SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 16, 2008

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Mazzarelli, J.P., Saxe, Friedman, Nardelli, JJ.

3034 Brian D. Bones, Index 102396/07
Plaintiff-Respondent,

-against-

Prudential Financial, Inc., et al.,
Defendants-Appellants.

Cahill Gordon & Reindel LLP, New York (Thomas J. Kavaler of counsel), for appellants.

Fensterstock & Partners LLP, New York (Jeanne M. Valentine of counsel), for respondent.

Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered August 23, 2007, which denied defendants' motion to dismiss the complaint, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Plaintiff's institution of an action against his former employer, defendant Prudential Insurance Company of America, "in accordance with" Labor Law § 740 constitutes "a waiver of the rights and remedies available under any other contract, collective bargaining agreement, law, rule or regulation or under the common law" (Labor Law § 740[7]), including his remaining claim for promissory estoppel, which arises from the allegedly

unlawful discharge (*Hayes v Staten Island Univ. Hosp.*, 39 AD3d 593 [2007]). Such a waiver may not be avoided by a plaintiff by amending the complaint, to withdraw the Labor Law § 740 claim (*Reddington v Staten Is. Univ. Hosp.*, 11 NY3d 80, 87-88 [2008]).

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

ENTERED: SEPTEMBER 16, 2008

CLERK

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4049 The People of the State of New York, Ind. 5101/05
Respondent,

-against-

Roosevelt Grant,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jessica Slutsky of counsel), for respondent.

Judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered August 2, 2006, convicting defendant, upon his plea of guilty, of attempted criminal possession of a forged instrument in the second degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

Defendant's claim that the instrument he possessed, a bent MetroCard, did not satisfy the forgery statute is essentially a challenge to the sufficiency of the evidence before the grand jury and is foreclosed by his guilty plea (*People v Taylor*, 65 NY2d 1 [1985]; *People v Greenman*, 49 AD3d 463, 464 [2008], *lv denied* 10 NY3d 934 [2008]). To the extent that defendant is challenging the sufficiency of his plea allocution, that claim is unpreserved since he failed to move to withdraw his plea on this ground. The narrow exception to the preservation rule explained in *People v Lopez* (71 NY2d 662, 665-666 [1998]) does not apply

since defendant's factual recitation did not negate any element of the crime or cast significant doubt on his guilt (*see People v Greenman*, 49 AD3d at 464). As an alternative holding, we reject defendant's claim on the merits (*see People v Mattocks*, 51 AD3d 301 [2008]).

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

ENTERED: SEPTEMBER 16, 2008

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4050 Kanagaraj Pandian, M.D., Index 17978/96
Plaintiff-Appellant,

-against-

New York Health and Hospitals Corporation, et al.,
Defendants-Respondents.

Sweeney Cohn Stahl Spector & Frank, White Plains (Julius W. Cohn of counsel), for appellant.

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

Order, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered on or about November 2, 2006, which granted defendants' motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, an anesthesiology resident in defendant Medical College, received negative performance evaluations both before and after an incident in which he was reported to have fallen asleep during surgery. The parties orally agreed that plaintiff would resign in exchange for withdrawal of disciplinary charges against him, and a promise of a "neutral" reference in the event of an employment or other residency inquiry.

Plaintiff's contract claim nowhere alleged that defendants agreed not to mention the incident in the evaluations they sent to the American Board of Anesthesiologists. Indeed, since the Medical College was required to provide evaluations to the Board

in order to ensure the competency of anesthesiologists, an agreement such as that advocated by plaintiff would be against public policy and would subvert the purpose of evaluating residents. Furthermore, plaintiff has not shown damages; he has not been denied employment or a medical license because of the negative evaluation, and only speculates that such would be the case. The claim was also barred by the statute of frauds, which requires a writing where a contract, by its terms, "is not to be performed within one year from the making thereof" (General Obligations Law § 5-701[a][1]).

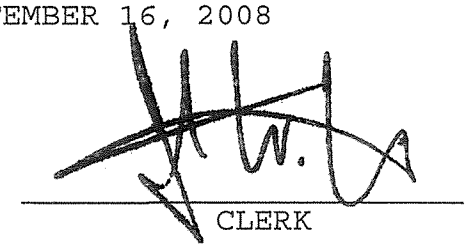
The defamation claim failed to demonstrate a triable issue of fact as to whether defendants were motivated by actual malice in making the negative statements in plaintiff's evaluations (*see Kasachkoff v City of New York*, 107 AD2d 130 [1985], *affd* 68 NY2d 654 [1986]). The prima facie tort claim failed to raise an issue of fact as to whether malevolence was the sole motive for defendants' otherwise lawful act (*see Slifer-Weickel, Inc. v Meteor Skelly*, 140 AD2d 320, 322-323 [1988]). The claim for interference with prospective economic advantage failed to allege a motive of malice or the infliction of injury by unlawful means other than self-interest or other economic considerations (*see Matter of Entertainment Partners Group v Davis*, 198 AD2d 63, 64 [1993]). Plaintiff similarly failed to demonstrate conduct so outrageous in character, and so extreme in degree, as to

constitute intentional infliction of emotional distress (*see Murphy v American Home Prods. Corp.*, 58 NY2d 293 [1983]). The allegations against Dr. Frost were unsubstantiated and belied by the record.

Finally, we reject the contention that the court should have dismissed defendants' motion for failure to annex their answer to the initial moving papers, inasmuch as the responsive pleading was attached to the reply papers (*see Welch v Hauck*, 18 AD3d 1096, 1098 [2005], *lv denied* 5 NY3d 708 [2005]).

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

ENTERED: SEPTEMBER 16, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 16, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
Karla Moskowitz
Dianne T. Renwick
Leland DeGrasse, Justices.

The People of the State of New York, Ind. 8164/02
Respondent,

-against- 4052

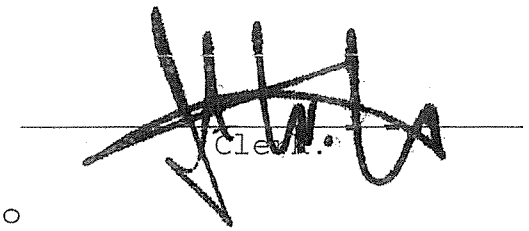
Robert Lebron,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Daniel FitzGerald, J.), rendered on or about July 7, 2005,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:



Clerk

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

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4053 Municipal High Income Fund, Inc., et al., Plaintiffs-Appellants, -against- Goldman, Sachs & Co., et al., Defendants-Respondents. [And a Third-Party Action]

Index 106273/05
590279/07

Berenbaum, Weinshienk & Eason, P.C., Denver, CO (Bruce E. Rohde, of the Bar of the State of Colorado, admitted pro hac vice, of counsel), and Davis & Ceriani, P.C., Denver, CO (Michael Cillo of the Bar of the State of Colorado, admitted pro hac vice, of counsel), for appellants.

