SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

NOVEMBER 5, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Andrias, Catterson, Acosta, Abdus-Salaam, JJ.

1028-
1028A ABA Consulting, LLC, Index 108232/08
Plaintiff-Respondent, 105556/07

-against-

Liffey Van Lines, Inc.,
Defendant-Appellant.

Agulnick & Gogel, LLC, New York (William A. Gogel of counsel), for appellant.

Strassberg & Strassberg, P.C., New York (Robert Strassberg of counsel), for respondent.

Order, Supreme Court, New York County (Walter B. Tolub, J.), entered January 23, 2009, which denied defendant's motion to vacate a 2007 settlement agreement, and, upon reargument of a prior order, denied in part defendant's motion to compel arbitration, denied its motion to dismiss the complaint, and modified the prior order only to direct that the parties submit the disputes pertaining to tax years 2007 and 2008 to mediation within 20 days, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered August 25, 2008, unanimously dismissed as subsumed in the appeal from the later order, with costs.

In March of 2004, the parties entered into a written agreement whereby plaintiff agreed to advise and assist defendant in identifying and qualifying for tax and business incentives and benefits. The consulting agreement set forth that the fee for plaintiff's services would be 20% of defendant's tax savings between 2004 and 2008, payable by April 15 of the year subsequent to defendant's receipt of any tax benefit. The agreement also provided that any disputes were to be submitted to mediation, and if unsuccessful, to arbitration.

Defendant paid plaintiff for 2004, but not for 2005 and 2006. Plaintiff requested mediation, and when defendant did not respond, it commenced an action for its fee, and to compel the payment of future compensation for 2007 and 2008. The parties settled that lawsuit, and executed a settlement agreement confirming the terms of their agreement. The settlement agreement, which did not contain a mediation or arbitration clause, provided that defendant would pay $99,297 in full settlement of its alleged liability for tax years 2005 and 2006, without prejudice to plaintiff's claims for 2007 and 2008 fees. The parties also agreed to exchange general releases. Plaintiff thereafter delivered a notice of discontinuance and a general release to defendant. However, defendant did not furnish a general release to plaintiff.

In June 2008, plaintiff commenced an action for breach of

the settlement agreement, seeking to compel defendant to execute a general release, and to pay plaintiff 20% of defendant's 2007 tax savings, as well as prospective savings for 2008. Defendant moved to dismiss this complaint and to compel arbitration of the dispute. In the August 25, 2008 order, the court denied the application for dismissal, and granted the motion to compel arbitration to the extent that it sought resolution of issues pertaining to 2007 and 2008 taxes. The order also directed defendant to deliver a general release to plaintiff in accordance with the settlement agreement within 20 days of service of a copy of the order with notice of entry.

After New York taxing authorities reversed defendant's tax credits for 2006, and sought a payment of $147,365.98 from it, defendant moved to vacate the settlement agreement. Defendant argued that it was induced to enter the settlement agreement upon the mistaken belief that an audit reducing any tax credits would result in a proportional refund or credit from plaintiff. In the order entered January 23, 2009, the court denied defendant's motion. The court concluded that if defendant expected to be reimbursed by plaintiff for reductions in tax credits for which it was required to reimburse the State, it should have insisted upon language effectuating such reimbursement within the settlement agreement. The court held that without such a provision, defendant had no contractual recourse from plaintiff

for its tax arrears. Defendant appeals from both orders.

Defendant first argues that the dispute over fees for 2005 and 2006 should have been submitted to mediation or arbitration, or both, rather than being determined by the court. However, the settlement agreement, which resolved the dispute over these fees, did not contain a provision requiring mediation or arbitration. Accordingly, the court had jurisdiction to determine subsequently arising issues related to the settlement agreement.

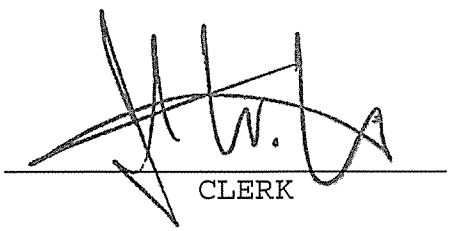
Next, defendant urges that the settlement agreement should be vacated on the ground of mutual mistake, arguing that the parties must have contemplated reimbursement for tax arrears. However, while mutual mistake may furnish grounds for vacating a written agreement, there is a "'heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties'" and the "proponent of reformation must 'show in no uncertain terms, not only that mistake or fraud exists, but exactly what was really agreed upon between the parties'" (*Chimart Assoc. v Paul,* 66 NY2d 570, 574 [1986], quoting *Backer Mfg. Corp. v Acme Quilting Co.,* 46 NY2d 211, 219 [1978]). Defendant has not established that the parties came to any agreement, or even contemplated the refund of payments recouped by the taxing authorities, or that either had any knowledge, at the time the settlement agreement was executed, that defendant would be audited. Accordingly, the settlement

agreement cannot be vacated on the ground of mutual mistake.

Defendant next argues that the settlement agreement should be vacated on the ground of unilateral mistake, contending that it was induced to pay fees upon the mistaken belief that any audit reducing its tax refunds would entitle it to a proportional refund or credit from plaintiff. However defendant presents no evidence that plaintiff fraudulently induced it to enter into the settlement agreement upon the false representation that it would adjust its fees if additional taxes were found due, as required for a finding that the contract was the product of unilateral mistake (*Rosen Auto Leasing, Inc. v Jacobs*, 9 AD3d 798, 800 [2004]). In fact, the settlement agreement was an arm's length transaction between businessmen who were represented by counsel, and the terms of plaintiff's compensation was consistent with that set forth in the parties original consulting agreement. We find no basis on this record for vacating that agreement (*see Greater N.Y. Mut. Ins. Co. v United States Underwriters Ins. Co.*, 36 AD3d 441, 443 [2007]).

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

ENTERED: NOVEMBER 5, 2009



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Gonzalez, P.J., Saxe, Catterson, McGuire, Acosta, JJ.

1311 Brooklyn Community Management LLC, et al., Petitioners-Appellants, Index 105159/08

-against-

New York City Department of Education, et al., Respondents-Respondents.

Wachtel & Masyr, LLP, New York (Howard Kleinhendler of counsel), for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel) for respondents.

Judgment, Supreme Court, New York County (Jane S. Solomon, J.), entered September 29, 2008, denying the petition seeking, inter alia, to annul respondents' determination disqualifying petitioner Brooklyn Community Management LLC (BCM), its affiliates and all principal owners or officers from conducting business with respondent Department of Education (DOE), and dismissing the proceeding brought pursuant to CPLR article 78, unanimously affirmed, without costs.

DOE's determination was rationally based upon BCM's continued refusal to accept responsibility for its failure to comply with a certain student's Individualized Education Plan and for having submitted false billing forms pertaining to that student. BCM also failed to answer accurately all questions on the VENDEX forms it submitted as part of its bid proposal for a new contract with DOE, and there were outstanding tax liens

against another entity identified as owned by BCM's owner (*see e.g. Matter of Ciprietti-Tolisano Assoc. v Karnovsky*, 268 AD2d 234 [2000], *lv denied* 95 NY2d 759 [2000]).

The penalty imposed is not shocking to one's sense of fairness (*seem Matter of Kelly v Safir*, 96 NY2d 32, 38 [2001]), and contrary to petitioners' contention, was not based upon a single billing error.

