided some guidance as to what constitutes "supervision" as used in this State's tax statutes. In *Matter of Astoria Gas Turbine Power, LLC v Tax Commn. of City of N.Y.* (7 NY3d 451 [2006]), the Court addressed the issue of how

the real property and particularly the equipment of a electric power generating plant should be taxed. The Court stated, "[T]he language 'subject to the supervision of the state department of public service' has been used repeatedly in this State's tax statutes to distinguish between noncompetitive public utilities and other market-driven business organizations" (*id.* at 455, citing *New York Steam Corp v City of New York*, 268 NY 137, 147 [1935]; *Cable & Wireless v City of N.Y. Dept. of Fin.*, 190 Misc 2d 410, 416 [Sup Ct, NY County 2001]). Its meaning depends on the type of the enterprise and the nature of the relationship with the PSC. The Court explained that in exchange for compliance with "strict regulation" by the PSC, traditional utilities are afforded certain important advantages not given to competitive enterprises, such as the exercise of monopoly power protecting them against competition (*Astoria*, 7 NY3d at 455). The *Astoria* court observed that in light of the various economic advantages given to them for providing necessary public services, noncompetitive public utilities are taxed differently than market-driven business entities. Significantly, the Court noted the difference between the "strict regulation" imposed on public utilities by the PSC, and the "light regulation" imposed on competitive enterprises covering "matters such as enforcement, investigation, safety, reliability and system improvement" (*id.*

[internal quotations marks omitted]), as well as certain "market mitigation measures" (*id.* at 456 n 2). Such "light regulation" does not constitute the type of "supervision" that defines an entity as a public utility for the purposes of the taxation statutes (*id.* at 456). The *Astoria* Court specifically held that the PSC's "regulation of [the plaintiff] is insubstantial when compared to a public utility's and does not subject the company to the 'supervision of the state department of public service' as contemplated by the Legislature" (*id.*). The Court concluded, "Because [the plaintiff] is subject to lightened governmental regulation, it cannot be considered a public utility and should not be classified like one" (*id.*).

The *Astoria* Court cited favorably to the decision in *Cable & Wireless v City of N.Y. Dept. of Fin.* (190 Misc 2d 410, 416 [Sup Ct, NY County 2001]). This case merits closer attention.

The question in *Cable & Wireless*, as it is here, was whether the plaintiff telecommunications firm was a utility or a vendor of utility services. The plaintiff there argued, as plaintiff does here, that, under the plain statutory language, it was "supervised" by the PSC and thus must be classified as a utility. In rejecting plaintiff's argument, the court conducted an extensive review of the legislative history of the statutes and their amendments, including the history of the circumstances

surrounding the statutes' initial passage in 1933 and their amendments through the 1940s to more recent times. After holding that plaintiff had the burden of proving that it was a supervised utility and thus exempt from the tax at issue, the court held that "in using the words 'subject to the supervision of the [PSC],' the City Council did not envision imposing the Utility Tax on gross income on entities such as [the plaintiff] which exhibit none of the characteristics of the monopolies to which the tax was intended to apply" (*id.* at 418). The plaintiff was therefore not a utility and was not entitled to an exemption from the UBT.

We find the reasoning in *Astoria* and *Cable & Wireless* to be equally applicable to the present case. By its own admission, plaintiff is "a competitive entity" that does not enjoy monopoly status. As a result, the "light regulation" by the PSC to which it is subject does not rise to the level of "supervision" necessary to classify it as a utility and thus warrant an exemption from the UBT.

There is no question that, as the court in *Cable & Wireless* noted, significant changes that were never envisioned by the original legislation have taken place in the telecommunications industry. Indeed, the evolution of the industry continues, with new methods of telecommunications appearing in and altering the

industry at a very rapid pace. These changes may, as plaintiff argues, require a reevaluation of what constitutes a utility. But as plaintiff also candidly acknowledges, changing the definition of utility would require legislative activity rather than judicial action. The Legislature is in the best position to amend the wording of these statutes to address changing industry conditions.

Accordingly, the order of the Supreme Court, New York County (Lynn R. Kotler, J.), entered April 27, 2016, which denied plaintiff's motion for summary judgment declaring that it is subject to the supervision of the New York State Department of Public Service and is therefore liable for the City utility tax and not the City unincorporated business income tax, and granted defendants' motion for summary judgment declaring that plaintiff is not a utility within the meaning of the City utility tax code

and is therefore liable for both the utility tax and the unincorporated business income tax, should be affirmed, with costs.

All concur.

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

ENTERED: JUNE 27, 2017

CLERK