Boies, Schiller & Flexner LLP, New York (David A. Barrett of counsel), for Goldman, Sachs & Co., respondent.

LeClair Ryan, P.C., Boston, MA (Warren D. Hutchison, of the Bar of the State of Massachusetts, admitted pro hac vice, of counsel), for R.W. Beck, Inc., respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 20, 2007, which denied plaintiffs' motion to dismiss defendants' statute of limitations defenses, unanimously affirmed, with costs.

After the Circuit Court of Wayne County, Michigan, dismissed a prior action without prejudice to plaintiffs commencing an action in New York, on the ground that New York was a more convenient forum than Michigan, plaintiffs took an appeal in Michigan and instituted this action in New York. Plaintiffs now seek dismissal of defendants' statute of limitations defenses in

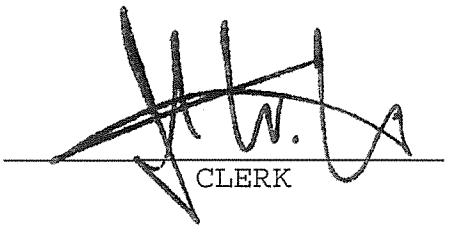
the New York action on the ground that defendants' successful forum non conveniens argument in the Michigan action presupposed the availability of a New York forum and therefore judicially estops them from asserting the statute of limitations as a defense.

Dismissal of the statute of limitations defense is not warranted. The Michigan appellate court, in affirming the dismissal of the Michigan action on the ground of forum non conveniens did not condition that dismissal on defendants' waiver in the New York action of any statute of limitations defenses and knew that defendants were asserting that plaintiffs' claims in the New York action were time-barred. In addition, defendants consistently maintained in the Michigan action, as well as the New York action, that plaintiffs' claims were time-barred under the New York statute of limitations as well as Michigan's (*see Gale P. Elston, P.C. v Dubois*, 18 AD3d 301, 303 [2005] [to be precluded under doctrine of judicial estoppel, position in subsequent action must be contrary to position successfully taken in prior proceeding]). Although the Michigan Court of Appeals deemed the issue of timeliness under the New York statute abandoned due to defendants' "fail[ure] to brief this argument with citation to appropriate authority," and, on the basis of this abandonment, the Michigan appellate court "assume[d]" the availability of a New York forum, this abandonment of the New

York statute in the Michigan action is not a waiver, i.e., a clear, unmistakable, intentional relinquishment (*see Matter of Professional Staff Congress-City Univ. of N.Y. v New York State Pub. Relations Bd.*, 7 NY3d 458, 465 [2006]), of the New York statute in the New York action. We note that plaintiffs, while acknowledging the availability of a New York forum and the applicability of the New York statute of limitations, never requested the Michigan appellate court to condition any forum non conveniens dismissal on a statute-of-limitations waiver.

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

ENTERED: SEPTEMBER 16, 2008



At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 16, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
Karla Moskowitz
Dianne T. Renwick
Leland DeGrasse, Justices.

The People of the State of New York, Ind. 3621/05
Respondent,

-against- 4055

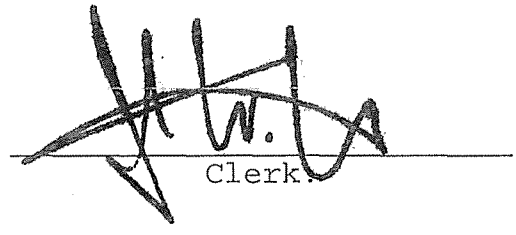
John Duncan,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael Obus, J.), rendered on or about July 20, 2006,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:



Clerk.

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

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4056-
4056A 1700 Broadway Co., Index 103794/07
Plaintiff-Appellant,

-against-

Greater New York Mutual Insurance Company,
Defendant-Respondent.

Conway, Farrell, Curtin & Kelly, P.C., New York (Darrel John of counsel), for appellant.

Thomas D. Hughes, New York (Richard C. Rubinstein of counsel), respondent.

Order and judgment (one paper), Supreme Court, New York County (Emily Jane Goodman, J.), entered February 19, 2008, which granted defendant's motion to dismiss the complaint and declared it was not required to defend or indemnify plaintiff in an underlying personal injury action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered May 15, 2008, which denied plaintiff's motion for reargument, unanimously dismissed, without costs, as taken from a nonappealable paper.

Under the terms of a commercial general liability policy issued by defendant, plaintiff, named as an additional insured, was required to give defendant notice of a claim or suit as soon as practicable. Absent a valid excuse, the failure to satisfy this notice requirement, which is a condition precedent to

coverage, vitiates the policy (*Security Mut. Ins. Co. of N.Y. v Acker-Fitzsimons Corp.*, 31 NY2d 436, 440 [1972]).

It is undisputed that plaintiff did not serve defendant with notice of the underlying personal injury action until eight months after plaintiff was served with the summons and complaint naming it as a defendant therein. Plaintiff has offered no excuse for this delay. Such delay without explanation constituted late notice as a matter of law. Defendant was not required to demonstrate prejudice by reason of the delay in order to disclaim coverage. New York has generally adhered to a no-prejudice rule, which allows a personal injury insurer in commercial general liability cases to disclaim coverage due to late notice of claim regardless of whether or not the insurer suffered any harm by reason of the delay (*see Argo Corp. v Greater N.Y. Mut. Ins. Co.*, 4 NY3d 332 [2005]).[1]

The named insured cannot be deemed to have provided timely notice of the lawsuit to defendant on behalf of plaintiff since the notice requirement in the policy applies equally to both primary and additional insureds, and notice provided by one insured in accordance with the policy terms will not be imputed

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[1]Starting in January 2009, policies will be required to permit an insured such as plaintiff to bring this type of action notwithstanding late notice of claim, with the burden on the insurer to establish prejudice from the delay (L 2008, ch 388, § 2, § 4, amending Insurance Law § 3420[a][6], [c][2][A]).

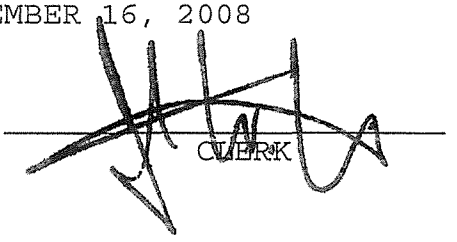
to another (*Travelers Ins. Co. v Volmar Constr. Co.*, 300 AD2d 40, 44 [2002]). An exception might exist where two claimants are similarly situated, i.e., where their interests are not adverse to each other, in which case notice by one may also be deemed applicable to a claim by another (*see e.g. Motor Vehicle Acc. Indem. Corp. v United States Liab. Ins. Co.*, 33 AD2d 902 [1970]). Here, plaintiff, an out-of-possession landlord of the premises where the accident in the underlying personal injury action took place, had an interest adverse to the primary insured, the tenant in the premises, from the moment the complaint was served naming them both as defendants. This adversity was confirmed when plaintiff and the primary insured filed cross claims against each other. Under these circumstances, notice of suit by the primary insured cannot be deemed timely notice by plaintiff.

