SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 6, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4972-
4972A-
4972B-
4972C-
4972D In re Charles Michael J., and Others,

Children Under the Age of
Eighteen Years, etc.,

Zaida M.,
Respondent-Appellant,

The Children's Aid Society,
Petitioners-Respondents.

Howard M. Simms, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for The Children Aid Society, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Mitchell Katz of counsel), Law Guardian.

Orders, Family Court, Bronx County (Clark V. Richardson, J.), entered on or about April 18, 2007, which, upon findings of permanent neglect, terminated respondent's parental rights, respectively, to Destiny Jess M., Eduardo M., Romeo Cesar J., and Smooth Love J., and committed custody and guardianship of the children to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously affirmed, without costs. Order, same court

and Judge, entered on or about April 18, 2007, which, upon a finding of permanent neglect, terminated respondent's parental rights to Charles Michael J., and committed custody and guardianship of the child to petitioner agency and the Commissioner of the Administration for Children's Services for the purpose of adoption, unanimously modified, on the facts, to vacate the termination of parental rights, the matter remanded for a further dispositional hearing, and otherwise affirmed, without costs.

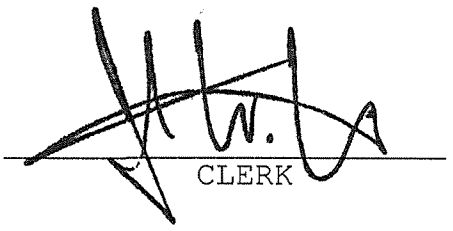
The findings of permanent neglect were supported by clear and convincing evidence (Social Services Law § 384-b[7]). Despite the diligent efforts of the agency to encourage and strengthen the parental relationship, which included arranging for frequent visitation with the children, scheduling service plan reviews, medical and educational appointments and meetings, respondent failed to comply with the court's directives that she visit with the children consistently, attend individual therapy, undergo a psychiatric evaluation, and plan for the return of the children (*see Matter of Tashona Sharmaine A.*, 24 AD3d 135 [2005], *lv denied* 6 NY3d 715 [2006]).

The finding that termination of respondent's parental rights is in the best interests of Destiny Jess M., Eduardo M., Romeo Cesar J., and Smooth Love J. is supported by a preponderance of the evidence, which shows that they have been in foster care

since 2001 and are either in or have the opportunity to be placed in kinship foster homes where they will be with siblings and maternal aunts (*see e.g. Matter of Ericka Stacey B.*, 27 AD3d 245, 246-247 [2006], *lv denied* 6 NY3d 715 [2006]). For the eldest child, Charles Michael J., who is not in a kinship foster or pre-adoptive home, termination would serve no useful purpose, since he is over the age of 14 and must consent to adoption, to which he has repeatedly expressed opposition. A further hearing is necessary to determine whether respondent's recent progress has continued and whether she is presently able to meet her eldest son's needs (*see Matter of Miguel Angel Andrew R.*, 263 AD2d 354 [1999]).

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

ENTERED: JANUARY 6, 2009



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 January 6, 2009.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 1869/06
Respondent,

-against- 4970

Oscar Olmeda,
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 (James A. Yates, J.), rendered on or about September 14, 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.

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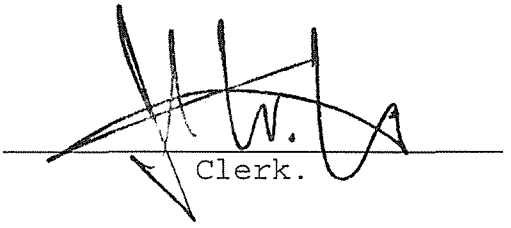

Clerk.

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 January 6, 2009.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman, Justices.

Pablo R. Elias, Index 17036/06
Plaintiff-Respondent,

-against- 4971

A.M. Acosta-Martinez,
Defendant-Appellant.,

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, Bronx County (George D. Salerno, J.), entered on or about January 14, 2008,

And said appeal having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated October 15, 2008,

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

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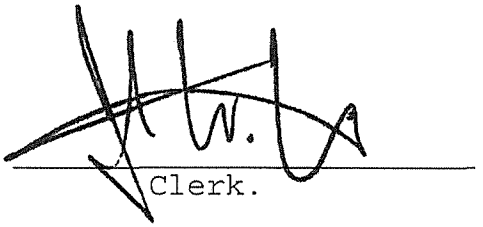


Clerk.

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4973 Sanford I. Weisburst, Index 312352/07
Plaintiff-Appellant,

-against-

Joanna Dreifus,
Defendant-Respondent.

Sanford I. Weisburst, New York, appellant pro se.

Chemtob Moss Forman & Talbert, LLP, New York (Susan M. Moss of counsel), for respondent.

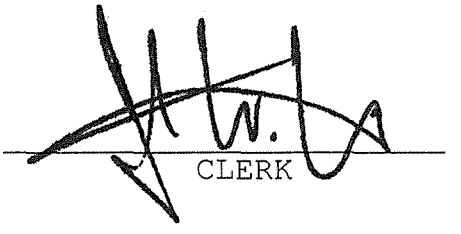
Order, Supreme Court, New York County (Saralee Evans, J.), entered June 25, 2008, which, insofar as appealed from, denied plaintiff's motion for an interim award of attorney's fees, unanimously affirmed, with costs.

The record does not show that defendant has significantly greater financial resources at her disposal than plaintiff has (Domestic Relations Law § 237[a]; *O'Shea v O'Shea*, 93 NY2d 187, 190 [1999]; *Charpié v Charpié*, 271 AD2d 169 [2000]).

We have considered plaintiff's remaining contention and find it unavailing.

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

ENTERED: JANUARY 6, 2009



Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4974 Stephen Herson, etc., et al., Index 604264/05
Plaintiffs-Appellants-Respondents,

-against-

Troon Management Inc., et al.,
Defendants-Respondents-Appellants.

Finkelstein Newman Ferrara LLP, New York (Lucas A. Ferrara of counsel), for appellants-respondents.

Schulte Roth & Zabel LLP, New York (Robert M. Abrahams of counsel), for respondents-appellants.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered March 19, 2008, which denied plaintiff's motion for summary judgment and defendants' cross motion for sanctions, unanimously affirmed, with costs.

Defendant Noel Levine is the general partner under four of the five subject limited partnership agreements. Defendant Troon Management, Inc., Levine's subchapter S corporation, is the general partner under the remaining agreement. The first, second, third and ninth causes of action are based on the premise that Levine and Troon have violated Real Property Law § 440-a by leasing the partnerships' properties and collecting rents therefrom without being licensed as brokers. The statute is inapplicable where the collection of rent is incidental to responsibilities which fall outside the scope or brokerage

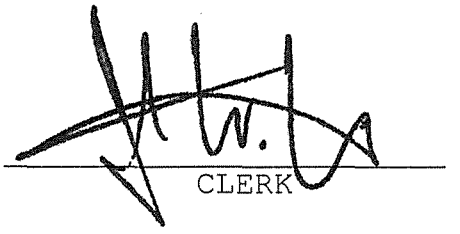
services (*cf. Eaton Assocs. v Highland Broadcasting Corp.*, 81 AD2d 603 [1981]). There is a triable issue of fact as to whether the collection of rent was a mere incident of the various real estate management services rendered by Levine and Troon. Moreover, Levine's testimony that he negotiated the leases in his individual capacity, rather than through Troon, sufficiently raises a triable issue of fact as to whether he was acting as a broker in those instances.

The fourth through eighth causes of action are based upon alleged overcharges of management fees under the agreements which do not include Troon as a general partner. Paragraph 12.5 (b) of each relevant partnership agreement provides that the fees charged for management services by affiliates such as Troon "shall be reasonable, and shall be no higher than those customarily charged for such services in the same geographical location to persons who are dealing at arm's length and have no affiliation with the Partnership." Summary judgment was properly denied with respect to these claims inasmuch as the record contains no proof of the said customary charges. With respect to the tenth and eleventh causes of action, the motion court properly denied summary judgment in light of the fact that the Flushing Thames Realty Co. Agreement vests Levine, the general partner, with the discretion to set aside reserves in amounts he deems appropriate.

The cross motion was properly denied because plaintiff's conduct was not frivolous within the meaning of 22 NYCRR 130-1.1 (c).

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

ENTERED: JANUARY 6, 2009



CLERK

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4975 The People of the State of New York, Respondent,

-against-

Gregory Molloy, Defendant-Appellant.

Ind. 2789/06

Office of the Appellate Defender, New York (Richard M. Greenberg of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Dale E. Ho of counsel), for appellant.

Robert M. Morgenthau, District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered December 21, 2006, convicting defendant, after a jury trial, of criminal contempt in the first degree (three counts) and criminal contempt in the second degree, and sentencing him, as a second felony offender, to an aggregate term of 2 to 4 years, unanimously affirmed.

The court properly admitted evidence of prior incidents involving the same victim, since this evidence was probative of the "reasonable fear of physical injury" element of Penal Law § 215.51(b)(vi), as well as to explain the origin of the charges and the relationship between defendant and his victim (*see People v Palladino*, 47 AD3d 491, 492 [2008], *lv denied* 10 NY3d 843 [2008]; *People v Garvin*, 37 AD3d 372 [2007], *lv denied* 8 NY3d 984 [2007]). A sufficient connection between the prior incidents and the victim's reasonable fear could be inferred from the evidence,

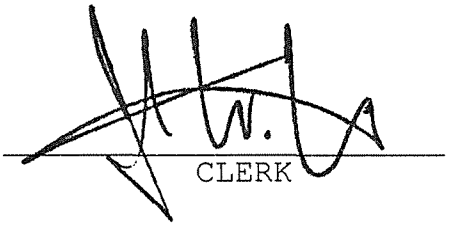
whose probative value outweighed any prejudicial effect.

Defendant's challenge to the sufficiency of the evidence is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits. Use of the conjunctive "and" in the indictment did not obligate the People to prove more than what was required under the statutes (*see People v Charles*, 61 NY2d 321, 327-328 [1984]).

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). Defendant was not so intoxicated as to cast doubt on his ability to form the requisite intent.

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

ENTERED: JANUARY 6, 2009



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 January 6, 2009.

Present - Hon. Jonathan Lippman, Presiding Justice
Angela M. Mazzarelli
John W. Sweeny, Jr.
Leland G. DeGrasse
Helen E. Freedman, Justices.

The People of the State of New York, Ind. 527/99
Respondent,

-against- 4976

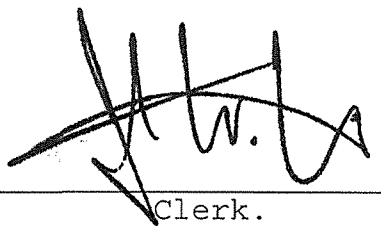
Andrew Goldstein,
Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Carol Berkman, J.), rendered on or about November 2, 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.

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4977 John Bykowsky, et al., Index 600681/99
Plaintiffs-Appellants,

-against-

Irving Eskenazi, et al.,
Defendants-Respondents,

Bruce Radler, et al.,
Defendants.

John Bykowsky, New York, appellant pro se and for appellants.

Dickstein Shapiro, LLP, New York (Howard Graff of counsel), for respondents.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered November 20, 2007, which, insofar as appealed from, held that defendants Eskenazi and Landau (the "Individuals") are not liable to plaintiffs on a certain promissory note, or for the rescission fee in the subject contract, or for lost profits, unanimously modified, on the law, to hold that the Individuals are liable on the note and for lost profits, the amounts of which are to be determined at the trial on damages, and otherwise affirmed, without costs.

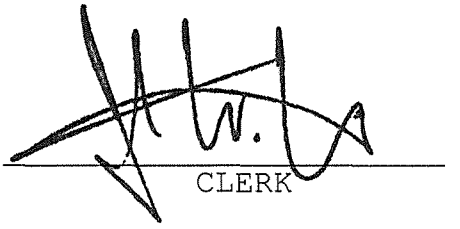
After a trial on liability, the court found that "defendants Eskenazi, Landau, Basketball City NY, Inc. and Basketball City USA, Inc. are liable to plaintiffs for breach of [contract] and any consequential damages resulting from the breach." This

finding made law of the case that precludes the Individuals' present challenges to their liability on the note and for lost profits. But even if there were no law of the case, we would hold the Individuals liable for the nonpayment of the note by defendants Basketball City New York, Inc. and Basketball City USA, Inc. (the BBCs), and also for lost profits. The various parties' obligations under the contract, which involved the creation of a chain of sports complexes, were interrelated, such that the Individuals' failure to secure financing in a manner compliant with the contract prevented the closing where the agreed upon exchange of shares was to take place, which in turn prevented plaintiff League's predecessor from being able to play games in the new complex, which in turn resulted in lost profits. Furthermore, as payment of the promissory note was conditioned on the League's playing a quota of games, the failure to close also resulted in plaintiff Bykowsky's inability to collect on the note. Accordingly, nonpayment of the note, and the lost profits arising out of the inability to use the complex, were within the contemplation of the parties at the time of contracting and were "the natural and probable consequence of the breach" (*Kenford Co. v County of Erie*, 73 NY2d 312, 319 [1989]). Plaintiffs are also entitled to contractual indemnification from the Individuals and

the BBCs. However, plaintiffs are not entitled to recovery of the rescission fee, which, under the contract, was only available during a limited period of time.

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

ENTERED: JANUARY 6, 2009



CLERK

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4978 William Taylor, Index 16823/06
Plaintiff-Respondent,

-against-

Miguel A. Vasquez,
Defendant-Appellant,

Calvin Osborne,
Defendant-Respondent.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Holly E. Peck of counsel), for appellant.

Order, Supreme Court, Bronx County (Wilma Guzman, J.), entered on or about May 13, 2008, which denied defendants' motion for summary judgment dismissing the complaint for lack of a serious injury as required by Insurance Law § 5102(d), unanimously reversed, on the law, without costs, the motion granted and the complaint dismissed. The Clerk is directed to enter judgment accordingly.

Defendants' medical submissions in support of their motion for summary judgment did not address plaintiff's medical condition during the 180 days following the accident. However, plaintiff's deposition testimony that he was confined to home and bed for just one or two weeks following the accident is an admission that defeats his claim that he suffered an impairment that substantially interfered with his usual and customary daily activities for 90 of the first 180 days following the accident

(see *Prestol v McKissock*, 50 AD3d 600 [2008]; *Cartha v Quinn*, 50 AD3d 530 [2008], *lv denied* 11 NY3d 704 [2008]). This claim is also defeated by reports prepared by medical providers who found that plaintiff was able to carry out normal activities of daily living two months after the accident.