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

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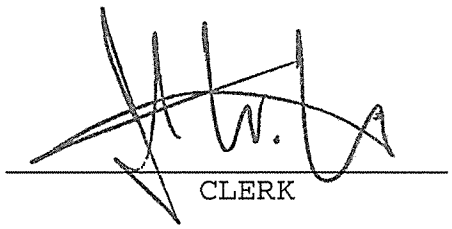

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Mazzarelli, J.P., Saxe, Catterson, DeGrasse, Abdus-Salaam, JJ.

960-
961-
961A-
961B Captain Lori Albunio, et al., Index 126981/02
Plaintiffs-Respondents, 113037/03

-against-

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

- - - -

Robert Sorrenti,
Plaintiff-Respondent,

-against-

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

Michael A. Cardozo, Corporation Counsel, New York (Julie Steiner of counsel), for appellants.

Mary D. Dorman, New York for Lori Albunio and Thomas Connors, respondents.

Meenan & Associates, LLC, New York (Colleen M. Meenan of counsel), for Robert Sorrenti, respondent.

Judgments, Supreme Court, New York County (Martin Shulman, J.), entered November 8, 2007, after a jury trial, respectively, inter alia, awarding plaintiff Robert Sorrenti the principal sum of $491,706 against the City of New York and awarding his attorneys, Meenan & Associates, LLC, by Colleen M. Meenan, Esq., attorney's fees in the amount of $366,323.75, unanimously affirmed, without costs. Judgment, same court and Justice, entered November 9, 2007, after a jury trial, inter alia,

awarding plaintiff Lori Albunio $579,728.83 and plaintiff Thomas Connors $588,113.45 against the City of New York, affirmed, without costs. Appeal from order, same court and Justice, entered on or about August 30, 2007, unanimously dismissed, without costs, as subsumed in the appeals from the aforesaid judgments. Judgment, same court and Justice, entered November 9, 2007, awarding attorneys' fees to counsel for plaintiffs Albunio and Connors, affirmed, without costs.

In support of their respective retaliation claims, plaintiffs Albunio and Connors both produced credible evidence of reductions in their supervisory responsibilities, interference with and loss of their job advancement opportunities, and other acts "reasonably likely to deter a person from engaging in protected activity" (Administrative Code of the City of New York § 8-102[7]). Both engaged in protected "opposition" activity, by advocating for plaintiff Sorrenti's transfer to the Youth Services Section (YSS) of the Deputy Commissioner of Community Affairs despite defendant James Hall's animus towards him (*see Crawford v Metropolitan Govt. of Nashville and Davidson County, Tenn.*, ___ US ___, 129 S Ct 846, 851 [2009]). After advocating for Sorrenti, both Albunio and Connors were shut out of meetings. Albunio was told to find another command and was forced to take a position viewed as a demotion in a less desirable assignment. Connors's tours of duty were changed in ways that made "no sense"

and prevented him from properly supervising staff, and when he sought to transfer out of YSS, having seen "the writing on the wall," he was not given the position he had been promised on transfer orders but instead was assigned the job of Integrity Control Officer, a position he viewed as a demotion.

Both Albunio and Connors produced evidence of a causal connection between their protected activity and the adverse employment action taken against them (*see Koester v New York Blood Ctr.*, 55 AD3d 447, 448-449 [2008]). Both had exemplary work records before the Sorrenti affair, but, after advocating for Sorrenti, their authority was eroded, Albunio was stripped of her command, and both were forced to transfer out of YSS to positions that were viewed as demotions.

Albunio and Connors also established that they were constructively discharged by producing evidence that their working environments had been made objectively so intolerable that a reasonable person in their respective positions would have felt compelled to leave (*see Gonzalez v Bratton*, 147 F Supp 2d 180, 197-198 [SD NY 2001], *affd* 48 Fed Appx 363 [2d Cir 2002]). It was for the jury to decide whether each plaintiff's resignation was temporally too remote from the retaliatory conduct (*id.* at 198). It could reasonably have concluded that neither plaintiff could afford to give up valuable pension rights and would have lost valuable pension benefits by resigning before

completing 20 years of service.

The jury's determination to award Sorrenti $471,706 in compensatory damages was supported by the evidence. Sorrenti's treating psychiatrist, Dr. Salvatore Ambrosino, testified that the cause of Sorrenti's major reactive depression was that he was being stereotyped as a pedophile. Sorrenti testified to the damage to his reputation and professional career caused by his being perceived as a gay man and stereotyped as a child molester. The record showed that he endured anxiety and panic attacks, experienced suicidal ideation, and took numerous medications to combat depression and anxiety. While Sorrenti had been diagnosed with a reactive depression following an incident with another police officer in 1999, the jury was entitled to credit Ambrosino's testimony that the events of 2002-2003, and in particular being stereotyped as unfit to be around children, was the cause of the current reactive depression. The award did not deviate materially from what would be reasonable compensation (CPLR 5501[c]; *see Matter of Town of Hempstead v State Div. of Human Rights*, 233 AD2d 451 [1996], *appeal dismissed* 89 NY2d 1029 [1997], *lv denied* 90 NY2d 807 [1997]).

The trial court's evidentiary rulings were proper and did not deprive defendants of their right to a fair trial.

The awards of attorney's fees to plaintiffs' attorneys were not excessive (*see e.g. Gonzalez v Bratton*, 147 F Supp 2d at 211-212; *Wahad v Coughlin*, 870 F Supp 506 [SD NY 1994]).

All concur except Catterson, J. who dissents in part in a memorandum as follows:

CATTERSON, J. (dissenting in part)

Because I do not believe that, prior to her transfer and purported demotion, Captain Lori Albunio engaged in the protected activity required to make out a retaliation claim, I must respectfully dissent in part.

This case arises from the events surrounding an unsuccessful application by former Police Sergeant Robert Sorrenti for a position at the New York City Police Department's Youth Services Section (hereinafter referred to as "YSS"). The following facts are undisputed: Lori Albunio graduated from the Police Academy in 1985 at the age of 21. Over the next 15 years she received several promotions, rising to the rank of captain in 1999. In February 2001, she was assigned as Commanding Officer of YSS, a subcommand of the Deputy Commissioner of Community Affairs. Inspector James Hall became Albunio's supervisor in early 2002.

In July or August 2001, Albunio received an application from Sergeant Sorrenti for a position at YSS. Although there was not a job opening at the time, Albunio, accompanied by Administrative Sergeant Steven Gilmartin, conducted a standard interview of Sorrenti and found him qualified for the position. His prior evaluations were "very, very good," and he came "highly recommended" for the position. Albunio rated him as having "above average potential."

When a vacancy opened up in April 2002, Albunio submitted a

request to Hall for Sorrenti to fill that vacancy. Although Hall's approval of these requests was usually a formality, he wished to re-interview Sorrenti and to interview an additional officer, a Sergeant Nicholson, for the position. Hall had not previously participated in any interviews at YSS.

At trial, Albunio testified that she and Hall interviewed Sorrenti in May 2002; Hall asked most of the questions. Hall asked Sorrenti several questions about his marital status and family and about an incident in which Sorrenti had loaned money to another male officer. Immediately after the interview, Hall told Albunio that "there was something not right about that guy." Albunio thought Hall believed that Sorrenti was gay. Immediately thereafter, Hall and Albunio interviewed Nicholson whom Albunio believed to be less qualified for the position than Sorrenti.