In *New York Tel. Co. v Travelers Cas. & Sur. Co. of Am.* (280 AD2d 268 [2001]), cited by plaintiff, the focus was on the time the primary insured forwarded the complaint to the insurer. There the primary and additional insureds' interests were not adverse when the former was initially served with the summons and complaint in the underlying action. Here, plaintiff and the primary insured were simultaneously served with the summons and complaint, and their interests were adverse at the time the

primary insured served defendant with notice of the lawsuit, even though plaintiff and the primary insured had not yet formally served cross claims against each other.

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

ENTERED: SEPTEMBER 16, 2008



Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4057 Minnette F. Beecham, Index 28018/03
Plaintiff-Respondent,

-against-

New York City Transit Authority, et al.,
Defendants-Appellants.

Wallace D. Gossett, Brooklyn (Anita Isola of counsel), for appellants.

Steven Wildstein, P.C., Great Neck (Michael K. Maiolica of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Lucy Billings, J.), entered on or about April 25, 2007, in plaintiff's favor, unanimously modified, on the facts, to the extent of directing a new trial on the issue of damages for past pain and suffering unless plaintiff stipulates to a reduction of the verdict from $500,000 to $300,000, and otherwise affirmed, without costs.

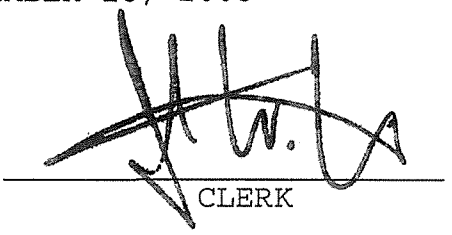
The trial court correctly refused to admit into evidence the history portion of plaintiff's Emergency Room record, which was offered to prove the truth of the facts asserted. This entry was not admissible as a business record because it was not germane to plaintiff's diagnosis or treatment (*Williams v Alexander*, 309 NY 283 [1955]; *Gunn v City of New York*, 104 AD2d 848, 849 [1984]).

The jury's apportionment of liability in plaintiff's favor was based on a fair interpretation of the evidence (*see Nicastro v Park*, 113 AD2d 129 [1985]). However, the award for past pain

and suffering materially deviated from reasonable compensation under the circumstances to the extent indicated (CPLR 5501[c]).

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

ENTERED: SEPTEMBER 16, 2008



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Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4058 In re Darrin C.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for presentment agency.

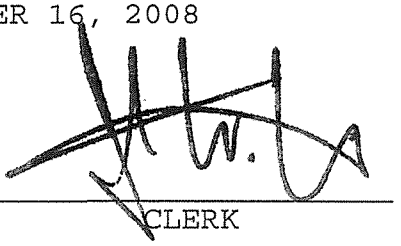
Order of disposition, Family Court, Bronx County (Juan M. Merchan, J.), entered on or about August 7, 2007, which adjudicated appellant a juvenile delinquent, upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of robbery in the second degree, attempted robbery in the second degree, grand larceny in the fourth degree and criminal possession of stolen property in the fifth degree, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility. The evidence established that appellant forcibly took property from one victim and attempted to take property from the other

victim (*see e.g. People v Spencer*, 255 AD2d 167 [1998], *lv denied* 93 NY2d 879 [1999]; *People v Green*, 262 AD2d 225 [1999]). The course of events, viewed as a whole, supports the inference that appellant was "aided by another person actually present" (Penal Law § 160.10[1]) in each instance (*see People v Moses*, 162 AD2d 311 [1990]). We have considered and rejected appellant's remaining claims.

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

ENTERED: SEPTEMBER 16, 2008



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Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4059 The People of the State of New York, Ind. 1265/05
Respondent,

-against-

Charles Lark,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jung Park of counsel), for respondent.

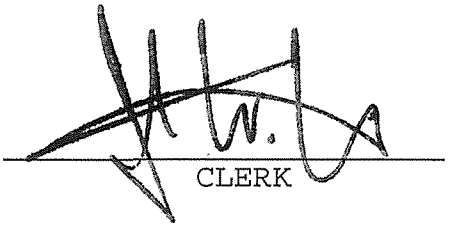
Judgment, Supreme Court, New York County (Edwin Torres, J.), rendered July 6, 2006, convicting defendant, after a jury trial, of two counts of criminal contempt in the first degree, and sentencing him, as a second felony offender, to concurrent terms of 2 to 4 years, unanimously affirmed.

The court properly denied defendant's eve-of-trial request for assignment of new counsel, after giving defendant a sufficient opportunity to establish good cause (*see People v Beriguette*, 84 NY2d 978 [1994]; *People v Hansen*, 37 AD3d 318 [2007]). In his oral argument, defendant simply asserted that his attorney never discussed the case with him. This assertion did not require further inquiry, since it was both conclusory and contradicted by facts known to the court. Furthermore, defendant presented a written submission in conjunction with his oral application, and his present claim that the court neglected or

declined to read it is without record support (*see People v Kinchen*, 60 NY2d 772, 773-774 [1983]). We also find that defendant never requested to represent himself, that the court never made any ruling in that regard, and that defendant's present arguments along those lines are without merit.

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

ENTERED: SEPTEMBER 16, 2008



Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4060-
4060A Victoria Kremen, et al., Index 101739/06
Plaintiffs-Respondents,

-against-

Benedict P. Morelli & Associates PC,
also known as Morelli Ratner PC, et al.,
Defendants-Appellants,

Schapiro & Reich Esqs., et al.,
Defendants.

Morelli Ratner PC, New York (Scott J. Kreppein of counsel), for appellants.

Richard Frank, P.C., New York (Scott H. Seskin of counsel), for respondents.

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered October 22, 2007, which denied the motion to dismiss the amended complaint, unanimously reversed, on the law, without costs, and the motion granted with respect to the Morelli and Ratner defendants. The Clerk is directed to enter judgment in favor of defendants Morelli Ratner PC, Benedict P. Morelli Esq., David S. Ratner Esq. and Jennie L. Shatynski Esq. dismissing the amended complaint as against them. Appeal from order, same court and Justice, entered May 9, 2007, which denied the Morelli/Ratner defendants' motion to dismiss the original complaint, unanimously dismissed, without costs.

Plaintiffs allege negligence in legal representation in their original medical malpractice action, which was dismissed as

untimely. Specifically, they allege failure to argue their entitlement to the "bankruptcy toll" of the statute of limitations. Title 11 USC § 108(a)(2) provides debtors a two-year toll of an existing statute of limitations period, but only if "such period has not expired before the date of the filing of the petition." Here, the bankruptcy toll was not triggered because the statute of limitations had already run.