As for plaintiff's claim that he suffered a permanent or significant limitation of use of his lumbar spine, defendants met their initial burden of demonstrating the absence of such limitation by submitting the affirmed medical report of a neurologist that describes the tests he performed supporting his finding that plaintiff had full range of motion in the cervical and lumbar spine, and his conclusion that plaintiff had recovered from the sprain/strain-type injury to the lumbar spine suffered as a result of the accident (*see Nagbe v Minigreen Hacking Group*, 22 AD3d 326 [2005]). Defendants also submitted an affirmed report of a radiologist who, upon review of the MRI taken a month after the accident, found no evidence of herniation or bulge, but identified a "bony overgrowth" at the L4-L5 intervertebral disc level that, she opined, could not have occurred in less than six months time, had no traumatic basis and was degenerative in origin. In opposition, plaintiff submitted a medical affirmation that, while asserting that plaintiff had a 20% loss of range of motion, was deficient since it failed to specify what objective tests, if any, were performed to arrive at that measurement, or

what the normal range of motion should be (see *Taylor v Terrigno*, 27 AD3d 316 [2006]; *Vasquez v Reluzco*, 28 AD3d 365 [2006]). Nor did plaintiff present any evidence rebutting the opinion of defendants' radiologist that the growth shown on the MRI was a degenerative condition that had developed over time (*see Pommells v Perez*, 4 NY3d 566, 579-580 [2005]). Also fatal to plaintiff's claim is the failure to explain his cessation of treatment after five months of physical therapy, acupuncture and chiropractic care (*see id.* at 574 [2005]; *Vasquez v Reluzco, supra*).

Although appellant's codefendant did not file a notice of appeal from the denial of the motion for summary judgment, summary judgment should be granted in his favor as well "because, obviously, if plaintiff cannot meet the threshold for serious injury against one defendant, [he] cannot meet it against the other" (*Lopez v Simpson*, 39 AD3d 420, 421 [2007]).

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

ENTERED: JANUARY 6, 2009

CLERK

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4979 Amnon Shiboleth, et al., Index 600350/98
Plaintiffs-Respondents,

-against-

Joseph Yerushalmi, et al.,
Defendants-Appellants,

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

Mischel & Horn, P.C., New York (Scott T. Horn of counsel), for appellants.

Flemming Zulack Williamson Zauderer LLP, New York (Richard A. Williamson of counsel), for respondents.

Judgment, Supreme Court, New York County (Lancelot B. Hewitt, Special Referee), entered March 7, 2007, in a partnership accounting for a two-person law firm, awarding plaintiffs various items of damages, unanimously modified, on the law and the facts, to vacate the awards of damages, the matter remanded to the Special Referee to apportion the value of the NSN contingency fee and the Phoenix Group fee in a manner consistent with *Shandell v Katz* (217 AD2d 472 [1995]), together with a recalculation of interest based on such reapportionment, and otherwise affirmed, without costs.

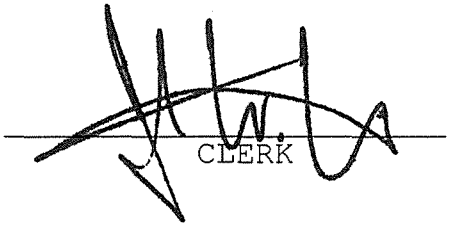
The NSN matter, which was in progress at the time of the firm's dissolution, involved a representation on a contingent basis in a Delaware lawsuit that eventually settled for $6,450,855.16. Defendants correctly assert that in apportioning

the fee, the Special Referee improperly applied the formula set forth in the retainer agreement between NSN and the firm, splitting the fee in proportion to his reckoning of pre- and post-dissolution hours, rather than in accordance with *Shandell v Katz* (*supra*) (*see also Liddle, Robinson & Shoemaker v Shoemaker* (12 AD3d 282 [2004]). Although local counsel may have tried the case, it appears that the individual defendant had a significant managerial role, was the point person for client communications, and brokered the settlement in a case that was initially thought to have little value. His contributions cannot be valued in the simplistic manner used by plaintiff's expert and adopted by the Special Referee. Furthermore, the value of a contingency fee case is not its settlement value; rather, "the Referee must evaluate the efforts undertaken by the former law firm prior to the dissolution date, or any other relevant evidence to form a conclusion as to the value of these cases to the law firm on the dissolution date" (*see Grant v Heit*, 263 AD2d 388, 389 [1999], *lv dismissed* 93 NY2d 1040 [1999]). Accordingly, we remand for the purpose of apportioning this contingency fee consistent with *Shandell v Katz*. For similar reasons, we also remand the Phoenix Group matter for a reapportionment of the fee. Here, the evidence shows that at the time of dissolution a fee of at least $1 million was owed the firm for work performed on an hourly basis but was largely uncollectible because Phoenix was insolvent

and had no assets; however, some years after the dissolution, owing entirely to defendants' efforts, a payment was made that, after collection fees, amounted to approximately $901,000. On remand, there should be explicit fact-finding as to whether the Phoenix Group receivable was reduced on account of amounts defendants had allegedly collected from Phoenix's third-party creditors. We have considered and rejected defendants' other arguments. No basis exists to disturb the Special Referee's findings crediting plaintiffs' accountant over defendants' (*see Morris v Crawford*, 304 AD2d 1018, 1022 [2003]), and finding that the former's report fully accounted for the firm's assets. It was also a proper exercise of discretion to award plaintiffs prejudgment interest (*see id.* at 1022-1023; *Sexter v Kimmelman, Sexter, Warmflash & Leitner*, 43 AD3d 790, 795 [2007]), and, under the circumstances, to make such award run from the date of dissolution.

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

ENTERED: JANUARY 6, 2009



Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4980 Savannah T&T Co., Inc., et al., Index 101876/04
Plaintiffs-Respondents,

-against-

Force One Express Inc., et al.,
Defendants-Appellants.

Hankin & Mazel, PLLC, New York (Mark L. Hankin of counsel), for appellants.

Apaamoore Agambila, New York, for respondents.

Judgment, Supreme Court, New York County (John E.H. Stackhouse, J.), entered July 17, 2007, after a nonjury trial, awarding plaintiffs the principal sum of $40,000, unanimously affirmed, with costs.

Plaintiffs, who are importers of food from Ghana, demonstrated at trial that defendants misappropriated a container of yams that they were obligated to deliver to plaintiffs' place of business. Defendants claimed they had a lien on the container and its contents. However, the agreement holding plaintiffs accountable for an unrelated container car that allegedly had been stolen from a third party, on which the purported lien was premised, was drafted by defendants and signed by Edwin Balidin, the corporate plaintiff's principal, under duress, i.e., because defendants refused to release his perishable goods otherwise. Moreover, plaintiffs neither bore responsibility for the theft of the container car nor had an equitable interest in the third

party such as would warrant holding them liable for reimbursing defendants for its value.

Unrefuted evidence in the form of Balidin's testimony and an invoice from the African exporters of the yams established that the wholesale value of the misappropriated yams was $40,000.

Defendant Phil Notaro, the corporate defendant's principal, was properly held personally liable for wrongfully withholding plaintiffs' goods from them and for coercing Balidin into signing the purported lien agreement, regardless of whether the corporate veil was pierced (*see American Express Travel Related Servs. Co. v North Atl. Resources*, 261 AD2d 310, 311 [1999]).

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

ENTERED: JANUARY 6, 2009

CLERK

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4981 The People of the State of New York, Respondent, Ind. 3948/03

-against-

Bismark Escolastico, Defendant-Appellant.

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

Bismark Escolastico, appellant pro se.

Robert T. Johnson, District Attorney, Bronx (Nancy D. Killian of counsel), for respondent.

Judgment, Supreme Court, Bronx County (William I. Mogulescu, J. on speedy trial motion; Judith S. Lieb, J. at jury trial and sentence), rendered January 5, 2005, convicting defendant of assault in the second degree, and sentencing him to a term of 5 years, unanimously affirmed.

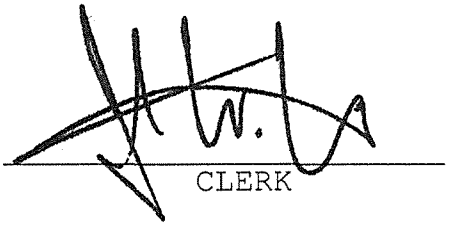
The court's mid-trial order remanding defendant to custody did not deprive him of a fair trial. The remand "did not constitute a prohibition against consulting with counsel, or make it impossible for [defendant] to consult with counsel" (*People v Kimes*, 37 AD3d 1, 30 [2006], *lv denied* 8 NY3d 881 [2007]); on the contrary, the court made a point of giving defendant suitable opportunities to confer with counsel at the courthouse. Furthermore, the jury was never informed that defendant had been remanded, and he has not established that the jury was

nevertheless able to discern the change in his status.

Defendant's pro se claims are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: JANUARY 6, 2009



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Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4982 Michael F. Vukovich, Index 115989/05
Plaintiff-Respondent-Appellant,

-against-

1345 Fee, LLC, et al.,
Defendants,

Plaza Construction Corp.,
Defendant-Appellant-Respondent,

ADCO Electrical Corp.,
Defendant-Respondent.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Denis Farrell of counsel), for appellant-respondent.

James J. McCrorie, P.C., Jericho, for respondent-appellant.

French & Rafter, LLP, New York (Lance E. Benowitz of counsel), for respondent.

Order, Supreme Court, New York County (Edward H. Lehner, J.), entered May 1, 2008, which, insofar as appealed from as limited by the briefs, denied plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240(1) cause of action, and denied the cross motion of defendant Plaza Construction Corp. (Plaza) for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims and on its claim for contractual indemnification against defendant ADCO Electrical Corp. (ADCO), unanimously modified, on the law, plaintiff's motion granted, and Plaza's cross motion granted as to its claim for contractual indemnification against

ADCO, and otherwise affirmed, without costs.

Plaintiff was injured when, while working as a pipe fitter at the premises being renovated, he received an electric shock and fell from the third or fourth rung of an unsecured A-frame ladder. There were no witnesses to the accident.

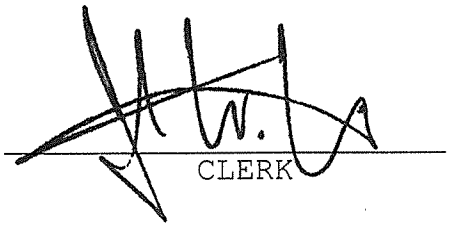
The evidence demonstrates that plaintiff was entitled to partial summary judgment on the issue of liability on his Labor Law § 240(1) claim. The ladder provided to plaintiff was inadequate to prevent him from falling five-to-seven feet to the floor after being shocked, and was a proximate cause of his injuries (*see Williams v 520 Madison Partnership*, 38 AD3d 464 [2007]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]). That plaintiff had no recollection of falling to the floor does not alter this result (*see Felker v Corning Inc.*, 90 NY2d 219 [1997]).

Since there are questions of fact concerning Plaza's authority to control the activity in question, summary judgment was properly denied with respect to the Labor Law § 200 and common-law negligence causes of action (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494 [1993]). Despite such factual questions, contractual indemnification in favor of Plaza against ADCO should have been granted since they allocated the risks of

the enterprise by provision for insurance (*see Kinney v G.W. Lisk Co.*, 76 NY2d 215 [1990]).

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

ENTERED: JANUARY 6, 2009



Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4984 Peter M. Levine, Index 101469/06
Plaintiff-Appellant,

-against-

Junia Hissa Neiva,
Defendant-Respondent.

Peter M. Levine, appellant pro se.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered June 26, 2008, which, insofar as appealed from as limited by the brief, granted plaintiff's motion pursuant to CPLR 5225 to the extent of directing defendant to deliver certain personal property within 30 days of her return to the United States, unanimously modified, on the law, to vacate the direction to deliver the specified property within 30 days of her return to the United States and to substitute therefor the direction that defendant deliver the said property within five days after service of a copy of this order, and otherwise affirmed, without costs.

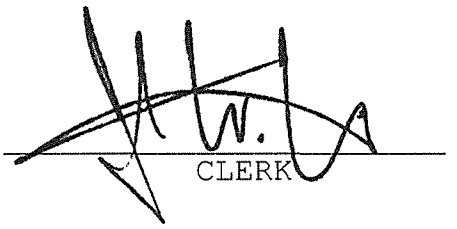
By ordering defendant to turn over her property within 30 days of her return to the United States when the date of her return was unknown, the court effectively granted her an indefinite discretionary stay of enforcement of the judgment. Since defendant did not appeal the judgment or post a bond, there

was no basis for a discretionary stay (*see Tauber v Bankers Trust Co.*, 259 AD2d 381 [1999], *lv dismissed* 93 NY2d 1036 [1999]; CPLR 5519[c]).

The court properly declined to order defendant to deliver all the items of property listed by plaintiff, as it appears the items that remained on the list were "of sufficient value to satisfy the judgment" (CPLR 5225[a]).

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

ENTERED: JANUARY 6, 2009



Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4985 191 Chrystie LLC, Index 104904/07
Plaintiff-Respondent,

-against-

Barry Ledoux, also known as Barry Sonnier,
Defendant-Appellant.

Grimble & LoGuidice, LLC, New York (Robert Grimble of counsel), for appellant.

Borah, Goldstein, Altschuler, Nahins & Goidel, P.C., New York (Paul N. Gruber of counsel), for respondent.

Order, Supreme Court, New York County (Martin Shulman, J.), entered March 17, 2008, which, in this declaratory judgment action by plaintiff owner to determine whether defendant is a protected tenant under Multiple Dwelling Law article 7-C (Loft Law), denied defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

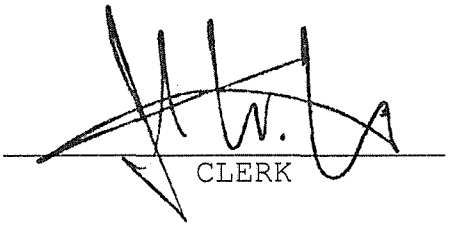
Defendant failed to demonstrate compliance with, or even address, the rule governing a prime tenant's right to protected tenant status upon recovery of vacated space (*see* NY City Loft Board Regulations [29 RCNY] § 2-09[c][5][iii]). Defendant's reliance on a statement regarding his potential future rights made by the Loft Board in a 1985 order is misplaced. The 1985 order never determined whether defendant was a protected tenant and the statement constituted non-binding dicta and did not bar

this action (*see Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 59 [2006]; *Donahue v Nassau County Healthcare Corp.*, 15 AD3d 332 [2005], *lv denied* 5 NY3d 702 [2005]). Since this action does not challenge the 1985 Loft Board order, the statute of limitations and laches defenses are unavailing, and in any event, laches cannot give rise to defendant's claimed right (*see Matter of Jo-Fra Props., Inc.*, 27 AD3d 298, 299 [2006], *lv denied* 8 NY3d 801 [2007]). Furthermore, contrary to defendant's contention, plaintiff did not allege in a holdover petition that defendant was a protected tenant.

We have considered and rejected defendant's remaining contentions.

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

ENTERED: JANUARY 6, 2009



Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4986 The People of the State of New York, Dkt. 69242C/03
Respondent,

-against-

Doundley Edwards,
Defendant-Appellant.

Ronald Cohen, New York, for appellant.

Robert T. Johnson, District Attorney, Bronx (Jean Soo Park of counsel), for respondent.

Judgment, Criminal Division of the Supreme Court, Bronx County (Diane Kiesel, J.), rendered May 9, 2005, convicting defendant, after a nonjury trial, of attempted stalking in the fourth degree, attempted criminal contempt in the second degree and harassment in the second degree, and sentencing him to an aggregate term of 90 days, unanimously affirmed.