A week or two later, Albunio asked Hall whether he had decided between Nicholson or Sorrenti. According to Albunio's testimony, Hall replied that he had requested Nicholson because he had "found out some f--d up s--t" about Sorrenti and "wouldn't want him around children." Albunio testified that this further indicated to her that Hall believed Sorrenti to be gay and that he had denied him the transfer for that reason.

However, Albunio acknowledged that she did not tell anybody of her belief because she feared that it "would have [ended her career] right then and there." Nor does the record reflect that

she raised any objections when Nicholson, and not Sorrenti, began working at YSS in 2002, or even that she confronted Hall to determine exactly what he had discovered about Sorrenti that disqualified him as a candidate.

On October 31, 2002, after hearing rumors that she was being transferred, Albunio requested a meeting with Hall's supervisor, Deputy Commissioner Frederick Patrick. Hall was present at the meeting. Patrick confirmed that they were considering replacing Albunio at YSS. When she asked why, Hall interjected, stating that Albunio had used "poor judgment when requesting personnel" who would embarrass him and Commissioner Patrick. Hall cited Sorrenti as the primary example, and gave one other. When Albunio objected that her performance had not previously been criticized and that she believed Sorrenti to be the more qualified candidate for the YSS position, Hall responded that she should have been "more detailed" in investigating Sorrenti.

The record does not reflect that Albunio asked for any further explanation of that evaluation, much less that she voiced her belief that Hall had discriminated against Sorrenti. Albunio asked to see her most recent performance evaluation, which was past due, but was told by Hall that she would see it at a later date.

To avoid the administrative transfer - under which she could be transferred anywhere - Albunio transferred to Transit District

One (hereinafter referred to as "Transit") as Executive Officer, second in command. Albunio testified that, even though her pay was the same, she was in a less desirable office, with less desirable hours, and lost several perks of working in YSS. Additionally, while YSS was a "highly political" and "influential" position, there was no opportunity for advancement from Transit, and Albunio went from being commanding officer at YSS to second-in-command at Transit.

On January 9, 2003, Albunio read in a newspaper that Sorrenti was suing the NYPD, claiming discrimination. On January 13, 2003, she filed a complaint with the Office of Equal Employment Opportunity (hereinafter referred to as the "OEEO"), alleging that Hall had retaliated against her because she advocated for Sorrenti, whom Hall perceived to be gay. Albunio recited the facts of Sorrenti's application process to YSS, and alleged Hall told her she was going to lose her command because she used poor judgment in selecting personnel that would embarrass him and Patrick. The complaint also addressed her overdue performance evaluation for the period of July 1, 2001 to June 30, 2002.

On January 15, 2003, Albunio gave testimony in the investigation of an OEEO complaint filed by plaintiff Thomas Connors regarding the same incident. In July 2003, Albunio was finally permitted to see her overdue performance evaluation. The

evaluation was signed by Deputy Inspector Ivan Dilan and by Hall as the rater and the reviewer respectively. Consistent with her earlier evaluations, her overall rating was four out of five: above standards. However, the comments included criticisms that were not present in past evaluations. In relevant part, Hall wrote:

> "In order to reach her maximum potential as the Commanding Officer of Youth Services Section the ratee needs to assert herself in the area of command presense [*sic*]. Although delegating is essential when in command of a unit, it should not compromise the commanders [*sic*] image as leader of that unit. Improvement in this area can be achieved by the ratee demonstrating more of a 'hands-on' approach to the strategic direction of the command."

Albunio claims that these concerns were never raised with her before she was shown the performance evaluation. The evaluation was dated August 29, 2002.

After receiving her performance evaluation, Albunio filed a second complaint with the OEEO claiming that the negative evaluation was falsified by Hall and filed in retaliation for requesting that Sorrenti join YSS. Additionally, she filed an appeal of her performance evaluation in August 2003, which was not resolved by the date of the trial.

Also in August 2003, Albunio suffered a line-of-duty injury to her shooting hand and was placed on limited duty. She testified that she believed this precluded her from receiving promotions. Albunio applied for transfer to Internal Affairs but

never received an interview. She retired from the Police Department in July 2005, testifying that it was "obvious" that she was not going to be promoted to Deputy Inspector, a discretionary promotion, and that her career was over. She testified that, had this series of events not occurred, she would have stayed on the force for 25 years.

Albunio initially filed her complaint jointly with plaintiff Thomas Connors against the City of New York and against Hall and Patrick in their official capacities (hereinafter collectively referred to as the "City") on July 16, 2003. The complaint alleged that Albunio recommended Sorrenti for a position at YSS based on his interview and qualifications; that Hall perceived Sorrenti to be gay and objected to Albunio's recommendation for that reason; that Albunio continued to advocate for Sorrenti; and that, as a result, she was retaliated against. The complaint alleged causes of action under the New York State Human Rights Law (Executive Law § 290 *et seq.*) (hereinafter referred to as the "state Human Rights Law") and the New York City Human Rights Law (Administrative Code of the City of New York § 8-101 *et seq.*) (hereinafter referred to as the "NYCHRL"). The complaint was later amended to allege continuing retaliatory acts by the defendants for Albunio's support of Sorrenti and the filing of OEEO complaints, and to allege constructive discharge.

The jury found, inter alia, that Hall, acting in his

official capacity, had discriminated against Sorrenti because of his perceived sexual orientation, and that Hall retaliated against Albunio for either opposing the alleged discrimination against Sorrenti or filing an EEO complaint, but that neither Patrick nor any other employees of the City had retaliated against Albunio. The jury awarded Albunio $479,473 in lost earnings against the City.

On appeal, the City asserts, inter alia, that Albunio did not engage in any protected activity prior to her transfer to Transit. I agree, and, for the reasons set forth below, I would reject Albunio's retaliation claim. In my opinion, Albunio did not establish the essential element of engaging in protected activity.

Albunio's claim arises under Administrative Code § 8-107(7), which provides, in relevant part:

> "It shall be an unlawful discriminatory practice . . . to retaliate or discriminate in any manner against any person because such person has (i) opposed any practice forbidden under this chapter, (ii) filed a complaint, testified or assisted in any proceeding under this chapter, (iii) commenced a civil action alleging the commission of an act which would be an unlawful discriminatory practice under this chapter, (iv) assisted . . . in an investigation commenced pursuant to this title, or (v) provided any information to the commission pursuant to the terms of a conciliation agreement . . ."

For her retaliation claim to succeed under this section, Albunio must "show that (1) she has engaged in

protected activity, (2) her employer was aware that she participated in such activity, (3) she suffered an adverse employment action based upon her activity, and (4) there is a causal connection between the protected activity and the adverse action." Forrest v. Jewish Guild for the Blind, 3 N.Y.3d 295, 312-13, 786 N.Y.S.2d 382, 396, 819 N.E.2d 998, 1012 (2004); see also Koester v. New York Blood Ctr., 55 A.D.3d 447, 448-49, 866 N.Y.S.2d 87, 89 (1st Dept. 2008).