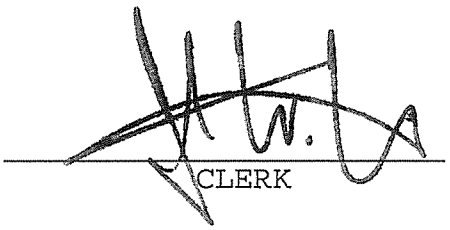
Defendants' argument is consistent with both the explicit text of the statute and the estoppel theory underpinning fraudulent concealment. "To be entitled to an estoppel, the plaintiff must show, in addition to fraudulent conduct by the physician, that he was diligent in commencing the action once he learned of the malpractice" (*Harkin v Culleton*, 156 AD2d 19, 21 [1990], *lv dismissed* 76 NY2d 936 [1990]). Simply filing a bankruptcy petition, in which plaintiffs did not even include the possible medical malpractice claim on their initial schedule of assets, does not demonstrate diligent pursuit of this claim. To hold otherwise would alter the elements of fraudulent concealment so as to excuse the due diligence inquiry, thus changing, rather than applying, the applicable non-bankruptcy law.

Moreover, plaintiffs lack standing to bring this action. Once the bankruptcy estate was fully administered and the trustee abandoned the claim, the cause of action revested solely in plaintiffs' names. When a trustee abandons a claim as to the

debtor, the latter may no longer invoke the benefit of 11 USC § 108(a)(2) (*see In re Marshall*, 307 BR 517, 520 [ED Va 2003]).

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

ENTERED: SEPTEMBER 16, 2008



Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4061 The People of the State of New York, Ind. 6317/05
Respondent,

-against-

Robert Monfiston,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Jared Wolkowitz of counsel), for respondent.

Judgment, Supreme Court, New York County (Carol Berkman, J.), rendered January 3, 2007, convicting defendant, after a jury trial, of robbery in the first degree, and sentencing him, as a second felony offender, to a term of 8 years, unanimously affirmed.

The court's summary denial of defendant's suppression motion was proper. Defendant received detailed information about the circumstances of his arrest, and he was in a position to rebut the People's position that the police had probable cause to search him. Accordingly, it was not enough for defendant to deny that he committed the crime or to state that he was doing nothing suspicious or unlawful at the time of his arrest (*see People v France*, 50 AD3d 266 [2008]; *People v Roldan*, 37 AD3d 300 [2007], *lv denied* 9 NY3d 850 [2007]). Since defendant did not dispute that the victim had chased him and had pointed him out to the

police, the allegations in his motion papers did not raise any factual issue warranting a hearing.

The court properly denied defendant's motion for substitution of counsel. The court, which conducted a sufficient inquiry into defendant's complaints and accorded him ample opportunity to be heard, correctly found that there was no good cause for assignment of another attorney to defendant on the eve of trial (*see People v Linares*, 2 NY3d 507, 511 [2004]). Counsel provided sound advice on the likelihood of conviction after trial and the advisability of pleading guilty, and defendant's distress at hearing unwelcome news was not a basis for substitution.

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

ENTERED: SEPTEMBER 16, 2008

CLERK

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4062-
4062A The People of the State of New York, Ind. 8274/00
Respondent, 2414/04

-against-

Jorge Mateo,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Gregory S. Chiarello of counsel), for appellant.

Judgment, Supreme Court, New York County (Arlene D. Goldberg, J.), rendered on or about June 11, 2002, unanimously dismissed, and judgment, same court (Brenda Soloff, J.), rendered June 7, 2007, unanimously affirmed.

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

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

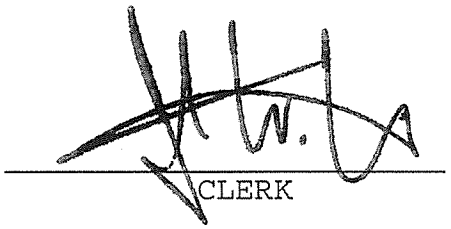
Denial of the application for permission to appeal by the judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

M-4029 - People v Jorge Mateo

Motion seeking to file pro se supplemental brief denied.

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

ENTERED: SEPTEMBER 16, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 16, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
Karla Moskowitz
Dianne T. Renwick
Leland DeGrasse, Justices.

The People of the State of New York, Ind. 1531/06
Respondent,

-against- 4063

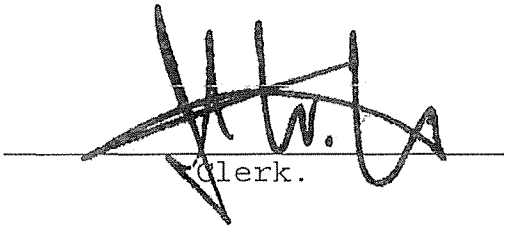
Julio Sanchez,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (A. Kirke Bartley, Jr., J.), rendered on or about April 25, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:



Clerk.

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

Gonzalez, J.P., Buckley, Moskowitz, DeGrasse, JJ.

4064 The People of the State of New York, Ind. 339/04
Respondent,

-against-

Michael Williams,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Peter D. Coddington of counsel), for respondent.

Judgment, Supreme Court, Bronx County (Megan Tallmer, J.), rendered January 2, 2007, convicting defendant, after a jury trial, of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant engaged in a pattern of physically abusing his five-week-old son, which culminated in an incident where he slammed his son onto his crib mattress five times with great force, and then held him in a choke hold. These acts, which created a grave risk of serious physical injury or death to the child, evinced a depraved indifference to human life (*see* Penal Law § 125.25[4]; *People v Bowman*, 48 AD3d 178 [2007], *lv denied* 10 NY3d 808 [2008]). Defendant's attempts to revive the child and obtain help may have shown a lack of homicidal

intent, but they did not undermine the jury's finding that he acted with depraved indifference at the time he inflicted the fatal injuries.

The court did not violate defendant's right to free exercise of his religion when it prohibited him from displaying his Bible in the presence of the jury, an act that would have posed the risk of evoking sympathy. The compelling interest of guaranteeing a fair trial to both sides justified the court's incidental restriction on defendant's religious practices (*see La Rocca v Lane*, 37 NY2d 575, 582-584 [1975], *cert denied* 424 US 968 [1976]; *People v Bryant*, 280 AD2d 403 [2001], *lv denied* 96 NY2d 826 [2001]).

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

ENTERED: SEPTEMBER 16, 2008

CLERK

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4065 Verizon New York, Inc., Index 100191/07
Plaintiff-Respondent,

-against-

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

Richard W. Babinecz, New York (Helman R. Brook of counsel), for appellant.

Pillinger Miller Tarallo, LLP, Elmsford (David E. Hoffberg of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered March 13, 2008, which, in an action by plaintiff Verizon to recover for damage to its cables and other property allegedly caused by a burnout in defendant Con Ed's nearby manhole, denied defendant's motion to dismiss the complaint for failure to preserve the damaged property, unanimously modified, on the facts, to direct that plaintiff produce the damaged cables at its own cost, and otherwise affirmed, without costs.