The trial court properly granted the People's motion to reduce the class A misdemeanor charges to class B misdemeanors, since such reductions were matters of prosecutorial discretion (*see People v Urbaez*, 10 NY3d 773, 775 [2008]). Defendant's other arguments related to the reduction are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find them without merit. Similarly unpreserved and meritless is defendant's claim that evidence of completed crimes was insufficient to establish attempted crimes

(*see People v Burke*, 186 Misc 2d 278, 281 [Crim Ct, Kings County 2000]). We also note that, by electing to proceed pro se, defendant did not exempt himself from any preservation requirements that would otherwise be applicable.

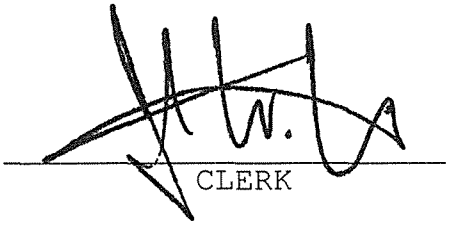
Since defendant improperly claims for the first time in his reply brief that there was no inquiry as to his waiver of the right to counsel at trial, we decline to review the issue (*see generally People v Napolitano*, 282 AD2d 49, 53 [2001], *lv denied* 96 NY2d 866 [2001]). In any event, defendant has failed to present an adequate record to overcome the presumption of regularity that attaches to judicial proceedings (*see People v Velasquez*, 1 NY3d 44, 48 [2003]).

The sentence was legally imposed. A pre-sentence report was not required since defendant was convicted of misdemeanors and a violation, and his aggregate sentence did not exceed 90 days' imprisonment (CPL 390.20[2]).

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 6, 2009



CLERK

Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4987N RLI Ins. Co., et al., Plaintiffs-Respondents, Index 109484/04 109856/05

-against-

Turner/Santa Fe, a Joint Venture, et al., Defendants-Appellants,

ABC Partnership, et al., Defendants.

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Christopher Simone of counsel), for appellants.

Cozen O'Connor, Philadelphia, PA (Jim H. Fields, Jr. of the Bar of the State of Pennsylvania, admitted pro hac vice, of counsel), for respondents.

Order, Supreme Court, New York County (Carol R. Edmead, J.), entered July 12, 2007, which, in a subrogation action, insofar as appealed from as limited by the briefs, denied defendants-appellants alleged tortfeasors' motion to dismiss plaintiffs insurers' claim for "soft costs" as time-barred, and deemed plaintiffs' bill of particulars amended to include the amount of such costs, unanimously affirmed, with costs.

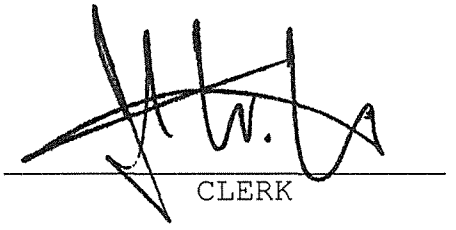
While the amount of "soft costs" (delay in opening/business interruption) was still being calculated and had not yet been paid by plaintiffs insurers to their injured insured, the owner of a construction site damaged by a fire, there is no dispute that defendants-appellants, subcontractors at the site allegedly responsible for the fire, were given notice, in the timely filed

complaint, that soft-costs claims were being made based on the same facts for which plaintiffs had already partially paid claims for "hard" property damages. Although the right to subrogation arises upon payment (*see J & B Schoenfeld, Fur Merchants, Inc. v Albany Ins. Co.*, 109 AD2d 370, 372-373 [1985]), and payment of the soft-costs claims were not made until more than three years after the fire, i.e., after the three-year statute of limitations had run on plaintiffs' subrogation causes of action (*see Allstate Ins. Co. v Stein*, 1 NY3d 416, 420-421 [2004]), plaintiffs clearly possessed an inchoate, or contingent, right of subrogation for soft-costs claims at the time they commenced the timely action, and defendants were clearly on notice of that right (CPLR 3013; *see Foley v Agostino*, 21 AD2d 60, 62-63 [1964]). If a third-party action is "broad enough to encompass contingent claims based on subrogation," and if "[l]ogically, there is no difference in terms of maturity of an action based on subrogation, as opposed to indemnity," in that both accrue upon payment or the determination of liability (*Krause v American Guar. & Liab. Ins. Co.* (22 NY2d 147, 152-153 [1968]), then logically there is no reason why a timely stand-alone action should not be broad enough to encompass a technically unripe subrogation claim as well. To hold otherwise would create the very circumstance condemned by the Court of Appeals, where "the insurer may be put in the position, on the one hand, of having to

pay the insured substantial sums of money on questionable claims in order to preserve its subrogation rights, or, on the other hand, it may have to forego the opportunity to prepare what might well have proved to be an excellent case against the alleged tort-feasor" (*id.* at 155). Thus, the court properly deemed the bill of particulars amended to include the exact amount of the soft-costs claims, once determined and paid to the insured by plaintiffs (*see Sahdala v New York City Health & Hosps. Corp.*, 251 AD2d 70 [1998]; CPLR 203[f]).

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

ENTERED: JANUARY 6, 2009



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Lippman, P.J., Sweeny, DeGrasse, Freedman, JJ.

4988N Tribeca Equity, Ltd., Index 109406/03
Plaintiff-Appellant,

-against-

19-21 Leonard Street Condominium, et al.,
Defendants-Respondents.

Goetz Fitzpatrick LLP, New York (Howard M. Rubin of counsel), for appellant.

Lebensfeld Borker Sussman & Sharon LLP, New York (Victor Rivera Jr. of counsel), for respondents.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered September 24, 2007, after a nonjury trial, which, to the extent appealed from, declared title to the subject property to be held by defendant condominium, denied plaintiff's requests for a declaration of title in its name and for damages for lack of access to the property, and awarded defendants costs and expenses, unanimously affirmed, without costs.

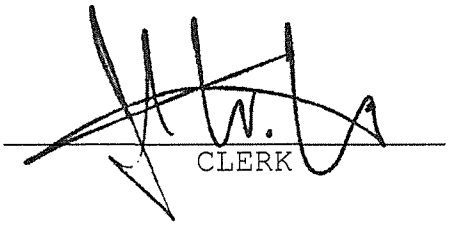
In this action to quiet title to real property, the trial court's factual findings were supported by a fair interpretation of the evidence (*see Claridge Gardens v Menotti*, 160 AD2d 544 [1990]). The testimony of witnesses as to the purported mislabeling of the proposed Unit 1S as common space on the initial survey was found to be lacking in credibility. After reviewing relevant portions of the Real Property Law and all the documents submitted with respect to the sale of each condominium

unit, the court properly held that while plaintiff was the prior owner of the cellar areas that became Units 1E and 1W, it was never the owner of the space designated as 1S, which remained the property of the remaining condominium owners. That being the case, plaintiff's monetary damages claims were properly dismissed.

Defendants' entitlement to costs, expenses and attorney fees was derived from the condominium By-Laws and Rules and Regulations.

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

ENTERED: JANUARY 6, 2009



Lippman, P.J., Mazzarelli, Sweeny, DeGrasse, Freedman, JJ.

4989N Ray & W Cut Inc., Index 111411/07
Plaintiff-Respondent,

-against-

240 West 37 LLC,
Defendant-Appellant.

Finkelstein Newman Ferrara LLP, New York (Barry Gottlieb of counsel), for appellant.

Donald Eng, New York, for respondent.

Order, Supreme Court, New York County (Joan A. Madden, J.), entered January 23, 2008, which, insofar as appealed from as limited by the briefs, granted plaintiff tenant's motion for a Yellowstone injunction, unanimously affirmed, without costs.

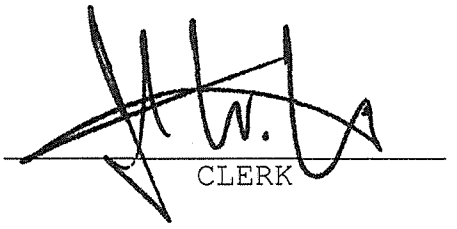
Plaintiff established its entitlement to a Yellowstone injunction upon its demonstration that it held a commercial lease, had received a notice to cure from defendant landlord, had requested injunctive relief prior to the expiration of the cure period and termination of the lease, and demonstrated that it was prepared and maintained the ability to cure the alleged default (*see Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assoc.*, 93 NY2d 508, 514 [1999]; *225 E. 36th St. Garage Corp. v 221 E. 36th Owners Corp.*, 211 AD2d 420, 421 [1995]). Indeed, plaintiff showed its willingness and ability to cure its default pertaining to the lease's insurance requirements by presenting the court with a certificate of insurance providing for 30 days'

notice of default to the landlord, as required by the lease. That the certificate of insurance stated that the issuing insurer would "endeavor" to provide 30 days' notice does not warrant a different determination.

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: JANUARY 6, 2009



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Tom, J.P., Mazzarelli, Saxe, Nardelli, Buckley, JJ.

4543 The People of the State of New York, by Andrew M. Cuomo, Plaintiff-Respondent-Appellant, Index 401110/06

-against-

H&R Block, Inc. et al., Defendants-Respondents,

H&R Block Tax Services, Inc., et al., Defendants,

H&R Block Financial Advisors, Inc., Defendant-Appellant-Respondent.

Stroock & Stroock & Lavan LLP, New York (Joseph L. Forstadt of counsel), for appellant-respondent/respondents.

Andrew M. Cuomo, Attorney General, New York (Cecelia C. Chang and Richard O. Jackson of counsel), for respondent-appellant.

Order, Supreme Court, New York County (Karla Moskowitz, J.), entered July 11, 2007, which, insofar as appealed from as limited by the briefs, in an action alleging that defendants engaged in fraudulent and deceptive business practices in connection with the marketing of an Express IRA, granted the motion of defendant H&R Block Financial Advisors, Inc. (Advisors) to dismiss the complaint as against it solely to the extent of dismissing the third cause of action for common-law fraud, and granted the motion of defendants H & R Block, Inc. (Block, Inc.) and H & R Block Services, Inc. (Services) to dismiss the complaint as against them, unanimously modified, on the law, to reinstate the fraud cause of action against Advisors, to deny the motion of

Block, Inc. and Services, and to reinstate the complaint as against them, and otherwise affirmed, without costs.

The court erred in rejecting, at this stage of the litigation, plaintiff's claim that the court obtained personal jurisdiction over Block, Inc. and Services through the actions of their subsidiaries in this State. Plaintiff's pleadings and accompanying documentation made a "sufficient start" to warrant further discovery on the issue of personal jurisdiction (*see Peterson v Spartan Indus.*, 33 NY2d 463, 467 [1974]; *Edelman v Taittinger, S.A.*, 298 AD2d 301, 302 [2002]). We also find that the complaint was sufficiently specific to state a cause of action against Services (*see Bernstein v Kelso & Co.*, 231 AD2d 314, 321-322 [1997]).

The fraud claim against Advisors was sufficiently pleaded, since the scienter requirement was satisfied by the allegations that Advisors was aware that the Express IRAs were poor investments, yet continued to market them, without proper disclosure about the fees and extra expenses they would entail (*see Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 97 [2003]).

The breach of fiduciary duty claim against Advisors was properly upheld. The complaint alleges sufficient facts establishing Advisors' fiduciary relationship with its Express

IRA customers (*see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 22 [2005]).

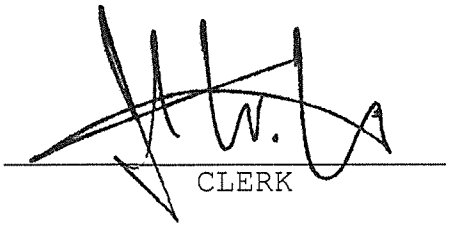
The court properly rejected defendants' argument that the Attorney General has no authority to recover on behalf of non-New York residents in this case. New York's vital interest in securing an honest marketplace in which to transact business was threatened when defendants used a New York business to complete the deceptive transactions at issue here by administering their money market fund, and advised customers that the New York business would be their "authorized agent" (*see Matter of People v Telehublink Corp.*, 301 AD2d 1006, 1009-1010 [2003]).

The court properly declined to compel arbitration of even the victim-specific claims (*see EEOC v Waffle House, Inc.*, 534 US 279 [2002]; *People v Coventry First LLC*, 52 AD3d 345 [2008]).

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

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

ENTERED: JANUARY 6, 2009



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Friedman, J.P., McGuire, Acosta, DeGrasse, Freedman, JJ.

4813 In re Gina McNeal, Index 119188/06
Petitioner,

-against-

Tino Hernandez, as Chair of the
New York City Housing Authority,
Respondent.

William E. Leavitt, New York, for petitioner.

Ricardo Elias Morales, New York (Meredith G. Mialkowski of counsel), for respondent.

Determination of respondent New York City Housing Authority, dated November 1, 2006, that petitioner does not qualify as a remaining family member (RFM) entitled to succeed to the public housing tenancy of her former mother-in-law, unanimously confirmed, the petition denied and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Shirley Werner Kornreich, J.], entered October 9, 2007), dismissed, without costs.

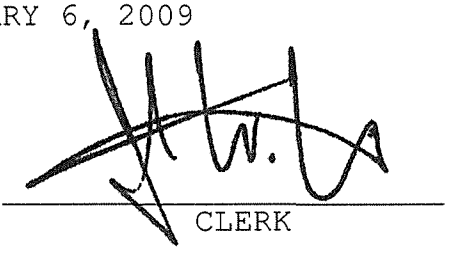
The determination is supported by substantial evidence that petitioner's occupancy of the subject apartment was unlawful, including, in particular, project management's denial of the mother-in-law's February 2005 request to add petitioner and her sons to the household, the only written request ever made by the mother-in-law, and the fact that in every affidavit of income

submitted by the mother-in-law from 1995 through 2005, the years of petitioner's occupancy, the mother-in-law listed herself as the apartment's only occupant and listed only her income (*see Matter of Abreu v New York City Hous. Auth. E. Riv. Houses*, 52 AD3d 432 [2008]). It does not avail petitioner that the February 2005 occupancy request was incorrectly denied on the ground of overcrowding because, the mother-in-law having vacated the apartment by July 2005, less than a year later, petitioner would not have qualified for RFM status even if the request had been granted (*see id.*). All of petitioner's allegations in support of her argument that respondent "implicitly approved" her occupancy (*see Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 291 [2004]; *but cf. Matter of Schorr v New York City Dept. of Hous. Preservation & Dev.*, 10 NY3d 776, 779 [2008]) were improperly made for the first time in the article 78 proceeding, and should not be considered (*see Matter of Torres v New York City Hous. Auth.*, 40 AD3d 328, 330 [2007]).

We have considered petitioner's other arguments, including that there should be a remand for the development of a record on the issue of implicit approval, and find them unavailing.

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

ENTERED: JANUARY 6, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4948 The People of the State of New York, Ind. 1922/05
Respondent,

-against-

Niasia Wallace,
Defendant-Appellant.