Albunio asserts that when she persisted in advocating for Sorrenti's transfer into YSS she was opposing discrimination, and therefore was engaged in a protected activity. See Forrest, 3 N.Y.3d at 313, 786 N.Y.S.2d at 396. However, even giving deference to the jury's determination that Albunio was transferred as a result of her support of Sorrenti, I do not believe that her actions were the type of opposition required by the NYCHRL. Albunio testified that she "opposed" Hall by not withdrawing her request for Sorrenti, retaining his application on file, and maintaining that he was qualified at the meeting where she was informed of her impending transfer.

At no point did she testify that she expressed a belief that Sorrenti was the victim of discrimination. By her own admission, she "kept it to [her]self" and told no one. Additionally, Albunio acquiesced in Hall's decision to hire Nicholson over Sorrenti. Indeed, the record reflects that Albunio did not at

any point elicit from Hall any acknowledgment that he believed Sorrenti to be homosexual; nor did Albunio ever voice her belief to Hall, or anyone else, that Hall thought so.

In my opinion, Albunio's silence on the question of discrimination - even if motivated by a legitimate fear for her job - precludes her from claiming that she "opposed" Hall's discriminatory behavior.

Albunio argues incorrectly that case law has found protected activity that falls short of an express objection. The sole New York case she cites for that proposition is Mariotti v. Alitalia-Line Aeree Italiane-Societa per Azioni, 2008 N.Y. Slip Op. 32160, 2008 NY Misc LEXIS 6022, 2008 WL 3243807 (Sup. Ct., N.Y. County, July 31, 2008). In that case, the plaintiff engaged in protected activity when he told his employer that it was impermissible to discriminate on the basis of age and then refused to fire an older employee. Unlike Albunio, the plaintiff expressly objected to the discrimination at issue and, in fact, *disobeyed* a discriminatory order.

Albunio's reliance on federal cases *interpreting* similar language in Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2003e *et seq.*) is similarly unavailing. See e.g., Rucker v. Higher Educ. Aids Bd., 669 F.2d 1179 (7th Cir. 1982); Tidwell v. American Oil Co., 332 F. Supp. 424 (D. Utah 1971); see also Local Civil Rights Restoration Act of 2005 (hereinafter referred to as

the "Restoration Act"), Local Law No. 85 (2005) of the City of New York § 1. ("Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of the New York City Human Rights Law."); cf. 42 U.S.C. § 2000e-3.

These cases also involve plaintiffs who spoke out against discrimination. For example, in Rucker, the plaintiff disobeyed a direct order to fire an employee for a discriminatory reason and the other employee was not fired. The Seventh Circuit found Rucker to be "a retaliation case in a more fundamental sense" than in the usual cases where an employee is fired for having made a charge of discrimination that was not validated since "[the plaintiff's] prompt and vigorous opposition *averted* unlawful discrimination." 669 F.2d at 1180 (emphasis added).

This stands in sharp contrast with Albunio's actions, which amounted to rating Sorrenti as qualified for the job and then asking Hall whether he had made a decision on the vacant position. Albunio may have harbored suspicious thoughts, but she did not act on them.

The aforementioned cases consistently support the proposition that whenever an employee acts against discrimination, even if he/she does so through unofficial means, that employee is protected. In this manner, the term "opposition" has been broadly construed. In my opinion,

Albunio's support of a candidate based on his qualifications does not constitute "opposition" against discrimination simply because the candidate is believed by some to be gay. Moreover, I believe that any faithful reading of the NYCHRL itself demonstrates that it cannot provide protection for Albunio in this case.

As in Title VII, "opposed" carries its ordinary meaning in the NYCHRL. See Crawford v. Metropolitan Govt. of Nashville and Davidson County, Tenn., _ U.S. _, 129 S. Ct. 846, 850 (2009). Cf. Administrative Code § 8-107(7) with 42 U.S.C. § 2000e-3 ("It shall be an unlawful employment practice [...] to discriminate against any individual [...] because he has opposed any [...] unlawful employment practice"). Webster's Dictionary defines "oppose" as "to confront with hard or searching questions or objections," or, inter alia, "to offer resistance to, contend against, or forcefully withstand." Webster's Third New International Dictionary 1583 (3d ed. 1993). To oppose a practice, then, it is not enough merely to disagree with it or harbor an unarticulated belief that it is wrong; one must confront the actor or resist the practice.

These definitions square neatly with the interpretations of Title VII given in the Equal Employment Opportunity Commission Compliance Manual (hereinafter referred to as the "EEOC Manual"), which provides clear standards regarding what is and is not opposition under the statute, and with the New York City

Council's interpretations of the NYCHRL. See Rep of Comm *on* General Welfare on the Local Civil Rights Restoration Act of 2005, 2005 New York City Legislative Annual at 536 ("[the standard applied to retaliation claims under the NYCHRL] is in line with the standard set out in guidelines of the [EEOC]"). The EEOC Manual defines opposition as when "an individual explicitly or implicitly communicates to his or her employer [...] a belief that its activity constitutes a form of employment discrimination." EEOC Manual, § 8-II(B)(1) at 8-3, (1998), available at http://www.eeoc.gov/policy/compliance.html. The EEOC Manual clarifies further with several examples, one of which is particularly instructive: where an employee who is a member of a protected class states that his salary is unfairly low, but does not state that he believes he is being subjected to wage discrimination based on his membership in that protected class, he is *not* engaging in protected "opposition" conduct. Id. § 8-II(B)(2) at 8-4. This is virtually identical to the instant case, where Albunio has claimed that she opposed the decision not to hire Sorrenti, but did not oppose it on the grounds that it was discriminatory.

At the heart of these definitions is the protection of *actions taken against* discrimination, not the protection of privately held, unexpressed beliefs. However broadly "opposing discrimination" may be construed, an employee must give voice to

that opposition before the law's protection applies. See Crawford, _ U.S. _, 129 S. Ct. at 351. The language does not extend this protection to those who are perceived as supporting a member of a protected class for promotion.

Under this reading of the NYCHRL, I think it clear that Albunio did not oppose the discrimination against Sorrenti. Merely stating her belief that Sorrenti was the better candidate is a far cry from suggesting that Hall's differing opinion and selection of an alternative candidate were the result of discrimination.

Albunio further argues that the analogies to state and federal law are inappropriate because the Restoration Act establishes these bodies of law merely "as a floor below which the City's Human Rights law cannot fall, rather than a ceiling. However, I believe this observation is largely immaterial. First, the Restoration Act was enacted more than two years after Albunio's transfer to Transit. Second, the amendments made by the Restoration Act expanded only the language defining an adverse employment action; there is no indication that this effected an expansion of the definition of opposition or protected activities beyond their original construction.

Moreover, even if this case were determined on equitable grounds, Albunio's self-acknowledged actions could not be considered protected activity. The law protects those who speak

out because anti-discrimination schemes depend in large part on the willingness of individuals to act against discrimination. Cf. EEOC Manual § 8-I(A) at 8-1 ("enforcement [...] depend[s] in large part on the initiative of individuals to oppose [...] discrimination"). In the absence of such protection, those who might otherwise oppose discrimination would be able to do so only at great personal peril.