Defendant moved to dismiss the complaint on the ground of spoliation after plaintiff stated in its bill of particulars and discovery responses that it was "no longer in possession of the damaged cables." In opposition to the motion, plaintiff stated that the damaged cables were actually left buried in the ground

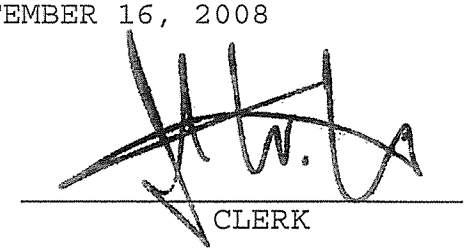
and could be inspected by defendant at plaintiff's manhole. The motion court adjourned the motion for such inspection, but was advised when the parties returned that the inspection required a excavation at a cost that neither party was willing to assume. The motion court then denied the motion, stating only that an issue of fact existed as to whether the damage to plaintiff's cables was caused by the burnout in defendant's manhole, as plaintiff claims, or by plaintiff's negligence in permitting its cables to undergo a process known as electrolysis, as defendant claims. While we are satisfied that the unavailability of the cables "substantially hinders" defendant's ability to prove that the damage was caused by electrolysis (*see Cohen Bros. Realty v Rosenberg Elec. Contrs.*, 265 AD2d 242, 244 [1999], *lv dismissed* 95 NY2d 791 [2000]), dismissal is too drastic a remedy where the cables were not destroyed and can be inspected if excavated. Instead, plaintiff's failure to preserve for inspection even a portion of the damaged cables, despite its belief all along that the damage was caused by the burnout in defendant's manhole, warrants that plaintiff incur the cost of the excavation (*cf. Ortega v City of New York*, 9 NY3d 69, 76 [2007]).

M-4008 - Verizon NY, Inc. v Con Ed. Company, Inc.,

Motion seeking leave to expand record on appeal denied.

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

ENTERED: SEPTEMBER 16, 2008



CLERK

Gonzalez, J.P., Buckley, Moskowitz, Renwick, DeGrasse, JJ.

4066-
4067 The People of the State of New York, Ind. 585/01
Respondent,

-against-

Randy Rodriguez,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (David A. Crow of counsel), and Proskauer Rose LLP, New York (Cynara Hermes of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Paula-Rose Stark of counsel), for respondent.

Judgment, Supreme Court, New York County (Leslie Crocker Snyder, J. at plea; Charles H. Solomon, J. at sentence), rendered October 10, 2003, convicting defendant of criminal sale of a controlled substance in the first degree and conspiracy in the second and fourth degrees, and sentencing him, as a second felony offender, to an aggregate term of 20 years to life, and order, same court (Charles H. Solomon, J.), entered on or about May 25, 2007, which denied defendant's motion to be resentenced pursuant to the Drug Law Reform Act (L 2004, ch 738), unanimously affirmed.

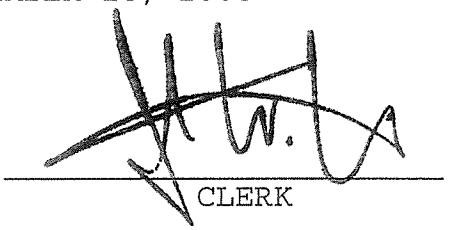
The court properly determined that substantial justice dictated denial of defendant's resentencing application. The court properly considered the totality of circumstances, including the amount of drugs involved in this case and

defendant's extensive history of large scale trafficking in narcotics and firearms (*see People v Salcedo*, 40 AD3d 356 [2007], *lv dismissed* 9 NY3d 850 [2007]; *People v Gonzalez*, 29 AD3d 400 [2006], *lv denied* 7 NY3d 867 [2006]), and properly concluded that these factors outweighed any positive aspects of defendant's prison record. The court neither misapplied the statute nor considered inappropriate criteria.

With regard to defendant's direct appeal, we perceive no basis for reducing the sentence.

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

ENTERED: SEPTEMBER 16, 2008



CLERK

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 16, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
Karla Moskowitz
Dianne T. Renwick
Leland DeGrasse, Justices.

The People of the State of New York, Ind. 3904/06
Respondent,

-against- 4068

Ayana Anderson,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Rena K. Uviller, J.), rendered on or about July 23, 2007,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon,

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

ENTER:

Clerk

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

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on September 16, 2008.

Present - Hon. Luis A. Gonzalez, Justice Presiding
John T. Buckley
Karla Moskowitz
Dianne T. Renwick
Leland DeGrasse, Justices.

In re William Hill
Petitioner,

-against-

4069
[M-3051]

Hon. Thomas Farber, J.S.C, et al.,
Respondents.

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.

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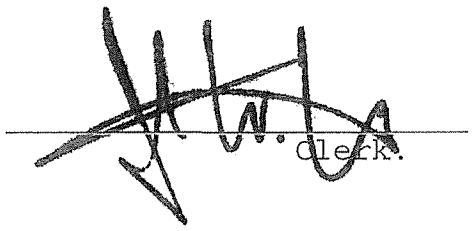

Clerk.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Eugene Nardelli
John W. Sweeny, Jr., JJ.

3154
Index 602229/99

x

Ulico Casualty Company,
Plaintiff-Respondent,

-against-

Wilson, Elser, Moskowitz, Edelman
& Dicker, et al.,
Defendants-Appellants.

x

Defendants appeal from an order of the Supreme Court, New York County (Marcy Friedman, J.), entered April 17, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability on its first cause of action for breach of fiduciary duty, directed that defendant disgorge the compensation received during the period of its disloyalty and directed an assessment of its amount, and denied defendants' cross motion for summary judgment dismissing the complaint.

Stroock & Stroock & Lavan LLP, New York (Ernst H. Rosenberger and Meredith L. Strauss of counsel), for appellants.

Epstein Becker & Green, P.C., New York (Barry A. Cozier, Peter L. Altieri and Jennifer M. Horowitz of counsel), for respondent.

TOM, J.P.

In this action for professional malpractice arising out of defendant law firm's[1] representation of plaintiff Ulico Casualty Co., Supreme Court awarded plaintiff partial summary judgment as to liability on its first cause of action, finding that defendant breached its fiduciary duty by assisting efforts to establish nonparty Legion Insurance Company in a competing business and lure away plaintiff's customers. The court directed that defendant forfeit the fees it received for the duration of the firm's breach and directed an assessment. While we agree that the complaint states viable grounds for recovery, our analysis proceeds on a different basis, and we conclude that defendant's liability is limited to the claim for legal malpractice.

Plaintiff specializes in the provision of trustee and fiduciary liability (TFL) insurance, marketing its products primarily to unions and their managed benefit plans. Defendant served as plaintiff's claims counsel from April 1986 through June 1999 under a written retainer agreement. The firm also rendered legal services jointly to plaintiff's managing general agent, which conducts its operations in New York as Professional Intermediaries Associates, Inc. and in New Jersey as Professional Indemnity Agency, Inc. (collectively, PIA).

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[1] The law firm, sued herein as Wilson, Elser, Moskowitz, Edelman & Dicker and Wilson, Elser, Moskowitz, Edelman & Dicker LLP, is collectively referred to as defendant.