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

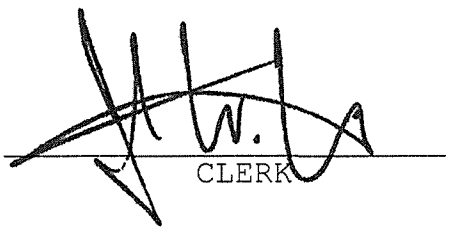
Robert M. Morgenthau, District Attorney, New York (Olivia Sohmer of counsel), for respondent.

Judgment, Supreme Court, New York County (A. Kirke Bartley, J.) rendered May 9, 2006, convicting defendant, after a jury trial, of assault in the first degree and burglary in the first degree, and sentencing her to concurrent terms of 8 years, unanimously affirmed.

The verdict 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 jury's determinations concerning credibility, including its evaluation of the victim's alleged delay in accusing defendant of being one of her assailants.

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

ENTERED: JANUARY 6, 2009



CLERK

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4950 In re Joan Davis, Index 400392/08
Petitioner-Appellant,

-against-

New York City Department of Housing Preservation and Development, et al.,
Respondents-Respondents.

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

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

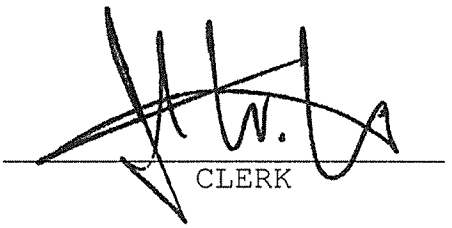
Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 30, 2008, which denied the petition and dismissed the proceeding brought pursuant to CPLR article 78, unanimously vacated, and the proceeding treated as if it had been transferred to this Court for de novo review pursuant to CPLR 7804(g), and, upon such review, the determination of respondent Department of Housing Preservation and Development (HPD), dated November 28, 2007, terminating petitioner's housing subsidy on the ground that she failed to include her minor son's disability payments, inter alia, in her 2004 application for an enhanced subsidy and her 2006 recertification application, unanimously modified, on the law, to the extent of vacating the penalty, and the matter remanded to HPD for the imposition of a lesser penalty, and the proceeding otherwise disposed of by confirming the remainder of respondent's determination, without costs.

HPD's finding that petitioner intentionally failed to disclose her son's SSI benefits is supported by substantial evidence and has a rational basis in the record (*see Matter of Purdy v Kreisberg*, 47 NY2d 354, 358 [1979]). The penalty of termination of the rent subsidy is shockingly disproportionate to the offense, however, since it will likely lead to homelessness for petitioner, a 25-year tenant, and the three minor children who live with her, one of whom is disabled (*see Matter of Sanders v Franco*, 269 AD2d 118 [2000]; *Matter of Spand v Franco*, 242 AD2d 210 [1997], *lv denied* 92 NY2d 802 [1998]). We note further that petitioner's omission of her son's income had no effect on the amount of rent subsidy she received.

While we do not condone petitioner's apparent misrepresentation and recognize that repeated such misrepresentations may warrant termination even absent harm to the agency, we remand to HPD to determine an appropriate lesser penalty (*see Matter of Milton v Christian*, 99 AD2d 984, 986 [1984]).

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

ENTERED: JANUARY 6, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4951-
4951A-
4951B-
4951C-
4951D In re Aaron Tyrell W., and Others,

Dependent Children under the
Age of Eighteen Years, etc.,

Ruth B.,
Respondent-Appellant,

Family Support Services Unlimited, et al.,
Petitioners-Respondents.

Elisa Barnes, New York, for appellant.

John R. Eyerman, New York, for Family Support Services Unlimited, respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Diane Pazar of counsel), Law Guardian.

Orders of disposition, Family Court, Bronx County (Allen Alpert, J.), entered on or about October 23, 2006, which terminated respondent mother's parental rights to the subject children upon a fact-finding determination of her mental retardation, and committing the children's guardianship and custody to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

While respondent displays adequate adaptive skills in many areas, there is clear and convincing evidence that she is unable, at present and for the foreseeable future, to provide proper and

adequate care for the subject children by reason of her mental retardation (*see* Social Services Law § 384-b[4][c], [6][b]; *Matter of Leomia Louise C.*, 41 AD3d 249 [2007]).

Respondent's claim that the court erred in not holding a dispositional hearing is unpreserved. Were we to review it, we would find such a hearing unnecessary in finding termination of parental rights to be in the best interests of the children (*Matter of Antonio V.*, 268 AD2d 341, 342 [2000], *lv denied* 95 NY2d 751 [2000]), despite their bond with their mother, given her inability to care for them (*see Matter of Joyce T.*, 65 NY2d 39, 49-50 [1985]).

Respondent is not entitled to a new hearing based on ineffective assistance of counsel, as she failed to demonstrate actual prejudice and deprivation of meaningful representation by reason of counsel's deficiency (see *Matter of James P.*, 17 AD3d 733 [2005]).

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

ENTERED: JANUARY 6, 2009

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4952 The People of the State of New York, Respondent, Ind. 12131/91

-against-

Rafael Martinez, Defendant-Appellant.

- - - - -

4953 The People of the State of New York, Respondent, Ind. 12131/91

-against-

Lorenzo Martinez, Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Sara Gurwitch of counsel), for Rafael Martinez, appellant.

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

Robert M. Morgenthau, District Attorney, New York (Patrick J. Hynes of counsel), for respondent.

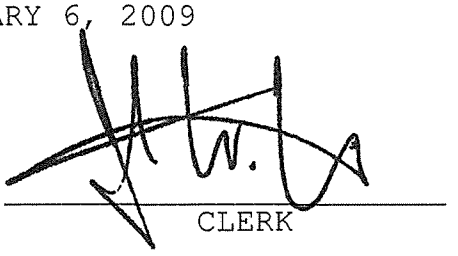
Orders, Supreme Court, New York County (Eduardo Padro, J.), entered on or about October 3, 2006, which denied defendants' motions to be resentenced under the Drug Law Reform Act of 2004 (L 2004, ch 738), unanimously affirmed.

The court properly determined that substantial justice dictated denial of each defendant's resentencing application, since the extreme seriousness of the underlying criminal conduct outweighed the mitigating factors cited by defendants. This Court has affirmed the denial of a resentencing application made

by another participant in the underlying conduct (*see People v Martinez*, 51 AD3d 569 [2008], *lv dismissed* 11 NY3d 791 [2008]), and the involvement of these defendants was even more serious than that of the prior defendant.

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

ENTERED: JANUARY 6, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4954 Red Apple Supermarkets, Inc., et al., Index 600420/06
Plaintiffs-Appellants,

-against-

Hudson Towers Housing
Company, Inc., et al.,
Defendants-Respondents,

Midstate Management, et al.,
Defendants.

Law Office of Nicholas C. Katsoris, New York (Dara Siegel of counsel), for appellants.

Thomas D. Hughes, New York (David D. Hess of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered October 4, 2007, directing a jury verdict for defendants Hudson Towers, Marina Towers and Gateway Plaza, dismissing the complaint against them, unanimously affirmed, without costs.

Plaintiff Gristede's failed to prove the elements necessary for a res ipsa loquitur charge (*see Dermatossian v New York City Tr. Auth.*, 67 NY2d 219, 226 [1986]). There was no evidence that the power outage was of the kind ordinarily resulting from negligence. There was also no proof that the alleged negligence was a proximate cause of plaintiffs' damages.

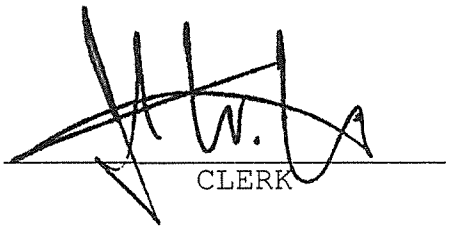
In directing the verdict, the court gave plaintiffs every favorable inference based on the evidence submitted, but saw no

rational basis upon which the jury could have found in their favor (*see* CPLR 4401; *Szczerbiak v Pilat*, 90 NY2d 553, 556 [1997]). Plaintiffs failed to present any evidence as to what caused the wires to burn, which resulted in a power failure that caused them to sustain damages due to loss of revenue and product.

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

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

ENTERED: JANUARY 6, 2009



CLERK

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4955 Phillis Lu Simpson, Esq., Plaintiff-Appellant, Index 118713/06

-against-

The Village Voice, Inc., et al., Defendants-Respondents.

Phillis Lu Simpson, New York, appellant pro se.

Miller Korzenik Sommers LLP, New York (David S. Korzenik of counsel), for The Village Voice, Inc., Judy Miszner, Doug Simmons and Adam F. Hutton, respondents.

Michael A. Cardozo, Corporation Counsel, New York (Victoria Scalzo of counsel), for The City of New York Department of Housing Preservation and Development, Shaun Donovan, Luiz Aragon, Neil Coleman and Deborah Rand, respondents.

Order, Supreme Court, New York County (Paul G. Feinman, J.), entered August 16, 2007, which granted defendants' motions to dismiss the complaint, unanimously affirmed, without costs.

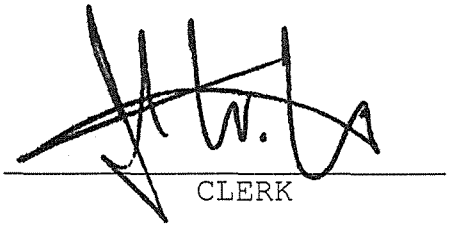
As to the City defendants, the complaint failed to meet the pleading requirements in CPLR 3016(a), and further failed to allege the time and manner of and persons to whom the publication was made (*Seltzer v Fields*, 20 AD2d 60, 64 [1963], 14 NY2d 624 [1964]). In any event, any statements allegedly made by those defendants were protected by qualified privilege, and plaintiff failed to defeat that defense by alleging malice (*see Foster v Churchill*, 87 NY2d 744, 751-752 [1996]).

As to the Village Voice defendants, the allegedly defamatory statements were either privileged under Civil Rights Law § 74

(*see Freeze Right Refrig. & Air Conditioning Servs. v City of New York*, 101 AD2d 175 [1984]) or truthful (*Silverman v Clark*, 35 AD3d 1, 12-13 [2006]), or constituted pure opinion (*Mercado v Shustek*, 309 AD2d 646 [2003]; *see Gross v New York Times Co.*, 82 NY2d 146 [1983]).

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

ENTERED: JANUARY 6, 2009



CLERK

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4956 Oxford Towers Co., LLC, Index 107373/06
Plaintiff-Appellant-Respondent,

-against-

Claudia Wagner, et al.,
Defendants-Respondents-Appellants.

Thomas S. Fleishell & Associates, P.C., New York (Susan C. Stanley of counsel), for appellant-respondent.

Hartman, Ule, Rose & Ratner, LLP, New York (David Ratner of counsel), for respondents-appellants.

Order and judgment (one paper), Supreme Court, New York County (Leland G. DeGrasse, J.), entered July 16, 2007, which, insofar as appealed from, granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, denied plaintiff's cross motion for summary judgment, and denied defendants' request for attorneys' fees, unanimously modified, on the law, to deny defendants' motion to dismiss the fourth cause of action (for use and occupancy) and to direct defendants, within 20 days of service of a copy of this order with notice of entry, to post a bond in the amount of $46,270.65 as security for their potential liability for past use and occupancy (at the rate of $3,084.71 per month during the 15-month period from May 1, 2006 to July 16, 2007) and, prospectively, to pay use and occupancy for months beginning after the date of this order at the rate of $3,084.71 per month, all without prejudice to the amount of use and

occupancy that may ultimately be awarded, and otherwise affirmed, without costs.

The September 1995 agreement that plaintiff landlord seeks to rescind in this action commenced in May 2006 provides that "in the event that [the] Rent Stabilization law ... becomes inapplicable to the apartment or the [defendants] Tenants, [plaintiff] ... will nevertheless, at the expiration of each lease, offer [defendants] a two-year renewal lease at the rent increase permitted for a two-year renewal under the Rent Stabilization law," but in no event shall such increase be less than 5% or greater than 10% over the rent paid in the expiring lease. In 1999, the Division of Housing and Community Renewal granted plaintiff's petition for high income rent deregulation. Subsequently, starting in 2000, the parties entered into several two-year lease renewals that referred to the 1995 agreement. Plaintiff now challenges that agreement as "an effort to preclude in perpetuity the application of the then newly-enacted high rent/high income deregulation amendment to the Rent Stabilization Code."

We reject plaintiff's argument that the 1995 agreement is void ab initio as against public policy and that the six-year statute of limitations that would otherwise bar its rescission and related declaratory causes of action is therefore

inapplicable. Unlike the cases cited by plaintiff (*Drucker v Mauro*, 30 AD3d 37 [2006], *appeal dismissed* 7 NY3d 844 [2006]; *Georgia Props., Inc. v Dalsimer*, 39 AD3d 332 [2007]), here the parties did not deregulate the apartment by private agreement. Nor is the agreement void by reason of its offer of renewal leases and reference to the Rent Stabilization Law's rent increase guidelines (*see Matter of Carrano v Castro*, 44 AD3d 1038 [2007]).

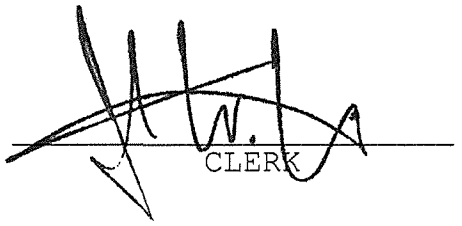
Plaintiff's claim for use and occupancy, however, is not time-barred. Defendants have no right to continue to occupy the apartment rent-free (*see Levinson v 390 W. End Assoc., L.L.C.*, 22 AD3d 397, 403 [2005]). Under the last lease in effect between the parties, the rent was $3,084.71 per month. Defendants must continue to pay this amount pendente lite and also post a bond to cover past use and occupancy from May 1, 2006 (the date on which they stopped paying rent) through July 16, 2007 (the date on which the order appealed from was entered) (*see id.* at 402). Under the parties' 1995 agreement, the actual rent owed by defendants will be higher; the record, however, does not contain sufficient information to allow that calculation.

The motion court properly denied defendants' request for attorneys' fees. Paragraph 23(D)(3) of the lease, on which defendants rely, provides that in the event the lease is cancelled, the landlord may re-rent the apartment, and any such

new rent received "shall be used first to pay Landlord's expenses ... [which] expenses include the costs of getting possession and re-renting the Apartment, including ... reasonable legal fees." This is not the type of provision covered by Real Property Law § 234. Furthermore, the action arises out of the 1995 agreement, not the lease (*cf. Peck v Wolf*, 157 AD2d 535, 536 [1990], *lv denied* 75 NY2d 709 [1990]).

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

ENTERED: JANUARY 6, 2009



Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4958 Benfield Electric Supply Corp., Index 13086/06
Plaintiff-Respondent,

-against-

C & L Elevator Controls, Inc., et al.,
Defendants,

Anthony Marchese,
Defendant-Appellant.

Law Office of James L. Breen & Associates, Farmingdale (James L. Breen of counsel), for appellant.

Goetz Fitzpatrick LLP, New York (Rosalie C. Valentino of counsel), for respondent.