I acknowledge that Albunio had a legitimate fear of reprisals if she voiced her objections; however the sole purpose of the retaliation statute is to allay concerns and encourage action in precisely this sort of situation. I cannot support a decision that would hold that her minimal activity is protected by a statute enacted to encourage and protect action when Albunio chose not to act or speak out. I would find, instead, that Albunio first engaged in protected activity on January 13, 2003, when she filed her first OEEO complaint. Because it occurred after her transfer, the filing of that complaint cannot support a finding against Hall that her transfer was retaliatory.

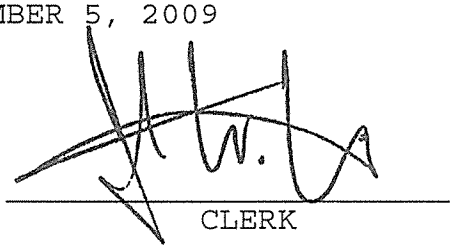
Albunio further argued that the performance evaluation she received covering 2001 to 2002 was another adverse employment action. However, Albunio received a four out of five rating and was marked "above standards." The only criticism she points to from Hall are statements that she needed to delegate less to reach her maximum potential as a leader. I would find, as a

matter of law, that this is insufficient to be considered adverse action, and therefore cannot support a finding of retaliation.

Accordingly, I would find that Albunio did not present a valid case for retaliation under the NYCHRL, and would therefore modify the jury verdict in favor of the defendants with respect to Albunio's retaliation claim. I otherwise concur with the majority.

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

ENTERED: NOVEMBER 5, 2009



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

1268-
1268A In re Charisma D. and Another,

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

Sandra R.,
Respondent-Appellant,

Commissioner of the Administration
for Children's Services,
Petitioner-Respondent.

Susan Jacobs, Center for Family Representation, Inc., New York (Michele Host of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Sharyn Rootenberg of counsel), for respondent.

Karen Freedman, Lawyers for Children, Inc., New York (Brenda Soloff of counsel), Law Guardian.

Orders of disposition, Family Court, New York County (Sara P. Schechter, J.), entered on or about March 5, 2008, which, upon a fact-finding determination that respondent mother neglected the subject children, placed the children in the custody of their respective paternal grandmothers until the completion of the permanency hearing, unanimously reversed, on the law, without costs, insofar as they bring up for review the fact-finding determination, the petition dismissed, and the remainder of the appeal dismissed as academic.

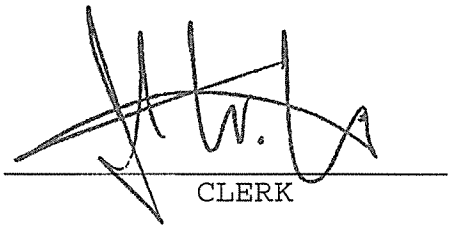
The evidence in support of the neglect finding is that

police officers recovered from the apartment in which respondent resided with the subject children and her mother one glassine envelope each of heroin and cocaine sufficient to establish misdemeanor crimes, and a digital scale. At the time of the search, respondent, one of the children, respondent's sister, her mother and her mother's boyfriend were present in the apartment. The heroin was recovered from a cabinet in the "dining room kitchenette area," the cocaine from respondent's mother's bedroom, and the scale from a dresser drawer in respondent's bedroom. According to the undisputed evidence at the fact-finding hearing, none of this contraband was in plain view. A police officer testified that respondent's mother told the police that the controlled substances were in the apartment and that they were hers; the officer also testified that respondent told the officers that her mother used drugs and that if any were found, they belonged to her mother. As for the scale, the officer testified that respondent told him about the scale and that it belonged to her infant son's father, who was no longer living in the apartment. Such evidence is legally insufficient to establish neglect under Family Court Act § 1012(f)(i)(B) (*see Nicholson v Scoppetta*, 3 NY3d 357, 369 [2004]). In view of the foregoing, the terms of the placement are academic. We also note

that the placement has been rendered moot by the expiration of the orders of disposition and subsequent orders finally discharging the children to respondent's custody.

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

ENTERED: NOVEMBER 5, 2009



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

1279N McLaughlin, Piven, Vogel Securities, Inc., et al., Petitioners-Appellants,

-against-

Robert Ferrucci, Respondent-Respondent. Index 600616/08

Law Office of Joseph D'Elia, Huntington (Mark G. Vaughan of counsel), for appellants.

Malecki Law, New York (Jenice L. Malecki of counsel), for respondent.

Order, Supreme Court, New York County (Eileen A. Rakower, J.), entered June 25, 2008, which, insofar as appealed from as limited by the briefs, confirmed an arbitration award of attorneys' fees to respondent in the principal amount of $117,000, unanimously affirmed, with costs.

The parties' securities brokerage agreement provided that the resolution of disputes arising thereunder would be governed by New York law and that "all controversies" between them would be settled by arbitration conducted in accordance with regulations of the National Association of Securities Dealers, Inc. (now called the Financial Industry Regulatory Authority or FINRA). The relevant regulation permits the award of "reasonable attorneys' fee reimbursement, in whole or in part, in accordance with applicable law."

An award in an arbitration subject to the FAA, such as this,

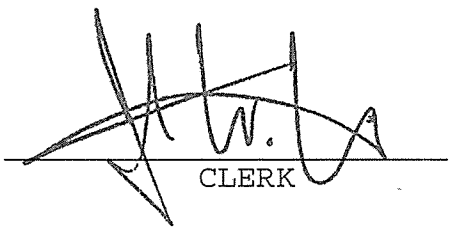
can be vacated on the ground of "manifest disregard of the law" (*see* generally *Wein & Malkin LLP v Helmsley-Spear Inc.*, 6 NY3d 471, 478, n8, 480 [2006], *cert dismissed* 548 US 940 [2006]). "But manifest disregard of the law is a severely limited doctrine. It is a doctrine of last resort limited to rare occurrences of apparent egregious impropriety on the part of the arbitrators ... To modify or vacate an award on the ground of manifest disregard of the law, a court must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case" (*id.* at 480-481 [internal quotation marks omitted]).

Here, as in *Matter of Stewart Tabori & Chang, Inc.* (282 AD2d 385, 386 [2001], *lv denied* 96 NY2d 718 [2007]), the award of attorneys' fees was not authorized by New York law, because no statute provided for such an award and it was neither authorized by an express provision of the arbitration agreement nor requested by both parties (*see also Matter of Matza v Oehman, Helfenstein & Matza*, 33 AD3d 493 [2006]). Unlike *Stewart Tabori*, however, we cannot find that the award was in manifest disregard of the law as it does not appear that the arbitrators knew that New York law was controlling on the question of their authority to award attorneys' fees. Because appellants reasonably could

have been understood to have taken the position before the arbitrators that they were free to choose to apply the law of a jurisdiction other than New York, we cannot find that the arbitrators knew they were constrained to apply the law of New York. Indeed, as is clear from a review of the written award, the arbitrators did not apply New York law. Accordingly, although the arbitrators should have applied New York law and concluded that they were without authority to award attorneys' fees, the award does not reflect an "apparent egregious impropriety on the part of the arbitrators" (*Wein & Malkin*, 6 NY3d at 480, *supra*).

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

ENTERED: NOVEMBER 5, 2009



Tom, J.P., Saxe, Renwick, DeGrasse, Richter, JJ.

1402 John Guinter, Index 108493/06
Plaintiff,

-against-

I. Park Lake Success, LLC, et al.,
Defendants/Third-Party
Plaintiffs-Appellants,

Rivco Construction Corp.
Third-Party Defendant-Respondent.