Defendant's relationship with PIA, as counsel, predates the relationship of either entity with plaintiff. TFL insurance was devised by Thomas Wilson, a partner in the law firm, and Marshall Rattner, PIA's principal. PIA drafted the first TFL policy and fostered acceptance of the concept by syndicates at Lloyd's of London. PIA provides TFL policies to a number of insurers, also functioning as their managing general agent, and it is undisputed that PIA's management agreement with plaintiff was not exclusive.

Defendant's retainer agreement with plaintiff similarly contains a provision that the firm's representation of the insurance company, as claims counsel, is nonexclusive, stating that defendant "shall devote all the time necessary to the business of the Company, but shall not by this retainer be prevented or barred from taking other employment of a similar or other legal character by reason of the employment herein specified." The firm, without objection from plaintiff, functioned as claims counsel for other insurers, including Lloyd's.

This dispute has its origins in 1995, when PIA decided to establish a business relationship with Legion Insurance Company. The motivation for this step, as expressed by Marshall Rattner, was that the quality of plaintiff's operation was compromised by "poor people, poor management, poor decisions, basically a company just riddled with incompetence, and we knew we had to get

out of there before it took us down." PIA planned to offer its customers quotes on policies issued by both plaintiff and Legion. After reaching an agreement in principle with Legion, PIA asked defendant to confirm that PIA could serve as Legion's managing general agent. PIA also asked defendant to confirm that the law firm could act as claims counsel for Legion. In both cases, defendant informed PIA that the proposed activities were not barred by any existing relationship with plaintiff, which was nonexclusive. Finally, defendant was asked not to disclose PIA's intention to underwrite insurance for Legion, a request that defendant honored.

Defendant filed the necessary paperwork to permit Legion to offer TFL insurance in all 50 states and the District of Columbia. Included in the papers filed was a continuity endorsement that facilitated the policyholder's transition between insurers by treating the Legion policy as a renewal of the one issued by plaintiff. Also filed was an endorsement designed to enhance Legion's coverage over the TFL insurance being offered by plaintiff. In accordance with PIA's instructions, defendant delayed filing applications in Pennsylvania and California until last because PIA knew that these filings would be communicated to plaintiff by a reporting service to which it subscribed. By mid-1997, plaintiff had become aware that defendant had filed applications nationally on

Legion's behalf, and by early fall plaintiff had learned that the firm was acting as Legion's claims counsel. In early February 1998, plaintiff sent a 30-day notice to PIA terminating its management agreement. By notice effective June 30, 1999, plaintiff ended its association with defendant, stating it had recently received information indicating that the firm "has breached its fiduciary duties to Ulico as counsel and has acted in a manner directly contrary to our interests."

In the year prior to defendant's discharge as claims counsel, at a time when the firm was also acting as claims counsel to Legion Insurance Co., three claims were made under Ulico policies by union benefit funds.[2] The benefit funds subsequently replaced their Ulico policies with TFL insurance policies obtained from Legion. Defendant sent reservation of rights letters to the funds on behalf of plaintiff, and plaintiff ultimately settled the claims, which were paid after Ulico severed its relationship with defendant.

The second amended complaint asserts a cause of action for malpractice. This claim encompasses the three benefit fund claims and alleges that, in handling these matters, defendant failed to exercise that degree of diligence and care normally possessed by attorneys of ordinary skill and knowledge. In

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[2] A fourth claim asserted as a basis of liability in the complaint has been abandoned by plaintiff on appeal.

connection with defendant's role in assisting PIA to set up Legion as a competitor, the complaint also asserts causes of action for breach of fiduciary duty, aiding and abetting PIA's breach of fiduciary duty, tortious interference with plaintiff's contractual relations and tortious interference with its prospective economic advantage. However, the complaint does not confine the malpractice cause of action to defendant's dual representation of plaintiff and Legion on the benefit fund claims, but incorporates the same factual allegations advanced in support of the causes of action for breach of fiduciary duty and aiding and abetting PIA's breach of fiduciary duty. The complaint seeks forfeiture of the amount received by defendant as compensation for its breach of fiduciary duty and $3.5 million for legal malpractice. However, all causes of action seek the same amount, "believed to be in excess of $25 million," in consequential damages, together with punitive damages.

Plaintiff moved for summary judgment on its cause of action for breach of fiduciary duty and for an order directing defendant to turn over legal fees received during the period of its disloyalty. Defendant cross-moved for summary judgment dismissing the complaint.

Supreme Court found the complaint meritorious. It declined to dismiss the malpractice cause of action on the basis of conflicting deposition testimony concerning whether defendant had

preserved its notice and coverage defenses as to the three benefit fund claims before requesting authority to settle them for as much as $4 million. The court further declined to dismiss plaintiff's breach of fiduciary duty cause of action as duplicative of its malpractice cause of action. It reasoned that the two claims arose from different facts – the malpractice claim from defendant's dual representation of plaintiff and Legion as claims manager, and the breach of fiduciary duty claim from defendant's assistance to PIA in transferring plaintiff's business to Legion. The court denied dismissal of the claim for aiding and abetting PIA's breach of fiduciary duty, reasoning that defendant failed to demonstrate its lack of "'substantial assistance' to PIA in connection with the latter's breach." Finally, the court declined to dismiss plaintiff's claim for tortious interference with contractual relations, rejecting defendant's assertion that PIA's contract with plaintiff was nonexclusive and noting that a tortious interference claim can be based on even an at-will or a voidable contract. However, the court granted the cross motion to the extent of dismissing plaintiff's claim for tortious interference with prospective economic advantage, a ruling with which plaintiff does not take issue and the propriety of which is not before us.

As to plaintiff's motion for partial summary judgment, the court rejected defendant's contention that it was unaware of

PIA's intention to effect a transfer of plaintiff's clients to Legion, identifying two pieces of documentary evidence establishing that defendant knowingly assisted PIA's efforts. The court therefore granted partial summary judgment to plaintiff on its first cause of action for breach of fiduciary duty and granted plaintiff's motion to recover legal fees to the extent of directing the assessment and forfeiture of fees paid to defendant from January 1, 1996 through June 30, 1999, the time period during which the court found defendant to have been disloyal to plaintiff.

It is defendant's position that the retainer agreement limits its representation to "claims counsel" and reflects the parties' understanding that defendant would provide similar representation to other companies offering TFL insurance coverage. Defendant contends that, in the absence of evidence of its misuse of client confidences, there is no basis upon which to find that the law firm breached its professional duty to plaintiff by providing legal assistance to PIA in establishing Legion as a provider of TFL insurance.

We agree that plaintiff has stated a viable basis for seeking recovery against defendant. The complaint alleges that in representing plaintiff on the three claims filed by union benefit funds under Ulico policies, defendant acted under a conflict of interest due to its simultaneous representation of

plaintiff and Legion, which had issued TFL policies to the benefit funds when coverage under their Ulico policies expired. The complaint asserts that, as a result of defendant's divided loyalties, the law firm's professional judgment was impaired, causing it to recommend that Ulico provide coverage despite the expiration of its policies prior to the date on which the claims were filed (*see Greene v Greene*, 47 NY2d 447, 451 [1979]).