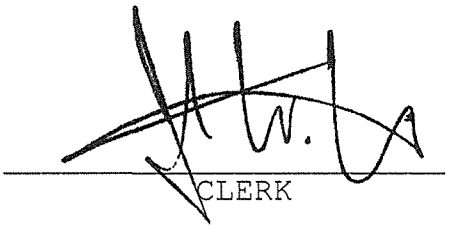
Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered September 6, 2007, which, insofar as appealed from as limited by the briefs, in an action for payment due on goods sold and delivered, granted plaintiff's motion for partial summary judgment on its cause of action for breach of contract and denied defendant-appellant's cross motion to dismiss the action as against him, unanimously modified, on the law, to the extent of denying plaintiff's motion except to the extent of invoices dated after June 30, 2004, and otherwise affirmed, with costs in favor of plaintiff-respondent payable by defendant-appellant.

Plaintiff established as a matter of law that it was entitled to collect on invoices, generated by purchases made by defendant C & L Elevator Controls, from its sole corporate officer appellant Marchese, which post-dated said corporation's

dissolution date (June 30, 2004), since appellant was personally responsible for those charges (*see Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]; *Brandes Meat Corp. v Cromer*, 146 AD2d 666, 667 [1989]). However, with respect to the pre-June 30, 2004 invoices, the record presents triable issues of fact as to whether appellant disregarded the corporate formalities of his now-dissolved closely-held corporations, and exercised domination over them to commit a fraud or wrong against plaintiff that resulted in plaintiff's injury (*see e.g. First Capital Asset Mgt. v N.A. Partners*, 300 AD2d 112, 116 [2002]).

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

ENTERED: JANUARY 6, 2009



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 January 6, 2009.

Present - Hon. David B. Saxe, Justice Presiding
Eugene Nardelli
John T. Buckley
Karla Moskowitz
Dianne T. Renwick, Justices.

The People of the State of New York, Ind. 7146/03
Respondent,

-against- 4959

Anonymous,
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 March 21, 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.

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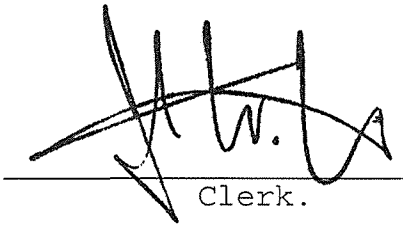


Clerk.

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

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4960 Job M. Spetter, Index 49680/02
Plaintiff-Respondent,

-against-

Alliance Towing Corp., et al.,
Defendants-Appellants,

John Doe No. 1,
Defendant.

Wilson, Elser, Moskowitz, Edelman & Dicker LLP, New York (Richard E. Lerner of counsel), for appellants.

Raymond E. Kerno, Mineola, for respondent.

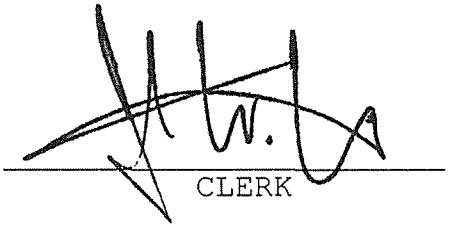
Judgment, Supreme Court, Bronx County (Norma Ruiz, J.), entered January 3, 2008, after a jury trial, awarding plaintiff damages for past and future pain and suffering in the principal amounts of $30,000 and $200,000 (over five years), respectively, plus interest, costs and disbursements, unanimously affirmed, without costs.

The testimony of plaintiff's treating physician and expert sufficiently established that the herniated disc in plaintiff's neck was caused by the subject accident and caused a significant and permanent loss of range of motion (*see Toure v Avis Rent A Car Sys.*, 98 NY2d 345 [2002]). While defendants' experts opined that plaintiff's neck condition was due to degenerative changes, no basis exists to disturb the jury's resolution of this

credibility issue (*see Apuzzo v Ferguson*, 20 AD3d 647, 648 [2005]; *Jones v Davis*, 307 AD2d 494, 496 [2003], *lv dismissed* 1 NY3d 566 [2003]). The damage award does not deviate materially from what would be reasonable compensation under the circumstances (*cf. Kithcart v Mason*, 51 AD3d 1162 [2008]). We find defendants' remaining contentions unavailing.

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

ENTERED: JANUARY 6, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4961 Zoraida Lopez, Index 24605/04
Plaintiff-Respondent,

-against-

Mumtaz K. Master, M.D., et al.,
Defendants,

Ronald H. McLean, M.D., et al.,
Defendants-Appellants.

Callan, Koster, Brady & Brennan LLP, New York (Michael P. Kandler of counsel), for Ronald H. McLean, M.D., appellant.

Garbarini & Scher, P.C., New York (William D. Buckley of counsel), for St. Barnabas Hospital, appellant.

Petes Berger Koshel & Goldberg, P.C., Brooklyn (Marc A. Novick of counsel), for respondent.

Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered April 9, 2008, which, insofar as appealed from as limited by the briefs, denied defendants Ronald H. McLean, M.D.'s and St. Barnabas Hospital's motions for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the complaint dismissed as against McLean and the hospital. The Clerk is directed to enter judgment accordingly.

As the court correctly found, McLean established prima facie his entitlement to summary judgment by submitting a medical expert's affidavit opining that his treatment of plaintiff

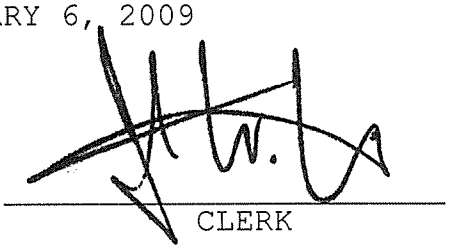
comported with good and accepted medical practice and that any delay in surgery was not the proximate cause of plaintiff's post-operative complications. The evidence plaintiff submitted in opposition was insufficient to raise a triable issue of fact. Her expert physician failed to controvert McLean's expert's assertions that the physical findings during surgery suggested that McLean had timely intervened; that conservative management, rather than surgery, was appropriate for a patient with plaintiff's symptoms (and initially appeared to be working) and was indicated as a way to spare plaintiff unnecessary surgery, which could be risky, given her recent medical history; and that that recent history contributed to plaintiff's post-operative complications. With respect to the proximate cause of the post-operative complications, plaintiff's expert offered only conclusory assertions (*see Rodriguez v Montefiore Med. Ctr.*, 28 AD3d 357 [2006]).

As there is no liability for plaintiff's injuries against McLean and the other physician defendants previously dismissed from this action, there can be no vicarious liability for plaintiff's injuries against the hospital (*see Magriz v St. Barnabas Hosp.*, 43 AD3d 331 [2007], *lv denied* 10 NY3d 790 [2008]; *Bertini v Columbia Presbyt. Med. Ctr.*, 279 AD2d 492 [2001]). In

any event, nowhere in his affirmation does plaintiff's expert identify the manner in which the hospital staff deviated from good and accepted medical practice.

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

ENTERED: JANUARY 6, 2009



CLERK

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4962 The People of the State of New York, Respondent, Ind. 30259/04 3290A/67

-against-

William Billups, also known as Muhammad Haqq, Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Britta Gilmore of counsel), for respondent.

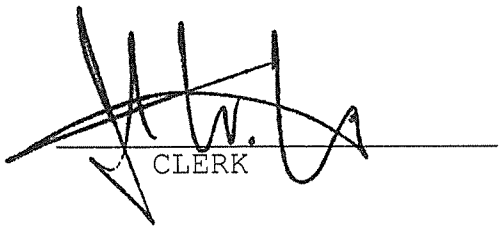
Order, Supreme Court, New York County (Arlene R. Silverman, J.), entered on or about August 15, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Defendant, who was assessed 20 points more than the threshold for a level three adjudication, received a downward departure to level two, and the court properly exercised its discretion in declining to grant a further departure to level one (*see People v Guaman*, 8 AD3d 545 [2004]). The departure to level

two sufficiently addressed the mitigating factors cited by defendant.

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

ENTERED: JANUARY 6, 2009



Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4963 The People of the State of New York, Ind. 7131/04
Respondent,

-against-

John Lubbe,
Defendant-Appellant.

Arthur S. Friedman, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Susan Axelrod of counsel), for respondent.

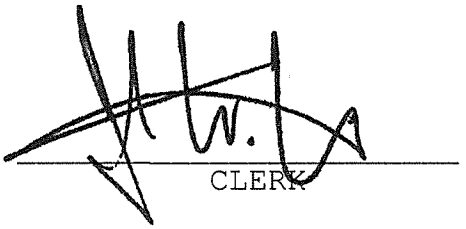
Judgment, Supreme Court, New York County (Arlene R. Silverman, J. at hearing; Daniel P. FitzGerald, J. at plea and sentence), rendered November 2, 2006, convicting defendant of possessing a sexual performance by a child, and sentencing him to a conditional discharge, unanimously affirmed. The matter is remitted to Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5) relating to the stay of execution of judgment.

All of defendant's suppression arguments are unpreserved (*see e.g. People v Martin*, 50 NY2d 1029 [1980]), and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits. The court properly denied defendant's motion to suppress the evidence seized from his computer. After learning from defendant's companion that she had discovered child pornography on his computer, the police were entitled to remain in defendant's apartment while they obtained a

warrant, even though he withdrew his consent to their presence and asked them to leave (*see People v Arnau*, 58 NY2d 27, 36-37 [1982]; *Segura v United States*, 468 US 796, 810 [1984]). The ensuing warrant was based on probable cause (*see People v Bigelow*, 66 NY2d 417, 423 [1985]; *Spinelli v United States*, 393 US 410 [1969]; *Aguilar v Texas*, 378 US 108 [1964]), and was sufficiently specific to satisfy constitutional requirements.

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

ENTERED: JANUARY 6, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4964-
4964A

Index 600044/07

American Guaranty and
Liability Insurance Company,
Plaintiff-Appellant,

-against-

Avraham Moskowitz, et al.,
Defendants-Respondents.

Steinberg & Cavaliere, LLP, White Plains (Steven A. Coploff of counsel), for appellant.

Fried & Epstein LLP, New York (Lee Epstein of counsel), for respondents.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered July 7, 2008, which, inter alia, declared that defendants are entitled to recover from plaintiff $33,845.03, representing legal fees and expenses incurred in this declaratory judgment action, and order, same court and Justice, entered February 28, 2008, which, inter alia, denied plaintiff's motion for summary judgment and granted defendants' cross motion for summary judgment declaring that plaintiff had a duty to defend defendant Avraham Moskowitz in an underlying federal action and that defendants are entitled to reimbursement for costs incurred in connection with this declaratory judgment action, unanimously affirmed, with costs.

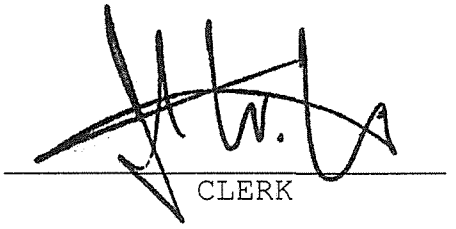
Moskowitz was counsel to a certain individual and companies in which she owned stock. He was named as a defendant in the

first amended complaint in a federal action alleging fraud and RICO violations against, inter alia, these clients. A fair reading of the amended complaint, which expressly alleges that Moskowitz "is and was an attorney" and "represented [the individual and the aforementioned companies]," reveals that the claims against him were predicated upon his purported acts or omissions in rendering those legal services. Therefore, they were covered under the subject professional liability insurance policy (*see Automobile Ins. Co. of Hartford v Cook*, 7 NY3d 131, 137 [2006] [when the allegations of the complaint even "suggest" a "reasonable possibility of coverage," the insurer will be required to defend]). The allegation that Moskowitz had served as "*de facto* in-house counsel" does not render him an officer, director or employee of a business enterprise whose coverage is negated pursuant to Exclusion D of the policy (*see RJC Realty Holding Corp. v Republic Franklin Ins. Co.*, 2 NY3d 158, 165 [2004]). Nor does the conclusory, unsupported allegation that Moskowitz was a member of a criminal enterprise, which apparently arose out of communications between him and his client or clients in the course of his representation of her or them, place him within Exclusion A, which renders the policy inapplicable to any claim arising out of a criminal act by an insured (*see Fitzpatrick v American Honda Motor Co.*, 78 NY2d 61, 68 [1991]).

We have considered plaintiff's remaining contentions and find them without merit.

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

ENTERED: JANUARY 6, 2009



CLERK

Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4966N-
4967N

Index 602309/07

George V Restauration S.A., et al.,
Plaintiffs-Appellants,

-against-

Little Rest Twelve, Inc.,
Defendant-Respondent.

Quinn Emanuel Urquhart Oliver & Hedges LLP, New York (Jeffrey A. Conciatori of counsel), for appellants.

Mound Cotton Wollan & Greengrass, New York (Michael R. Koblenz and Sara F. Lieberman of counsel), for respondent.

Order, Supreme Court, New York County (Bernard J. Fried, J.), entered April 23, 2008, as amended April 28, 2008, which denied plaintiffs' motion for a preliminary injunction, unanimously reversed, on the law, with costs, the motion granted, and the matter remanded for further proceedings. Appeal from order, same court and Justice, entered July 17, 2008, which, to the extent appealed from, denied plaintiffs' motion to renew on the prior order, unanimously dismissed, without costs, as academic.

Plaintiffs, one of which holds the federally registered trademarks "Buddha Bar" and "Buddha-Bar," seek injunctive relief in connection with defendant's operation of an Asian-themed restaurant/bar under the name "Buddha Bar NYC." While the parties dispute whether defendant's use of the trademark and associated trade dress was pursuant to a written agreement, the

following facts are uncontested: plaintiffs, affiliated entities or both have owned and operated the "Buddha Bar Paris" since 1996; in 2005, one of plaintiffs' principals gave defendant the idea of using the Buddha Bar mark and its associated concept, for which defendant paid royalty fees to plaintiffs; and up until the initiation of this litigation, defendant advertised Buddha Bar NYC's affiliation with Buddha Bar Paris, a connection noted in the media. Therefore, regardless of whether or not defendant's use was pursuant to a written agreement, it acted as a licensee, and upon termination of the license, its continued use of the brand constituted infringing conduct.

Plaintiffs have established a likelihood of success on the merits of their trademark claims arising from defendant's infringing conduct. In a trademark infringement action, "a showing of likelihood of confusion establishes both a likelihood of success on the merits and irreparable harm" (*Hasbro, Inc. v Lanard Toys*, 858 F2d 70, 73 [2d Cir 1988]). Irreparable harm was established inasmuch as a former licensee's use creates "an increased danger that consumers will be confused and believe that the former licensee is still an authorized representative of the trademark holder" (*Sunward Elecs. v McDonald*, 362 F3d 17, 25 [2d Cir 2004]). In such a case, "the reasons for issuing a preliminary injunction for trademark infringement are more compelling than in the ordinary case. When in the licensing

context unlawful use and consumer confusion have been demonstrated, a finding of irreparable harm is automatic" (*Church of Scientology Intl. v Elmira Mission of Church of Scientology*, 794 F2d 38, 42 [2d Cir 1986]).