Conway, Farrell, Curtin & Kelly, PC, New York (Keith D. Grace of counsel), for appellants.

Melito & Adolfsen, PC, New York (Robert D. Ely of counsel), for respondent.

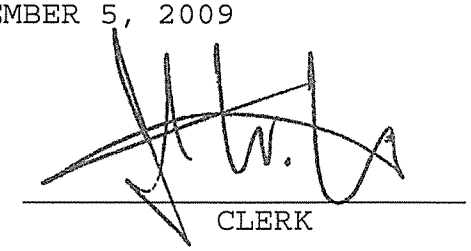
Order, Supreme Court, New York County (Debra A. James, J.), entered on or about June 16, 2009, which, to the extent appealed from, granted third-party defendant's motion for summary judgment dismissing the third-party complaint, unanimously affirmed, without costs.

Given that third-party plaintiff Ball, as contractor, retained authority over the work site and actually performed the cleanup and maintenance, third-party defendant subcontractor owed it no duty to maintain the site (*Lopez v Consolidated Edison Co. of N.Y.*, 40 NY2d 605 [1976]). While the subcontractor was liable to indemnify for injury resulting from its own acts or omissions, it was not liable, as a matter of law, for injury manifestly

caused by the contractor's maintenance of a debris pile.

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1344 The People of the State of New York, Ind. 3369/06
Respondent,

-against-

Pablo Rodriguez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Heather L. Holloway of counsel), for appellant.

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

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered March 21, 2007, convicting defendant, after a jury trial, of course of sexual conduct against a child in the first degree, and sentencing him to a term of 20 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. The child victim's inability to remember certain details, and her delay in reporting the pattern of abuse, were satisfactorily explained.

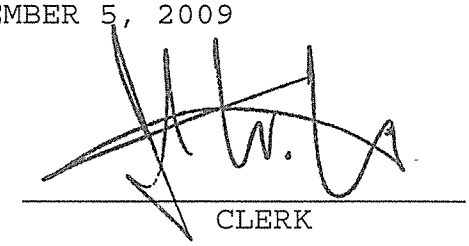
The trial court properly denied defendant's request for a missing witness charge regarding the child's older brother, since defendant did not demonstrate that he could have provided any

material noncumulative information (*see People v Ortiz*, 44 AD3d 364 [2007], *lv denied* 9 NY3d 1008 [2007]). The child testified that her brother was not present when defendant abused her, and the record indicates that he could have testified, at most, about insignificant matters such as defendant and the victim's unremarkable movements within the apartment.

The court's instructions were sufficient to prevent defendant from being prejudiced by those portions of the prosecutor's summation that allegedly shifted the burden of proof (*see People v Santiago*, 52 NY2d 865 [1981]; *see also People v D'Alessandro*, 184 AD2d 114, 118-119 [1992], *lv denied* 81 NY2d 884 [1993]), and a mistrial was not warranted.

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

ENTERED: NOVEMBER 5, 2009



CLERK

Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1345 Jennifer Broodie, Index 28674/03
Plaintiff-Appellant,

-against-

Gibco Enterprises, Ltd., et al.,
Defendants-Respondents.

Kahn Gordon Timko & Rodriques, P.C., New York (David S. Dender of counsel), for appellant.

Dubow, Smith & Marothy, Bronx (Steven J. Mines of counsel), for Gibco Enterprises, Ltd., respondent.

Kaufman Borgeest & Ryan LLP, Valhalla (Jacqueline Mandell of counsel), for T. Rhodes, Inc., respondent.

Order, Supreme Court, Bronx County (George D. Salerno, J.), entered on or about June 3, 2008, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff sued to recover damages for injuries resulting from a trip and fall on a single step that separated the bar area from the dining area at defendants' restaurant. Since there was no allegation that the step was defective, in ill-repair or was covered with solid or liquid debris, the claim of negligence had to be predicated on the proposition that the place of the trip and fall was inherently dangerous because of insufficient lighting in the bar area. New York landowners and licensed occupiers do owe people on their property a duty of reasonable care to maintain the premises in a safe condition in order to

minimize foreseeable dangers (*see Tagle v Jakob*, 97 NY2d 165, 168 [2001]). However, a court may still afford summary judgment to a landowner or licensed occupier on the ground that the condition complained of by a visitor was both open and obvious and, as a matter of law, not inherently dangerous (*see Burke v Canyon Rd. Rest.*, 60 AD3d 558, 559 [2009]).

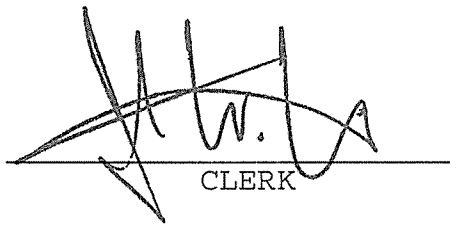
Here, defendants moved for summary judgment dismissal by showing prima facie that the area above the step was lit by a recessed lighting fixture in the ceiling, and that the step neither was inherently dangerous nor constituted a hidden trap. Indeed, several color photographs in the record depicted the step as not particularly high, and clearly painted in white and black so as to be visible even in the low light provided by the recessed ceiling bulb above, and one or more black and yellow signs warning "CAUTION WATCH YOUR STEP" were posted in the vicinity. Plaintiff admitted in her deposition testimony that she was able to see the step after she got up from the floor.

In opposition to the motions, plaintiff produced no competent admissible evidence to establish the existence of material issues of fact for trial about the sufficiency of lighting. Under such circumstances, her "testimony alone is

insufficient as a matter of law to raise a triable issue of fact on her claim of inadequate lighting" (*Branham v Loews Orpheum Cinemas, Inc.*, 31 AD3d 319, 325 [2006], *affd* 8 NY3d 931 [2007]), or demonstrate that the step was inherently dangerous or constituted a hidden trap (*see Burke*, 60 AD3d at 559).

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

ENTERED: NOVEMBER 5, 2009



CLERK

Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1346 In re Nusrat C.,
Petitioner-Respondent,

-against-

Muhammad R.,
Respondent-Appellant.

Laurence H. Olive, New York, for appellant.

Randall S. Carmel, Syosset, for respondent.

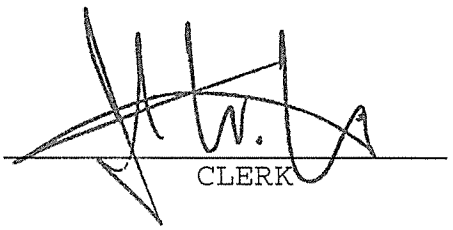
Writ of habeas corpus, Family Court, Bronx County (Andrea Masley, J.), entered on or about August 8, 2008, in a custody proceeding, which directed respondent to produce the parties' child, and order, same court (Marian R. Shelton, J.), entered on or about December 27, 2007, which denied respondent's motion to dismiss the proceeding for lack of subject matter jurisdiction, unanimously affirmed, without costs.

Subject matter jurisdiction exists under both (1) Domestic Relations Law § 70(a), where, as here, even though the child lives abroad, both parents live here and are personally before the court (*see People ex rel. Satti v Satti*, 55 AD2d 149, 152-153 [1976], *affd* 43 NY2d 671 [1977]), and (2) Domestic Relations Law § 76(1)(d), where, as here, the child's state of residence lacks jurisdiction under Domestic Relations Law § 76(1)(a)-(c). We have considered and rejected respondent's other arguments,

including that the proceeding should be dismissed on the ground that New York is an inconvenient forum (Family Ct Act § 76-f).