We further agree that the cause of action asserted as breach of fiduciary duty is not redundant because it is based upon different facts than those underlying the cause of action alleging legal malpractice (*see Estate of Nevelson v Carro, Spanbock, Kaster & Cuiffo*, 290 AD2d 399, 400 [2002]). However, we do not agree that plaintiff may seek to recover damages for defendant's breach of fiduciary duty on legal grounds less rigorous than those required for recovery under a theory of legal malpractice. Nor do we perceive any reason to summarily decide the question of the forfeiture of defendant's legal fees on a preliminary record.

However the various claims asserted by plaintiff are denominated in the complaint, all arise from defendant's failure to adhere to its duty to accord undivided loyalty to its client. It is no defense to defendant's alleged violation of its professional duty that it reserved the right to accept "other employment of a similar or other legal character" during its

representation of plaintiff. It is axiomatic that the relationship of attorney and client is fiduciary: "The attorney's obligations, therefore, transcend those prevailing in the commercial market place" (*Matter of Cooperman*, 83 NY2d 465, 472 [1994]), and a firm may not circumscribe its professional obligations by purporting to transform the attorney-client relationship into an arm's length commercial affiliation. Thus, a law firm may not evade its professional responsibilities to a client by the expedient of inserting contractual limitations on the firm's ethical duties into the retainer agreement (*see Swift v Ki Young Choe*, 242 AD2d 188, 192 [1998], citing Code of Professional Responsibility DR 6-102(A) [22 NYCRR 1200.31(a)]).

Because the attorney-client relationship is both contractual and inherently fiduciary, a complaint seeking damages alleged to have been sustained by a plaintiff in the course of such a relationship will often advance one or more causes of action based upon the attorney's breach of some contractual or fiduciary duty owed to the client. The courts normally treat the action as one for legal malpractice only (*see e.g. Brooks v Lewin*, 21 AD3d 731, 733 [2005], *lv denied* 6 NY3d 713 [2006] [claims for breach of fiduciary duty and punitive damages dismissed on motion]; *Tabner v Drake*, 9 AD3d 606, 611 [2004] [contract claim dismissed as asserting no obligation beyond fiduciary duty owed to client]; *Nevelson*, 290 AD2d at 400 [claims for breach of fiduciary duty

and breach of contract predicated on same allegations and seeking identical relief to malpractice cause of action dismissed as redundant]; *Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38, 39 [1998] [contract and fraudulent misrepresentation claims dismissed as redundant of malpractice claim; error to dismiss conflict of interest claim as precluded by prior decision]).

Defendant contends that the breach of fiduciary duty claim should be dismissed as duplicative of the legal malpractice claim. Plaintiff's second amended complaint adequately sets forth that the breach of fiduciary duty claim relates to defendant's actions in helping Legion set up a competing business, whereas the malpractice claim relates to their handling of the claims as plaintiff's claims counsel. Therefore, the two claims are not "premised on the same facts and seeking the identical relief" (*Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [2004]), and both can be asserted.

It is well settled that the relationship of client and counsel is one of "unique fiduciary reliance" (*Cooperman*, 83 NY3d at 472) and that the relationship imposes on the attorney "[t]he duty to deal fairly, honestly and with undivided loyalty . . . including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's" (*id.*). Thus,

any act of disloyalty by counsel will also comprise a breach of the fiduciary duty owed to the client. In *Greene* (47 NY2d at 451), the Court of Appeals noted that "attorneys historically have been strictly forbidden from placing themselves in a position where they must advance, or even appear to advance, conflicting interests," a rule that is intended to preclude breach of the attorney's duty of loyalty. As this Court has recognized, a law firm may simultaneously represent the competing interests of two opposing clients only with the client's consent after full disclosure of the dual representation and its consequences (*see e.g. Matter of Metropolitan Transp. Auth. (Cohen)*, 222 AD2d 340, 341 [1995]; Code of Professional Responsibility DR 5-105 [22 NYCRR 1200.24]).

It is clear that defendant's surreptitious advancement of the conflicting interests of PIA and Legion in setting up Legion as a competitor to plaintiff might be construed as a violation of the firm's fiduciary duty to its client. However, violation of the ethical constraint against dual representation does not, without more, support a claim for recovery of damages (*Schwartz v Olshan Grundman Frome & Rosenzweig*, 302 AD2d 193, 199 [2003]); to recover against an attorney, a client or third party is required

to prove both the breach of a duty owed to it (*see Prudential Ins. Co. of Am. v Dewey, Ballantine, Bushby, Palmer & Wood*, 80 NY2d 377 [1992]) and damages sustained as a result (*see Estate of Steinberg v Harmon*, 259 AD2d 318 [1999]; *Senise v Mackasek*, 227 AD2d 184, 185 [1996]).

Recovery for professional malpractice against an attorney requires proof of three elements: "(1) the negligence of the attorney; (2) that the negligence was the proximate cause of the loss sustained; and (3) proof of actual damages" (*Mendoza v Schlossman*, 87 AD2d 606, 606-607 [1982]). It requires the plaintiff to establish that counsel "failed to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of the legal profession" and that "'but for' the attorney's negligence" the plaintiff would have prevailed in the matter or would have avoided damages (*AmBase Corp. v Davis Polk & Wardwell*, 8 NY3d 428, 434 [2007]; *see Barbara King Family Trust v Voluto Ventures LLC*, 46 AD3d 423, 424 [2007]).

An action for breach of fiduciary duty is governed by a considerably lower standard of recovery. It requires only that the plaintiff identify "a conflict of interest which amounted merely to a substantial factor in [the plaintiff's] loss" (*Estate of Re v Kornstein Veisz & Wexler*, 958 F Supp 907, 924 [SD NY 1997], *appeal dismissed* 159 F3d 1346 [2d Cir 1998] [internal quotation marks and citation omitted]). However, this Court has

noted that, in the context of an action asserting attorney liability, the claims of malpractice and breach of fiduciary duty are governed by the same standard of recovery (*Weil, Gotshal*, 10 AD3d at 271).

In the matter at bar, as in *Weil, Gotshal*, we conclude that to recover under a claim for damages against an attorney arising out of the breach of the attorney's fiduciary duty, the plaintiff must establish the "but for" element of malpractice, irrespective of how the claim is denominated in the complaint. Plaintiff sustained a loss of income when some of its insureds decided to replace their TFL policies with coverage afforded by Legion instead of renewing their policies with plaintiff. However, while defendant is alleged to have filed papers with state insurance departments enabling Legion to offer TFL insurance, Legion previously performed the majority of such filings on its own and could have done so in this instance. Plaintiff has not demonstrated that it would not have sustained a loss of business *but for* defendant's assistance to Legion and has not established its entitlement to recover damages against defendant as to this cause of action. Thus, it should have been dismissed.