In trademark cases, the likelihood of confusion is determined under an objective, eight-factor test that requires the court to consider, inter alia, "the strength of [plaintiff's] mark, the degree of similarity between the two marks, the proximity of the products, the likelihood that the prior owner will bridge the gap, actual confusion, and the reciprocal of defendant's good faith in adopting its own mark, the quality of defendant's product, and the sophistication of the buyers" (*Polaroid Corp. v Polarad Elecs. Corp.*, 287 F2d 492, 495 [2d Cir 1961], *cert denied* 368 US 820 [1961]). In ruling on injunctive relief here, the court should have applied the *Polaroid* test (*see New Kayak Pool Corp. v R & P Pools*, 246 F3d 183, 185-186 [2d Cir 2001]).

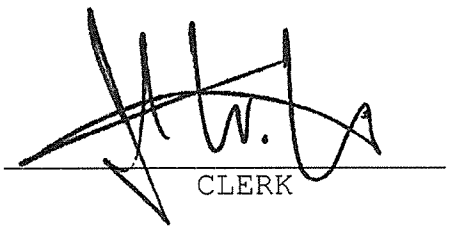
Application of the *Polaroid* factors herein necessarily leads to a finding of likely confusion, namely, as to the strength of the mark as evidenced by plaintiffs' ability to license it to others, references to the mark in the media, defendant's use of the identical mark, defendant's prior association with Buddha Bar Paris in advertising campaigns and on its Web site, and defendant's use of the mark in the identical manner as

plaintiffs'. The established association between the Buddha Bars in New York and Paris and the resultant likelihood of confusion cannot be undone by a small disclaimer at the bottom of the entry page to Buddha Bar NYC's Web site.

Having thus established both a likelihood of success on the merits and the possibility of irreparable harm, plaintiffs should have been granted a preliminary injunction.

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

ENTERED: JANUARY 6, 2009



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Saxe, J.P., Nardelli, Buckley, Moskowitz, Renwick, JJ.

4968N In re State Farm Indemnity Co., Index 260030/08
Petitioner-Appellant,

-against-

Troy Moore, et al.,
Additional Respondents-Respondents,

Alnardo Perez,
Proposed Additional Respondent,

New York Central Mutual Fire Insurance Co.,
Proposed Additional Respondent-Respondent.

Richard T. Lau & Associates, Jericho (Joseph G. Gallo of counsel), for appellant.

Russo, Keane & Toner, LLP, New York (David S. Gould of counsel), for New York Central Mutual Fire Ins. Co., respondent.

Order, Supreme Court, Bronx County (Patricia A. Williams, J.), entered on or about April 28, 2008, which denied the petition brought pursuant CPLR article 75 to permanently stay arbitration of a claim for uninsured motorist benefits, unanimously affirmed, without costs.

Respondents Troy Moore and Rashod Cowan sustained injuries in an accident between an automobile owned and operated by Moore and in which Cowan was a passenger, and a vehicle owned by Alnardo Perez. Moore's vehicle was insured by petitioner and records showed that Perez's car was insured by respondent New York Central Mutual Fire Insurance Co. (Central). Central, upon being notified of the accident, commenced an investigation during

which it unsuccessfully attempted to contact Perez. Due to Perez's lack of cooperation, Central disclaimed coverage and Moore and Cowan commenced an arbitration proceeding seeking recovery of uninsured motorist benefits.

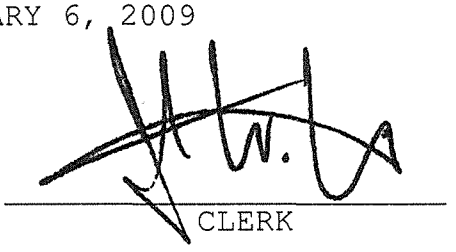
"When an insured deliberately fails to cooperate with its insurer in the investigation of a covered incident as required by the policy, the insurer may disclaim coverage" (*Matter of New York Cent. Mut. Fire Ins. Co. [Salomon]*, 11 AD3d 315, 316 [2004]). To meet its "very heavy burden" (*id.*), the insurer must establish that it diligently acted in seeking the cooperation of the insured, that its efforts were reasonably calculated to bring about the insured's cooperation, and that the insured's attitude "was one of 'willful and avowed obstruction'" (*Thrasher v United States Liab. Ins. Co.*, 19 NY2d 159, 168 [1967], quoting *Coleman v New Amsterdam Cas. Co.*, 247 NY 271, 276 [1928]). Although it is not required of the insurer to show that the insured openly avowed an intent to obstruct the investigation of the claim, "the facts must support an inference that the failure to cooperate was deliberate" *(Matter of Liberty Mut. Ins. Co. v Roland-Staine,* 21 AD3d 771, 773 [2005]).

The court properly denied the petition to permanently stay the arbitration, as Central provided sufficient grounds for disclaiming coverage. The evidence demonstrates that upon being informed of the subject accident, Central promptly commenced a

detailed investigation and diligently followed up on it. In addition to numerous telephone calls being made to the number Perez provided in the subject insurance policy, letters via certified or registered mail were sent to the address provided by Perez, and Central provided evidence that Perez signed for one of the letters. Furthermore, visits were made to Perez's address and his mother maintained that she did not know his whereabouts. In light of these unsuccessful efforts that were reasonably calculated to obtain Perez's cooperation, the inference that Perez deliberately chose not to cooperate is compelling.

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

ENTERED: JANUARY 6, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Jonathan Lippman, P.J.
David B. Saxe
David Friedman
John W. Sweeny, Jr.
Rolando T. Acosta, JJ.

4373
Index 600430/07

John C. Braddock, et al.,
Plaintiffs-Appellants,

-against-

David B. Braddock, et al.,
Defendants-Respondents,

John Does Nos. 1-10,
Defendants.

Plaintiffs appeal from an order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered October, 17, 2007, which granted defendants' motion to dismiss the complaint for failure to state a cause of action.

Kostelanetz & Fink, LLP, New York (Brian C. Wille and Usman Mohammad of counsel), for appellants.

Thompson & Knight LLP, New York (Brian C. Dunning and Irene R. Dubowy of counsel), for respondents.

SAXE, J.

Plaintiff John Braddock alleges that he was shockingly used and abused after placing his trust in his cousin, defendant David Braddock, who lured John to sacrifice his lucrative career and the opportunities available to him and to uproot his home, in order to provide, at a huge discount, the critical service of locating a major investor to fund an oil and gas exploration company that David was attempting to form. John asserts that his cousin David induced him to make these enormous sacrifices by falsely representing that they would essentially jointly own and run the company, Broad Oak Energy (Broad Oak). He asserts that after he resigned from his full-time position in a New York investment firm, moved with his wife to Dallas, and found the investor for the company -- charging a fraction of his usual fee for his services as an investment banker -- he was slowly forced out of the company, first being driven to accept a substantially reduced position with lesser salary, benefits and terms, and later being subjected to humiliating scorn and abusive conduct. Especially in light of the familial relationship, these allegations state causes of action for fraud, breach of fiduciary duty, and promissory estoppel.

On a motion to dismiss under CPLR 3211, the court must "accept the facts as alleged in the complaint as true, accord

plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Properly applied to the record before us, this standard requires that the foregoing causes of action be reinstated.

To plead a claim for common-law fraudulent inducement, a plaintiff must assert the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 348 [1999]). The complaint here sufficiently sets forth these elements.

It is specifically alleged that David orally misrepresented to John that, once John raised the capital needed from an investor, he would be appointed to serve as the company's CFO and land manager, and he would be issued "founder's shares" giving him equity interests in the company equal to half the allotment that David would receive as company chairman and CEO. In alleged reliance on these promises, John not only accepted a drastically reduced investment banking fee, but he also was thereafter persuaded by David to pay most of the senior executives' required capital investment from the commissions he would be entitled to receive on the closing of the investment. What is more, in mid-

March of 2006, David used the same assurances to convince John to agree to use some of his investment banking fees to fund the payments that Broad Oak was obligated to pay at closing to another consultant, J. Barry Brokaw.

On March 31, 2006, immediately after the investor, Warburg Pincus, agreed to provide $150 million in start-up capital to Broad Oak, David cut off all contact with John. Eventually, when pressed, in conversations and then in an e-mail dated April 17, 2006, David informed John that he would not be made CFO or land manager, although he offered that John could still be employed in the position of landman, with the understanding that eventually he would become the company's land manager, at which point he would become entitled to receive the originally promised founders' shares. David asserted that these changes were at the insistence of Warburg Pincus, although it is important to recognize that the record before us does not definitively establish this assertion to be an indisputable fact. Since, by the time David surprised John with these reduced terms, John had left his home and employment, was unemployed and had discontinued all other pending investment banking transactions to work for Broad Oak, he was in no position to do anything but cooperate in an attempt to salvage something from his former expectations.

In his responsive April 17, 2006 e-mail, John acknowledged

the validity of David's message earlier that day suggesting, inter alia, that John's "substantial financial management and investment banking skill do not transfer to the high level of Oil & Gas Accounting and land management skills that are required in a very small start-up company," and indicated his willingness to forgo the CFO position and accept for the moment a lesser position at a reduced salary and as an "*employee at-will*, subject to the same objective performance criteria as any other employee."

On May 16, 2006, when the closing with Warburg Pincus occurred, John signed a termination and fee agreement, which documented his previous agreements to satisfy the company's payment obligations to Brokaw out of his reduced investment banking fees. On that date, John was also presented with an employment agreement, and after two weeks of discussions with his cousin in which he attempted to reassure himself that he could count on David's new promises, John signed the employment agreement on May 30, 2006, accepting the position of landman as an at-will employee.

John states that after he began his employment as landman for Broad Oak, he began to experience mistreatment. He was refused access to company meetings and was intentionally embarrassed, mocked and threatened. Not long after he began in

his new position, John was diagnosed with papillary carcinoma of the thyroid in early June, and on June 26, 2006, his thyroid was removed. While John asserts that initially this had no impact on his job performance, he also asserts that harassment about his condition and its treatment became an integral part of David's campaign to drive him from the company, using embarrassment and cruelty. When the stress began to take a toll on his health, John was granted a conditional medical leave of absence in October 2006. However, at the end of November 2006, Broad Oak terminated his employment on the ground that he had failed to provide the required medical information from his physician.

The foregoing allegations satisfy the particularity requirement for a fraud claim (CPLR 3016[b]).

As to the element of justifiable reliance, it is not amenable to determination as a matter of law on this record and in this context. First, it must be emphasized that the issue is generally one of fact (*see Talansky v Schulman*, 2 AD3d 355, 361 [2003]).

"Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" *(EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 20 [2005]). Moreover, since David and John are cousins, John's reliance on David's good faith may be found to be reasonable even

where it might not be reasonable in the context of an arms' length transaction with a stranger. Family members stand in a fiduciary relationship toward one another in a co-owned business venture (*see Venizelos v Oceania Mar. Agency*, 268 AD2d 291 [2000]; *see also Birnbaum v Birnbaum*, 73 NY2d 461 [1989]). A fiduciary relationship is

> "[f]ounded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations and those informal relations which exist whenever one man trusts in, and relies upon, another" *(Wende C. v United Methodist Church, N.Y. W. Area*, 6 AD3d 1047, 1055 [2004], *affd* 4 NY3d 293 [2005], *cert denied* 546 US 818 [2005]).

Under the circumstances alleged here, John had reason to believe that David would treat him, in their interaction, with good faith and integrity.

In assessing whether John's actions may be found to be reasonable, the question is not whether he *ultimately* understood that his cousin had lied to him, but whether he could have reasonably understood that his cousin was lying to him at the time when he *first* took actions in response to David's assurances. In other words, initially, did he reasonably rely on David's representations when he left his job, moved to Dallas, and accepted a drastically reduced investment banking fee, and

thereafter, did he reasonably rely on David's further assurances when he agreed to pay Brokaw's fees out of his own commissions? These questions require fact-finding and therefore cannot be resolved in the context of a CPLR 3211 motion.

The dissent, relying on the classic definition of fraud as the misrepresentation of a *present* fact, reasons that John's claim of fraud was properly dismissed because it amounts to a promise to confer a benefit *in the future*, which is only actionable when the defendant had no intention of fulfilling the promise at the time it was given (*see Tribune Print. Co. v 263 Ninth Ave. Realty*, 57 NY2d 1038 [1982]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [1976], *affd* 43 NY2d 778 [1977]). The validity of this rule is not in dispute. But the issue here, whether David ever intended that his promises would be fulfilled, is one of fact that should not be determined on a CPLR 3211 motion. While an inference that the promisor never intended to fulfill his promise should not be based solely upon the assertion that the promise was not, in fact, fulfilled (*see Brown v Lockwood*, 76 AD2d 721, 732-733 [1980]; *Lanzi v Brooks*, 54 AD2d at 1058), we must recognize that a present intention not to fulfill a promise is generally inferred from surrounding circumstances, since people do not ordinarily acknowledge that they are lying.

In *Lanzi v Brooks*, the complaint "neither allege[d] that

defendant falsely stated his future intentions at the time he purportedly made the ... representation nor contain[ed] any factual assertions from which this conclusion [could] be drawn" (54 AD2d at 1058). Here, in contrast, the inference that David knew all along that he would not fulfill his promises to John may be drawn from the full range of the troubling series of events visited on John. Those events, viewed together, permit the conclusion that David conducted himself in bad faith, planning all along to take advantage of his cousin's trust in order to obtain from him, at a fraction of the usual cost, the crucial service of finding the necessary investor to provide the start-up capital, and that he planned that once the necessary investor was on board, he would remove John by degrees until he was excised from the company completely. David's assurances as to the structure of the new company and the roles each of them would play within that structure therefore may be found to have constituted "promises made with a present, but undisclosed intent not to perform them" (*see Schulman v Greenwich Assoc., LLC*, 52 AD3d 234, 234 [2008] [internal quotation marks & citation omitted]), forming the basis for a claim of fraud.

The dissent also suggests that reliance on the alleged assurances was unreasonable as a matter of law because, given his lack of experience and the nature of the planned enterprise, John

knew or should have known from the outset that in this type of venture he could not rely on assurances that he would be given the executive-level position to which he claims entitlement. The problem with this reasoning is that it fails to employ the correct standard to be used on a CPLR 3211 motion. Rather than assuming the truth of the factual allegations of the complaint and all possible inferences, the dissent's reasoning accepts defendants' view of the circumstances. For instance, the dissent asserts that John Braddock was "by reason of his own prior professional involvement in oil and gas ventures and his extensive familial connections to the industry, particularly well aware of the risks such ventures entailed," and that John must have understood that any investment "would almost certainly be conditioned upon a significant measure of control by the investor over the company's management, operations and finances," so that "no promise of high executive-level employment in the company, much less one involving an allocation of a substantial equity membership interest, could have reasonably been viewed as an 'assurance' or a 'guarantee.'" These and similar assertions amount to findings of fact that are improper in the context of a CPLR 3211 motion (*see Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1998]).