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

ENTERED: NOVEMBER 5, 2009



Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1347 The People of the State of New York, Ind. 39/06
Respondent,

-against-

Darnell Holmes,
Defendant-Appellant.

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

Judgment, Supreme Court, Bronx County (Nicholas Iacovetta, J.), rendered on or about August 3, 2006, unanimously affirmed.

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

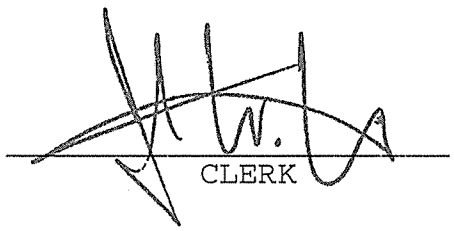
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 5, 2009



Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1348 Mel Hantz, Index 106738/09
Petitioner-Respondent,

-against-

Hillman Housing Corporation,
Respondent-Appellant.

Sills Cummis & Gross P.C., New York (Mitchell D. Haddad of counsel), for appellant.

Stephen C. Cooper, New York, for respondent.

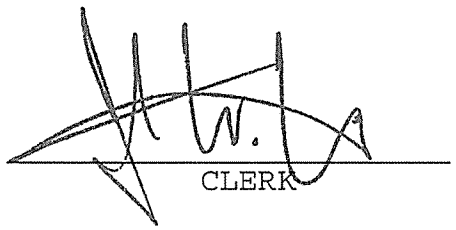
Order, Supreme Court, New York County (Jane S. Solomon, J.), entered June 19, 2009, which denied Hillman Housing Corporation's (Board) motion to dismiss the tenant's petition on res judicata grounds, unanimously reversed, on the law, without costs, the motion granted and the petition dismissed.

The tenant's second action seeking to compel the Board to grant his request to install an in-wall air conditioning system arose out of the same transaction, and facts, as had been considered in the tenant's prior litigation on the issue. The nature of tenant's proposed air conditioning installation and reasons for its need (i.e., medical, aesthetics, etc.) remained unchanged from the facts available at the time of the Board's original July 2005 determination, as well as at the time of the aforementioned prior litigation. Whether a mistaken factual assumption by the Board in considering Hantz's first application led to an errant determination may not be revisited based upon

re-submission of the same facts, pertaining to the same transaction, as had been originally considered by the Board (*see e.g. Mchawi v State Univ. of N.Y., Empire State Coll.*, 248 AD2d 111, 112 [1998], *lv denied* 92 NY2d 804 [1998]). The applicable statute of limitations period for challenging the Board's 2005 determination having since expired, Hantz's alleged new claim based on the same facts as those previously considered was properly dismissed on res judicata grounds (*see e.g. Marinelli Assoc. v Helmsley-Noyes Co.*, 265 AD2d 1, 4-5 [2000]).

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1349 Liberty Surplus Insurance Corporation, et al., Plaintiffs-Respondents, Index 113296/07

-against-

National Union Fire Insurance Company of Pittsburgh, Pa., et al., Defendants-Appellants.

Sedgwick, Detert, Moran & Arnold LLP, New York (Timothy D. Kevane of counsel), for National Union Fire Insurance Company of Pittsburgh, Pa., appellant.

Bevan, Mosca, Giuditta & Zarillo, P.C., New York (Anthony J. Zarillo, Jr. of counsel), for Mitsui Sumitomo Insurance Company of America, appellant.

Jaffe & Asher, LLP, New York (Marshall T. Potashner of counsel), for respondents.

Order, Supreme Court, New York County (Judith J. Gische, J.), entered August 6, 2008, which denied defendants' motions to dismiss the fifth, sixth and seventh causes of action in the amended complaint, unanimously affirmed, with costs.

A contract of liability insurance is governed by "the local law of the state which the parties understood was to be the principal location of the insured risk" (*Zurich Ins. Co. v Shearson Lehman Hutton*, 84 NY2d 309, 318 [1994], quoting Restatement [Second] of Conflict of Laws § 193). Where the covered risks are spread over multiple states, courts will generally locate the risk in one state, namely, "the state of the insured's domicile at the time the policy was issued," and a

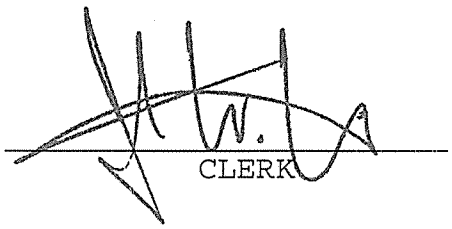
"corporate insured's domicile is the state of its principal place of business" (*Certain Underwriters at Lloyd's, London v Foster Wheeler Corp.*, 36 AD3d 17, 24-25 [2006], *affd* 9 NY3d 928 [2007]). The liability policies at issue in this action were issued by defendants to Hontz Elevator Company, which had operations in several states but maintained its principal place of business in Connecticut, the state of its incorporation. Accordingly, the subject policies, which do not contain choice-of-law provisions, are governed by Connecticut law. We further note that the accident giving rise to the underlying personal injury litigation occurred in Connecticut; that the subject policies contain amendatory endorsements required by Connecticut law but no New York endorsements; and that the record, while showing that Hontz had locations in Connecticut, Florida, Massachusetts and Rhode Island, gives no indication Hontz conducted any operations in New York.

We reject defendants' contention that the fifth cause of action, for breach of the duty of good faith and fair dealing, and the seventh cause of action, alleging violations of Connecticut's Unfair Insurance Practices Act and Unfair Trade Practices Act, are not viable under Connecticut law (*see Active Ventilation Prods. v Property & Cas. Ins. Co. of Hartford*, 2009 Conn Super LEXIS 1967, 2009 WL 2506360). We reject defendants' similar contention with respect to the sixth cause of action for

breach of fiduciary duty on that basis, and find that that cause of action was adequately pleaded under Connecticut law (*see Grazynski v Hartford Ins. Co.*, 1997 Conn Super LEXIS 1876, 1997 WL 407897).

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

ENTERED: NOVEMBER 5, 2009



Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1352 Hayden Williams, et al.,
Plaintiffs,

Index 18019/04
84158/04

-against-

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

- - - - -

New York State Dormitory Authority,
Third-Party Plaintiff-Respondent,

-against-

F&R Installers,
Third-Party Defendant-Appellant.

Marks, O'Neill, O'Brien & Courtney, P.C., Elmsford (Brian D. Meisner of counsel), for appellant.

Fabiani Cohen & Hall, LLP, New York (John V. Fabiani of counsel), for respondent.

Order, Supreme Court, Bronx County (Stanley Green, J.), entered December 17, 2008, which, to the extent appealed from as limited by the briefs, granted summary judgment to defendant Dormitory Authority on its third-party claim, unanimously affirmed, without costs.

Plaintiff commenced this action to recover for personal injuries sustained in February 2004 when he slipped and fell on "black ice" while performing construction work for third-party defendant at the Bronx Criminal Courthouse. According to plaintiff, he stepped inside a partially enclosed "bulkhead" to help his foreman install a panel and slipped on the ice. As he

was falling to the ground, he cut his arm on an iron angle embedded in the ice. The third-party action seeks contractual indemnification against the subcontractor.