By the same reasoning, the inability to establish that PIA did not independently reach its decision to breach its managing general agent agreement with plaintiff is fatal to plaintiff's cause of action for tortious interference with contractual

relations. However, we reject defendant's contention that this claim should be dismissed because PIA did not breach the contract. Although the agency agreement is nonexclusive, it cannot be said that, as a matter of law, a trier of fact would be precluded from finding that PIA's efforts to replace plaintiff's policies with those issued by Legion represent a breach of the covenant of good faith and fair dealing inherent in all contracts (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]; *Ansonia Assoc. Ltd. Partnership v Public Serv. Mut. Ins. Co.*, 257 AD2d 84, 87 [1999]). Be that as it may, Supreme Court noted "extensive evidence of PIA's intent to replace Ulico with Legion," without any prompting on defendant's part, and we perceive no reason to disturb this finding.[3] Because intent to induce a breach of contract is an element of tortious interference with contractual relations (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]), this claim should have been dismissed.

Viability of the cause of action for aiding and abetting the breach of PIA's fiduciary duty requires a prima facie showing of a fiduciary duty owed to plaintiff by PIA, a breach of that duty, and defendant's substantial assistance to PIA in effecting the

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[3] The record also contains denials that defendant was ever consulted in connection with PIA's decision.

breach, together with resulting damages (*see Kaufman v Cohen*, 307 AD2d 113, 125 [2003]). Assuming for the purposes of summary judgment that PIA owed plaintiff a fiduciary duty and that its assistance to Legion comprised a breach of such duty, plaintiff has failed to make a prima facie showing that defendant provided substantial assistance to Legion's endeavors so as to subject the law firm to liability (*see Willis Re Inc. v Hudson*, 29 AD3d 489, 490 [2006]). As noted, the filings performed by defendant on Legion's behalf readily could have been performed by Legion itself; and in filing last in those states where it would be most likely to come to plaintiff's attention, defendant did no more than carry out the instructions of its client. The allegation contained in the complaint that defendant provided "substantial assistance to PIA in building Legion's trustee and fiduciary liability insurance program with Ulico's current and prospective customers" is made only upon information and belief and is unsupported by the record. The assertion that defendant used confidential information acquired during its representation of plaintiff fails to state the nature of that information or how it was misused, and plaintiff fails to demonstrate that defendant had any involvement in deceptive marketing practices alleged to have been employed by PIA. Plaintiff merely suggests that because defendant rendered legal advice to PIA during the time PIA sought to divert plaintiff's business to Legion, defendant

must have been complicit in any breach of any fiduciary duty that plaintiff might have been owed. Innuendo does not constitute an evidentiary showing sufficient to withstand defendant's cross motion (*see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]), and the cause of action for aiding and abetting should have been dismissed.

The forfeiture of defendant's legal fees directed by Supreme Court involves different considerations. Unlike a cause of action for breach of fiduciary duty, the circumstances of an attorney's discharge by a client may afford a basis for recoupment of legal fees independent of any claim of legal malpractice. Because the attorney-client relationship demands "undivided loyalty and devotion on the part of the attorney" (*Campagnola v Mulholland, Minion & Roe*, 76 NY2d 38, 43 [1990]), it is settled that an attorney who is discharged by a client for cause "has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement" (*id.* at 44; *Teichner v W & J Holsteins*, 64 NY2d 977, 979 [1985]). However, unless the question of the attorney's disloyalty can be resolved on the record (*see e.g. Griffin v Sciame Constr. Co.*, 267 AD2d 100 [1999] [breach of the duty of undivided loyalty found on prior appeal]), a hearing is required to determine whether

discharge was for cause (*Matter of Weitling*, 266 NY 184, 187 [1935]; *Genton v Arpeggio Rest.*, 232 AD2d 274 [1996]; *Andreiev v Keller*, 168 AD2d 528, 529 [1990]).[4]

From a procedural perspective, where, as in the cited cases, the only matter before a court is a motion implicating an attorney's right to a retaining lien or entitlement to fees, the question of forfeiture is merely ancillary to the action and appropriately decided in that context. Where, as here, forfeiture is part of the recovery sought in the action, the issue of whether the attorney should be required to disgorge the compensation received during the period of alleged disloyalty is properly entertained on a full record after trial (*see e.g. Soam Corp. v Trane Co.*, 202 AD2d 162, 163 [1994], *lv denied* 83 NY2d 758 [1994]; *Maritime Fish Prods. v World-Wide Fish Prods.*, 100 AD2d 81, 91 [1984], *appeal dismissed* 63 NY2d 675 [1984]).

The issue of an attorney's breach of the duty of loyalty to a client implicates the scope of that duty — for instance, whether it was limited to a particular function such as claims processing, as defendant herein contends, or whether it extended to general matters or involved misuse of confidential information

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[4] Defendant's contention that its fees were paid by PIA, not plaintiff, is uncompelling. PIA acted as plaintiff's agent. Moreover, as defendant concedes, it was compensated with a percentage of the gross premiums received by PIA which, to the extent they represented premiums due plaintiff, were reduced commensurately.

acquired in the course of the attorney-client relationship, as Supreme Court apparently concluded. Such considerations are inherently factual, they are not resolved by the record before us, and it was error to summarily grant plaintiff recovery of its legal fees. Whether defendant improperly handled claims filed under Ulico policies due to a conflict of interest remains to be decided, and the related question of whether defendant was discharged for cause on that basis is properly reserved for trial.

To impose punitive damages, the law requires "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton disregard of another's rights" (*Pearlman v Friedman Alpren & Green*, 300 AD2d 203, 204 [2002]). Defendant's conduct lacks the component of malice, moral turpitude or wanton dishonesty that warrants the imposition of exemplary damages (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 489 [2007]).

Accordingly, the order of the Supreme Court, New York County (Marcy Friedman, J.), entered April 17, 2007, which, to the extent appealed from as limited by the briefs, granted plaintiff's motion for partial summary judgment as to liability on its first cause of action for breach of fiduciary duty, directed that defendant disgorge the compensation received during the period of its disloyalty and directed an assessment of its

amount, and denied defendant's cross motion for summary judgment dismissing the complaint, should be modified, on the law, so as to deny plaintiff's motion for partial summary judgment and grant defendant's cross motion for summary judgment to the extent of dismissing the cause of action for attorney malpractice except as it pertains to defendant's representation in connection with the Carpenters Local No. 120, Laborers Local No. 322 and Laborers Local No. 35 claims, the cause of action for breach of fiduciary duty, the cause of action for aiding and abetting the breach of fiduciary duty, and the cause of action for tortious interference with contractual relations, striking the demand for punitive damages, and vacating so much of the order as directs the disgorgement of attorneys' fees and an assessment of the amount thereof, and otherwise affirmed, without costs.

All concur.

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

ENTERED: SEPTEMBER 16, 2008

CLERK