Nor is it appropriate here to determine the issue of

justifiable reliance as a matter of law by relying on the documents that John signed on behalf of himself and Broad Oak Advisors during the course of his association with David and Broad Oak Energy. Construing the allegations liberally, the documents that defendants offer should not be treated as conclusively establishing the absence of reasonable reliance. The lack of certainty in the engagement agreement, and the reduction in salary and terms of employment provided for in the subsequent written contracts, sometimes omitted and sometimes altered the earlier oral assurances and representations, but did not directly contradict them, which distinguishes this matter from such cases as *Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl.* (249 AD2d 232 [1998], *lv denied* 95 NY2d 762 [2000]).

Although the engagement agreement signed on February 28, 2006 did not promise John any particular position with the company or compensation but, rather, made provision for how terms would be reached "*if*" he became employed by Broad Oak Energy, nevertheless John had reason to retain his belief in David's oral assurances. David's conduct toward John during February and March 2006, in the process of forming the company, comported with David's promises and John's expectations, as the two men together attended numerous meetings with potential investors, presenting

themselves as senior executives. Further, other documents supported that belief, including a March 2006 draft business plan for the proposed company that identifies John as "Partner, CFO and Land Manager," an April 6, 2006 Term Sheet that lists David and John as the company's "management team," and presentation materials for potential investors that similarly identified John as Broad Oak's "CFO and Land Manager."

Nor do the April 17, 2006 e-mail from John to his cousin and the subsequent agreements they entered into negate *as a matter of law* the frauds claimed here. John's recognition in that e-mail of his limitations and his willingness to accept, for the moment, lesser employment terms, do not establish a lack of reasonable reliance on the original, earlier lies.

It is also inappropriate to rely on the reference in John's e-mail to "at-will" employment to hold that *as a matter of law* he could not have reasonably relied on his cousin David's alleged promises of a future executive position with Broad Oak. Not only are we unable to determine in this context whether John even understood the legal connotation of the term "at will," but indeed, the suggestion that he understood the term's meaning is undercut by his own use of the phrase "subject to ... objective performance criteria" immediately after the term "employee at-will" in the e-mail. The juxtaposition of the concept of

evaluation of his work based on "objective performance criteria" with the phrase "employee at-will," when the very concept of at-will employment is that there is no obligation for the employer to apply objective performance criteria, makes it doubtful that John understood exactly what he was agreeing to.

The subsequent agreements John entered into in May 2006, similarly, should not be relied on to justify dismissal of his complaint. The perpetration of the initial fraud had already been completed, and John had already suffered damages, before entering into these agreements. Only a waiver of *that claim* could extinguish it, and no such waiver is established by defendants. Proof of a waiver, of course, requires establishing "an intentional relinquishment of a known right" and should not be lightly presumed (*see S. & E. Motor Hire Corp. v New York Indem. Co.*, 255 NY 69, 72 [1930]; *Jumax Assoc. v 350 Cabrini Owners Corp.*, 46 AD3d 407 [2007]). No such intentional relinquishment by John of a known right of action is established by the record before us.

It should also be recalled that John asserts that David used *additional* fraudulent inducements to convince him to accept the provision of the May 16, 2006 agreement by which he would use his own fees and his allotment of founders' shares to fund what until then had been *defendants'* obligation to pay consultant J. Barry

Brokaw. In particular, John asserts that David assured him that if he were willing to begin in the position of landman, he would ultimately achieve the position of land manager, with a stock interest commensurate with that which was originally promised. John asserts that he remained unaware of the falsity of those inducements at the time he executed the May 2006 documents.

The situation presented here should be distinguished from cases in which a plaintiff who was involved in a business deal claims that, in the original discussions of the deal, misrepresentations were made as to its terms but the falsity of those representations was revealed by the time the deal was executed. In such cases, the ultimate terms of the deal, if agreed upon, are all that the plaintiff is entitled to, and he will not be permitted to seek damages based upon the original misrepresentations, because he did not rely on them in electing to go through with the deal (*see e.g. Chelsea, LLC v Seventh Chelsea Assoc.*, 304 AD2d 498 [2003]). Here, in contrast, John's subsequent execution of documents that fundamentally altered the originally promised terms of his position with the company was not merely an election to enter into the deal anyway. First of all, even before he executed the first of the agreements relied upon by defendants, the deal was essentially under way, at least on his part, in that he had already sacrificed his former life

and undertaken tasks to forward the venture, and he was no longer in a position to reject the offered terms or even to negotiate effectively. Indeed, when the allegations are understood in the context of an ongoing attempt by John to salvage something from his dashed expectations, the fact that he subsequently acceded to new and lesser terms should not justify holding *as a matter of law* that he did not reasonably rely on his cousin's alleged misrepresentations and false assurances, to his own severe detriment.

If all these interactions had been between strangers conducting an arm's length business transaction, strict reliance on the signed written documents, to the exclusion of the parties' words and conduct, would be appropriate. But the expectation of the good faith of a family member in circumstances such as these may justify some reliance on assurances that are not incorporated into written documents drafted and executed later.

Indeed, this matter is strikingly similar to *Brunetti v Musallam* (11 AD3d 280 [2004]), in which this Court reversed a grant of summary judgment dismissing an action for breach of fiduciary duty and fraud. In *Brunetti*, the plaintiff claimed that the defendants, who had joined the company he originally founded, fraudulently induced him to sign an agreement divesting himself of 70% of his shares of the company and surrendering his

employment rights by becoming an at-will employee, by falsely representing that a necessary investor had conditioned an investment of millions of dollars in the company upon his doing so. In reinstating the complaint, this Court explained that the issues of material misrepresentation and reasonable reliance were not subject to summary disposition and emphasized the relevance of the defendant's fiduciary obligation of good faith toward the plaintiff (11 AD3d at 281).

Here, as in *Brunetti*, the issues of material misrepresentation and reasonable reliance are not subject to summary disposition, and the fiduciary relationship between the parties, with its concomitant mutual obligation to act in good faith, makes John's reliance on David's assurances all the more reasonable.

The merger clauses in each agreement, stating that prior agreements were superseded and terminated, may preclude further reliance on the terms of those earlier agreements, but they cannot negate John's detrimental reliance on fundamental representations whose falsity had already created a colorable fraud claim by the time the new agreement was executed, unless that already existing claim was waived, and waiver was not established here. Nor should the merger clauses preclude the claim that, even as the new agreements were executed, David

continued to lure John into cooperating through the use of false assurances that John would still, ultimately, acquire the originally contemplated level of ownership interest in Broad Oak Energy. As in *Brunetti* (*supra*), in appropriate circumstances, a subsequent contract changing the terms of a plaintiff's employment to that of an at-will employee with severely reduced position and benefits does not preclude a claim that the plaintiff was fraudulently induced into accepting the new terms.

In this context, the defense of ratification does not preclude the fraud claims as a matter of law (*see Girschowitch v DeLong*, 51 NYS2d 499 [1944]). While an act ratifying a contract after the discovery of fraud in the inducement may defeat the right to challenge that contract, a plaintiff may still bring an action for damages for the fraud unless such a claim has been waived. "Ratification of a contract after knowledge of fraud in the inducement thereof is no defense to an action for fraud and deceit unless there has been a waiver of the cause of action for damages itself" (NY Jur 2d Fraud § 217, citing *Potts v Lambie*, 138 App Div 144 [1910]; *Clearview Concrete Prods. Corp. v S. Charles Gherardi, Inc.*, 88 AD2d 461 [1982]).

The case of *Agristor Leasing-II v Pangburn* (162 AD2d 960 [1990]) illustrates how the ratification defense works and why it should *not* be applied here. There, the defendant leased farming

equipment, then claimed fraud because the leased equipment did not live up to the representations made about it; thereafter, the defendant entered into a payment deferral agreement excusing his default in payments and allowing him to continue using the leased equipment. The Court held that, by signing the deferral agreement after acquiring knowledge of the claimed fraud, the defendant had affirmed the original agreement by accepting a benefit under it, i.e., the continued use of the equipment, and thus he was barred from challenging it on grounds of fraud (*id.* at 961).

Here, in contrast, the allegations indicate that the initial fraud -- the one that induced John to give up his job, move to Dallas, and locate an investor, on the promise of a substantial interest in the company to be formed with that investment -- was discovered in April 2006, and, by that time, the damage was done. John's subsequent acceptance of the terms of the employment agreement did not amount to an acceptance of anything under the prior agreement that would constitute an implicit affirmance or ratification of that contract that he entered into before he acquired knowledge of the fraud; indeed, nothing that John did or agreed to after learning of that initial fraud amounted to anything except an attempt to salvage something from a devastating setback.

The *Brunetti* matter reminds us that even when the plaintiff signs a document changing the terms of his employment, the ratification defense may not be determined as a matter of law if there are factual issues as to whether the plaintiff knew he had been misinformed when he signed the later document (11 AD3d 280, *supra*). Certainly, here, John's acquiescence to the reduced employment terms that he claims he was virtually forced to accept cannot serve to preclude his fraud claims as a matter of law without fact-finding as to what actually occurred.

Not only are the allegations sufficient to permit John's claim of fraud to proceed; they also are sufficient to make out the elements of a claim for promissory estoppel -- "a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made and an injury sustained in reliance thereon" (*see Williams v Eason*, 49 AD3d 866, 868 [2008]). Here, too, the agreements that John executed should not be read, in the context of a motion pursuant to CPLR 3211, to invalidate *as a matter of law* his claim of injury sustained in reasonable reliance on David's promises.

Further, in view of the nature of the claimed relationship and circumstances here, we should not be determining as a matter of law whether John has a viable cause of action for breach of fiduciary duty.

The cause of action for imposition of a constructive trust is based upon John's claimed right to the founders' shares originally promised to him and any profits earned as a consequence of defendants' alleged wrongful possession of those shares. Since John alleged that he contributed a portion of his investment banking fees and contributed time and energy to the creation of the company in reliance on David's promise that he would receive a specified ownership interest in it, dismissal of this claim was improper (*see Ferguson v Murphy*, 273 AD2d 34 [2000]; *Matter of Urdang*, 304 AD2d 586, 587 [2003]).

However, the allegations fail to support a viable cause of action for constructive discharge. Although we have declined to use the May 30, 2006 agreement, in which John agreed to being an at-will employee, as a ground for rejecting his claim of justifiable reliance as a matter of law and thereby rejecting the fraud claim, his execution of that agreement, including the at-will term, precludes a claim for constructive discharge, regardless of any claimed lack of understanding of the agreement. Moreover, the allegations do not support a claim that his discharge was based upon his illness, which John offers as an alternative ground for the constructive discharge claim. We therefore affirm the motion court's ruling that the cause of action for constructive discharge must be dismissed.

John's claims for declaratory relief must be reinstated, except for the ninth and tenth causes of action, which rely on the substantive claim of constructive discharge.

Accordingly, the order, Supreme Court, New York County (Marylin Diamond, J.), entered October 17, 2007, which granted defendants' motion to dismiss the complaint for failure to state a cause of action, should be modified, on the law, the motion denied in part so as to reinstate the first, second, third, seventh, eighth and eleventh causes of action, and otherwise affirmed, without costs.

All concur except Lippman, P.J. and Friedman, J. who dissent in an Opinion by Lippman, P.J.

LIPPMAN, P.J. (dissenting)

It is alleged that in early 2005 plaintiff John Braddock, (John), then a successful Wall Street investment banker, was approached by his cousin, defendant David Braddock (David), with a business proposition. David, described in the complaint as a former "mud logger"[1] whose career in oil and gas exploration had been "decidedly mixed," had, despite the notorious failure of one of his earlier oil and gas ventures, resolved to reenter the entrepreneurial arena. He wished to form an oil and gas exploration company to tap "unconventional" oil and gas reserves situated in northern Louisiana and Texas by means of "horizontal drilling," a technique that had only recently become economically viable by reason of very high, indeed unprecedented, global oil and gas prices. The proposed venture, to be known as Broad Oak Energy, Inc. (BOE), was, however, wholly uncapitalized, and David hoped that John, with his experience in finance, might be instrumental in securing the $75 to $150 million investment thought necessary for the venture's launch. John eventually agreed to provide the sought investment banking services, and to do so at a significantly reduced fee, but allegedly premised his

[1]"Mud loggers" use bore samples to record and chart geological subsurface conditions in connection with hydrocarbon exploration.

agreement upon David's assurances that he would be employed by BOE as its chief financial officer and land manager and that he would receive half as many founders' shares in the company as were to be issued to David, who himself proposed to serve as the company's chief executive officer. By the end of February 2006, John, acting through his wholly owned investment banking and advisory services company, plaintiff Broad Oak Advisors, LLC (BOA), had identified several interested investors and, although a financing commitment had not yet been obtained, felt confident of securing the investment necessary to BOE's viability. On February 27, 2006, he resigned from his New York position, and the next day, well in advance of his eventual relocation from New York to Texas, where BOE's offices were to be situated, executed an engagement agreement, by which he "formally accepted" what is characterized in the complaint as "the fee arrangement earlier agreed to with his cousin."

It is not disputed that John was never employed or compensated in accordance with David's alleged initial oral assurances. John, however, does not seek damages for breach of promise, either on the basis of David's oral assurances or based upon the parties' subsequent written agreements, but rather would recover in tort, most notably for fraud. It is, in essence, alleged that John's entire course of conduct in providing

investment banking services for a discounted fee, giving up his lucrative New York employment as an investment banker and advisor, moving to Texas and agreeing to take the non-executive position with BOE from which he was eventually dismissed in November 2006, was induced by David's above-described assurances. The complaint, however, does not adequately state a claim for fraud and, indeed, it is clear from the documentary evidence submitted by defendants in support of that branch of their motion seeking dismissal of the complaint pursuant to CPLR 3211(a)(1), that plaintiffs have no cause of action for fraud.

A claim for fraud is necessarily premised upon an intentional misrepresentation of present fact (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]). Accordingly, fraud is not stated when the representation sued upon amounts to no more than a promise to confer a benefit or assume a detriment in the future (*Adams v Clark*, 239 NY 403, 410 [1925]; *Brown v Lockwood*, 76 AD2d 721, 731 [1980]). The cases, however, recognize that an assurance given as to a future benefit or detriment may furnish a basis for recovery on a fraud theory where the assurance constitutes a deliberate misrepresentation of the defendant's present intention, i.e., where the defendant at the time of giving the assurance intends that it will not be

fulfilled (*see e.g. Tribune Printing Co. v 263 Ninth Ave. Realty*, 57 NY2d 1038 [1982]; *Lanzi v Brooks*, 54 AD2d 1057, 1058 [1976], *affd* 43 NY2d 778 [1977]; *Adams v Gillig*, 199 NY 314, 320-321 [1910]). It is thus the defendant's contemporaneous harboring of an intention contrary to his or her represented promise that will potentially elevate what would otherwise be a claim based upon a promise, sounding simply in contract, to one based upon a misrepresentation of fact, sounding in fraud. Essential to the statement of a fraud claim premised upon a purported promise, then, are factual allegations from which the misrepresentation of an inconsistent present intention can be inferred (*Lanzi*, 54 AD2d at 1058; *Adams v Clark*, 239 NY at 410), and it is clear that the required inference is not permissibly drawn simply from the circumstance that the promise or assurance ultimately was not made good upon (*Brown v Lockwood*, 76 AD2d at 732-733; *Lanzi*, 54 AD2d at 1058).

This complaint is utterly devoid of any factual allegation permitting the inference that David, in representing to John that he would eventually become BOE's chief financial officer and land manager and receive a specified founders' equity interest in the company, falsely portrayed his contemporaneous intentions. While there is a conclusory allegation to that effect, the complaint does not specify any factual circumstance from which the

requisite deliberate misrepresentation by David of his actual intention might permissibly be inferred. And, although plaintiffs contend that there is some dispensation from CPLR 3016(b)'s requirement of specificity in pleading fraud when it comes to setting forth the element of intent or scienter, it is well established that what is properly no more than a claim for breach of promise may not be transformed into one for fraud by the mere addition of a perfunctory allegation that the promissor did not intend to keep his or her promise (*see New York Univ.*, 87 NY2d at 318; *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 614 [1994]; Eastman *Kodak Co. v Roopak Enters.*, 202 AD2d 220, 222 [1994]; *Lanzi*, 54 AD2d at 1058). The cases, even while occasionally relaxing the rigorous statutory pleading requirements for fraud where it appears that a plaintiff has a claim but for good reason has been unable to articulate some relatively inaccessible circumstance of it in detail, consistently affirm the necessity of a pleading alleging facts from which each element of the tort can be made out (*see e.g. Kaufman v Cohen*, 307 AD2d 113, 120-121 [2003]; *Houbigant, Inc. v Deloitte & Touche*, 303 AD2d 92, 98 [2003]). While a mere failure to plead with the ordinarily required particularity may sometimes be excused, the utter failure to allege facts warranting an inference essential to establishing fraud comes within no

recognized dispensation.

Lanzi v Brooks (54 AD2d 1057 [1976], *supra*) is instructive. There, as here, the claim for fraud was premised on a promissory representation and the complaint contained a conclusory allegation that the representation was made by the defendant with the intent to deceive the plaintiff (at 1058). In nonetheless dismissing the action for failure to state a claim, the Appellate Division observed in language resonant here as well:

> "Absent a present intent to deceive, a statement of future intentions, promises or expectations is not actionable on the grounds of fraud (*Adams v Clark*, 239 NY 403). A complaint based upon a statement of future intention must allege facts to show that the defendant, at the time the promissory representation was made, never intended to honor or act on his statement . . . Plaintiff's complaint neither alleges that defendant falsely stated his future intentions at the time he purportedly made the [complained of representation] nor contains any factual assertions from which this conclusion can be drawn" (*id.*).

In affirming the dismissal on this ground, the Court of Appeals noted pointedly that its affirmance was predicated on the plaintiff's fundamental failure to "allege either a present intent not to carry out the promises of future action, or, in fact, any factual assertions from which this conclusion can be drawn," and not upon a possibly excusable failure to meet the

exacting standard of particularity imposed by CPLR 3016(b) (43 NY2d 778, 779-780 [1977]). Here too, the dispositive issue is whether fraud is alleged at all, not whether, although otherwise adequately alleged, it is articulated in sufficient detail to pass CPLR 3016(b) muster. Although this complaint, like the complaint in *Lanzi*, contains pro forma allegations of knowing misrepresentation, to the effect that David falsely represented his actual intentions when he gave the assurances now alleged to have been fraudulent, it does not state facts that, if proved, would permit a fact-finder reasonably to conclude that David's promissory representations, at the time of their making, did in fact falsify his then actual intentions, and thus it does not state a claim for fraud.

Fraud, a wrong bordering on criminality (*see Gaidon v Guardian Life Ins. Co. of Am.*, 94 NY2d 330, 348 [1999]), is, by design, not easily asserted, and it may be particularly difficult to plead where the present fact alleged to have been misrepresented is a subjective intention. Nonetheless, in a case such as this one, premised upon promissory representations, it is precisely the contemporaneous existence of the promisor's contrary subjective intent that marks his conduct as fraudulent and distinguishes it from the sort of conduct properly supportive of no more than a cause of action for breach of contract. It is

then critically important that the empirical basis for the essential inference as to the existence of the promisor's contrary intention, the very "fact" alleged to have been misrepresented, be set forth clearly in the pleading. Otherwise, breach of promise would be routinely pleaded in the alternative as fraud and the essential distinctions between the causes impermissibly blurred.

While a mere pleading defect might be remediable, it is plain that the defect in plaintiffs' fraud claim is not confined to its articulation, but extends more profoundly to its merits. Defendants' submissions, taken together with the circumstances of the purported fraud, as alleged in the complaint, demonstrate conclusively that plaintiffs could not have reasonably relied on the alleged assurances and, accordingly, that they have no claim for fraud (*see Lanzi,* 54 AD2d at 1058*; and see Demov, Morris, Levin & Shein v Glantz,* 53 NY2d 553, 557-558 [1981]).

As noted, on February 28, 2006, John, through his wholly owned company BOA, entered into an engagement agreement pursuant to which the terms of his compensation for his investment banking services were formalized. The agreement, although not silent as to the matters covered by David's prior oral representations, i.e., John's contemplated employment with and founders' equity interest in BOE, was altogether noncommittal on these issues,

providing only that

> "*[i]f* [BOA] becomes employed by [BOE], [BOA] will be granted certain equity membership interests in [BOE] *as negotiated among the Parties at such time,*" and that "*[i]f [BOA] does not become employed by [BOE],* BOE will grant [BOA] a fractional percentage of [BOE's] equity membership interests *which is to be determined by [BOE], in its sole discretion,* based on the amount of [BOE's] equity membership interests held by [BOE], its officers and directors, *after the first Transaction* [i.e., BOE's initial financing], and based on the amount of contributed Equity Financing and Debt Financing capital accepted by [BOE] from investors on the Investor Contact List" (emphasis added).

The engagement agreement contained a merger clause stipulating that it was "the complete and exclusive statement of the Agreement and understanding of the Parties regarding the subject matter hereof, which supercedes and merges all prior proposals, agreements and understandings, oral and written, relating to the subject matter hereof."

In support of their motion, defendants also submitted e-mails exchanged on April 17, 2006, subsequent to BOE's receipt on March 31, 2006 of a $150 million funding commitment from the investment bank of Warburg Pincus LLC (Warburg) but prior to the closing of the financing transaction, which would take place on May 16, 2006. In the first of these e-mails, David wrote John,

> "[As hard as you and I have worked to build a company where we could work together, it has

> become obvious to me, you, the other management members and Warburg that your substantial financial management and investment banking skills do not transfer to the high level of Oil Gas Accounting and land management skills that are required in a very small start-up company . . . *Let's find a way for us to gracefully close this endeavor and step apart*" (emphasis added).

John replied that the group concerns described by David were "rational and ha[d] merit" but that he nonetheless wished to continue his involvement in the venture. He proposed to do so on terms markedly different from those originally contemplated. Specifically, he volunteered to "*step back from the CFO role,*" to accept employment with BOE as a landman rather than a land manager; to accept a reduced salary and equity interest; and to serve the company as an at-will employee.

On May 16, 2006, at the closing of the BOE/Warburg funding transaction, John, individually and on behalf of BOA, entered into a termination and fee payment agreement. As is here relevant, that agreement, although stating categorically that "other than as set forth in this Agreement, BOA [and] J. Braddock . . . have no further right to any fee payments from BOE Corp or BOE LLC on account of the Engagement Agreements or any other agreement or arrangement regarding the provision of services by BOA [and] J. Braddock to [BOE]," contained no provision entitling John or BOA to founders' shares in accordance with the alleged

earlier representations by David.

Also on May 16, 2006, John was presented with an at-will employment agreement, which in its very first paragraph stated that it "supercede[d] all prior discussions regarding your employment with BOE." The terms of the agreement substantially conformed to those John had proposed in his April 17, 2006 e-mail, which is to say that they were dramatically at variance with David's alleged representations as to the nature of the positions John would fill at BOE. John executed the agreement on May 30, 2006, and pursuant thereto worked for BOE as a landman until his termination a half year later.

It should be clear that, subsequent to April 17, 2006, when in his e-mail David frankly apprised John of his wish to "close this endeavor and step apart," there could have been no reasonable basis for John's reliance on David's alleged prior assurances as to how the endeavor would unfold. Indeed, John, acknowledging that concerns over the adequacy of his skills in the areas of oil and gas accounting and land management were rational and possessed merit, plainly understood that David's "assurances" as to his assumption of executive responsibilities in those areas were no longer operative, and himself proposed, instead of serving the venture as its CFO and land manager, to be employed at will by BOE in the non-executive capacity of landman.

He also volunteered, commensurate with the proposed reduction in his contemplated status, to accept a smaller allotment of founders' shares than he had been promised. The ensuing agreements entered into by plaintiffs, setting forth their significantly revised entitlement to compensation for their investment banking services, and the terms of John's at-will employment with BOE, purport to govern their subject matters exclusively and are utterly inconsistent with the promises upon which John now claims to have relied. As such, they are preclusive of any legally tenable claim of reasonable reliance upon those promises (*see Citibank v Plapinger*, 66 NY2d 90, 95 [1985]; *Societe Nationale d'Exploitation Industrielle des Tabacs et Allumettes v Salomon Bros. Intl.*, 249 AD2d 232 [1998], *lv denied* 95 NY2d 762 [2000]; *Bango v Naughton*, 184 AD2d 961, 963 [1992]).

It is, nonetheless, urged that John may have been the victim of a fraud completed before the e-mails of April 17, 2006 and ensuing agreements. In this connection, it is noted that John resigned from the investment banking firm where he had been employed on February 28, 2006, and it is contended that, in taking this momentous step, he reasonably relied upon his cousin's assurances of executive employment and founders' shares in the start-up company. However, the engagement agreement, the

provisions of which were undoubtedly known to John at the time of his resignation,[2] while explicitly addressing the subject of plaintiffs' eventual entitlement to an equity membership interest in BOE as an element of their compensation, conspicuously failed to provide any "assurance" that plaintiffs would receive the equity interest David had allegedly promised. In fact, far from providing an assurance of the promised interest, the agreement left the equity element of plaintiffs' compensation for subsequent determination, by negotiation if the "Advisor" became employed by company, and by the company "in its sole discretion" if the "Advisor" was not so employed. The agreement thus expressly contemplated the possibility that BOA, or, practically speaking, John, would not be employed by BOE and, in any event, furnished no ground to suppose that David's unilateral promises would ultimately be honored by the company once it was funded and otherwise constituted. Indeed, the agreement is clear that hiring and compensation are prerogatives solely of the company, and it pointedly forbids reliance on "all prior proposals, agreements and understandings, oral and written, relating to the subject matter hereof," a reference which can only be understood

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[2]Although John tendered his resignation one day before executing the engagement agreement, the agreement is alleged merely to have formalized what had been previously agreed upon.

as embracing with specific purpose the frequently reiterated promises of executive employment and compensation allegedly made by David to John in advance of the contract and at a time when the "company" had no actual existential dimension. Accordingly, because plaintiffs "in the plainest language announced and stipulated that [they were] not relying on any representations as to the very matter as to which [they] now claim[] [they were] defrauded," their fraud claim must fail (*Danann Realty Corp. v Harris*, 5 NY2d 317, 320-321 [1959]).

Of course, the failure of the engagement agreement to include assurances of the sort allegedly given by David, was a reflection of - indeed, was dictated by - the circumstance that no such assurances could then be reliably given. At the time of David's nominal assurances, BOE was but an unfunded shell requiring for its viability an enormous infusion of capital. And, while John was confident of procuring financing for the venture, there had been, at the time, neither a commitment of funds nor even the emergence of a leading candidate to provide such a commitment. Moreover, John, in addition to being an experienced investment banker and financial consultant, was, by reason of his own prior professional involvement in oil and gas ventures and his extensive familial connections to the industry, particularly well aware of the risks such ventures entailed.

Indeed, his own cousin and prospective co-venturer, David, had suffered a conspicuous failure in one such endeavor, in the aftermath of which, according to the complaint, he had been forced from the industry for several years. It is inconceivable that, with his vast fund of personal and professional experience and expertise, John did not understand that any substantial investment in the proposed venture, a high-risk start-up exploration company seeking to tap "unconventional" oil and gas reserves, would almost certainly be conditioned upon a significant measure of control by the investor over the company's management, operations and finances. In these circumstances, rife with uncertainty over the still inchoate entity's very viability, no promise of high executive-level employment in the company, much less one involving an allocation of a substantial equity membership interest, could reasonably have been viewed as an "assurance" or a "guarantee." As John must, and in any event should, have understood, the promise by David to appoint him, his cousin, to key executive positions for which he was by his own admission not particularly well qualified would almost certainly invite scrutiny by the "company" in its post-financing incarnation. The reality was that David simply was not in a position to assure that his promises to John would be kept by the company, and, as noted, the engagement agreement, far from

encouraging any misperception on that account, clearly reserved to the company the authority to determine whether John would ultimately be employed and the terms of his compensation. Had David's "promises" been the stuff of which binding, reliable commitments could have been made, there is every reason to suppose that John would have insisted upon their inclusion in the engagement agreement, since their fulfillment was, from John's perspective, essential to justify the discounted investment banking fees formalized by the agreement. That they were not so included, would point ineluctably, even in the absence of the agreement's merger provision specifically forbidding reliance on "all prior proposals, agreements and understandings, oral and written, relating to the subject matter [t]hereof," to the conclusion that John understood, at the time, that what he now terms "assurances" and "guarantees" could have been reasonably understood as only as expressions of expectation or intent, the realization of which would depend upon contingencies not within the power of the parties to foreseeably accommodate to their stated objectives.

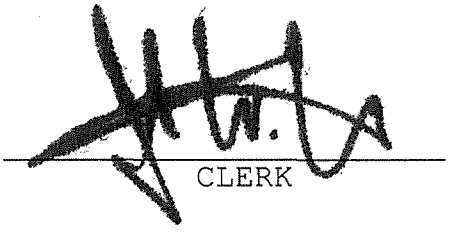
None of the objective circumstances compelling the conclusion that John could not, in electing to terminate his employment on February 28, 2006, reasonably take assurance from David's promises, was hidden from or misrepresented to him, and,

indeed, the fraud he alleges does not involve their concealment. Rather, he alleges, albeit inadequately, that David concealed his intention not to act in accordance with his promises. But the alleged concealment, even if it had occurred, would not change the essential calculus. What John did know and what he contemporaneously represented is more than sufficient to defeat his present claim of reasonable reliance. While he may have had a moral claim to rely upon his cousin even when objective circumstances counseled otherwise, there is no legal right to recovery in fraud that may be vindicated upon such a predicate.

Accordingly, I would affirm the dismissal of plaintiffs' fraud cause of action, and, in light of the non-viability of their claim of reasonable reliance, would affirm as well the dismissal of plaintiffs' cause alleging promissory estoppel, and their cause for breach of fiduciary duty, which, as alleged, also depends upon the reasonableness of plaintiffs' reliance upon the complained-of misrepresentations.

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

ENTERED: JANUARY 6, 2009



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