Paragraph 3.7 of the contract between nonparty prime contractor Enclos and the third-party defendant expressly provided for the indemnity of the Dormitory Authority, as owner, and defendant Bovis, as construction manager:

> Subcontractor shall indemnify and hold Enclos, Construction Manager, and Owner harmless from any and all fines, liabilities, damages, and/or expenses assessed against or incurred by Enclos, Construction Manager, or Owner as a result of Subcontractor's failure to so comply.

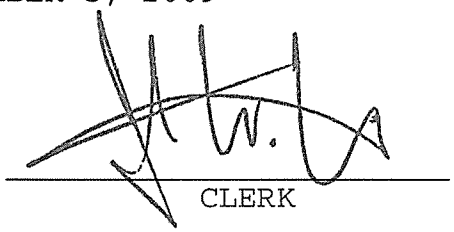
Paragraph 9.3 incorporated by reference the terms of the prime contract between the Dormitory Authority and Enclos, and clarified that the third-party defendant agreed to indemnify Enclos with respect to these provisions. The subcontractor's obligation to indemnify was thus expressly stated in these agreements. Paragraph 9.2 expressly provided for partial indemnification by including recognized "savings" language ("To the fullest extent permitted by law"), and thus did not violate General Obligations Law § 5-322.1 (*see Dutton v Pankow Bldrs.*, 296 AD2d 321, 322 [2002], *lv denied* 99 NY2d 511 [2003]).

The dismissal of the Labor Law § 200 and common-law negligence claims against defendants has not been appealed by plaintiff. Accordingly, third-party defendant is not relieved of its contractual obligation to indemnify defendants by § 5-322.1,

which prohibits contractual indemnification of a party that was actively negligent, but not of a party that merely had statutory vicarious liability for the negligence of another (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179-180 [1990]; *see also Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795 [1997]).

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1353 The People of the State of New York, Ind. 5333/04
Respondent,

-against-

Jose Martinez,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Mugambi Jouet of counsel), for appellant.

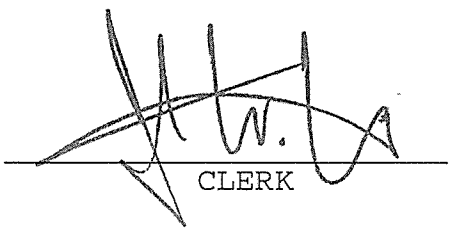
Robert M. Morgenthau, District Attorney, New York (Philip J. Morrow of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles Solomon, J.), rendered on or about September 27, 2005,

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

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

ENTERED: NOVEMBER 5, 2009



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

Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1354 The People of the State of New York, Ind. 662/04
Respondent,

-against-

Vone Wynn,
Defendant-Appellant.

Gail Gray, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Dana Poole of counsel), for respondent.

Judgment, Supreme Court, New York County (Charles H. Solomon, J. at *Gomberg* inquiry; Bonnie G. Wittner, J. at hearings, jury trial and sentence), rendered March 24, 2005, convicting defendant of murder in the second degree, and sentencing him to a term of 25 years to life, unanimously affirmed.

Defendant was not deprived of his right to conflict-free counsel. Defendant chose to retain an attorney who was the brother of a former prosecutor who had handled the initial stages of this case and who had taken a videotaped statement from defendant. Defendant made a valid waiver of any potential conflict arising from this situation when, at several court appearances and during a thorough inquiry pursuant to *People v Gomberg* (38 NY2d 307 [1975]), the court warned him of the possible disadvantages of this arrangement. Moreover, defendant also consulted with a second, conflict-free attorney regarding

the decision to remain with the potentially conflicted attorney, and it was the second attorney who cross-examined the lead attorney's brother at both the suppression hearing and trial. There is no merit to defendant's suggestion on appeal that, despite all these precautions, there was an unwaivable conflict (*see United States v Perez*, 325 F3d 115, 125-129 [2d Cir 2003]).

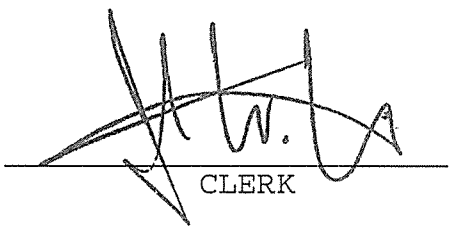
The court properly exercised its discretion when it precluded defendant from introducing a document reflecting a prior inconsistent statement after the witness had admitted making the statement (*see People v Piazza*, 48 NY2d 151, 164-165 [1979]), and, with regard to another witness, when it permitted the People to introduce evidence that defendant characterizes as a prior consistent statement, but which actually clarified other portions of the same statement that had been elicited on cross-examination (*see People v Torre*, 42 NY2d 1036 [1977]). The court properly received portions of defendant's statement to a detective for which the People had not provided timely notice, because the detective testified about the complete statement at the suppression hearing and defendant had a full opportunity to litigate the issue, rendering irrelevant any deficiency in the notice (*see e.g. People v Dillon*, 30 AD3d 1135, 1136 [2006], *leave denied*, 7 NY3d 812 [2006]). The court properly declined to charge justification, since there was no reasonable view of the evidence, when viewed most favorably to defendant, that defendant

believed, or had any reason to believe, that the victim was using or about to use deadly physical force (*see People v Goetz*, 68 NY2d 96, 105-106 [1986]; *People v Watts*, 57 NY2d 299, 301 [1982]). By failing to object, or by failing to request a further remedy following corrective action, defendant failed to preserve any of his remaining challenges to the court's conduct of the trial, and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

The record does not establish that defendant's sentence was based on any improper criteria, and we perceive no basis for reducing the sentence or remanding for resentencing.

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1355 Jorgina Garcia, Index 15247/06
Plaintiff-Appellant,

-against-

Good Home Realty, Inc.,
Defendant-Respondent.

Alexander J. Wulwick, New York, for appellant.

Jeffrey Samel & Partners, New York (Judah Z. Cohen of counsel), for respondent.

Order, Supreme Court, Bronx County (Norma Ruiz, J.), entered July 2, 2008, which, in an action for personal injuries sustained in a slip and fall on an interior staircase in an apartment building, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant established its prima facie entitlement to summary judgment by showing that it neither created, nor had actual or constructive notice of the defective condition that caused plaintiff's fall (*see Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500-501 [2008]). Defendant submitted, inter alia, the deposition testimony of one of its employees who said that after plaintiff's fall he inspected the stairs and saw that they were dry. Defendant also submitted an affidavit from its porter at the time of the accident, who stated that he did not mop the stairs on the morning of plaintiff's fall.

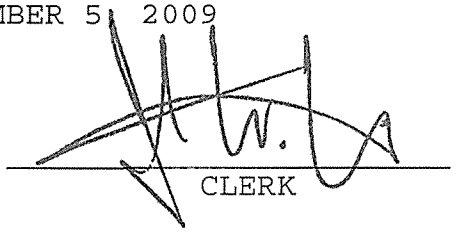
In opposition, plaintiff failed to raise a triable issue of

fact. Plaintiff, who initially testified that the cause of her fall was an unidentified wet condition of the stairs, submitted an affidavit stating that the stairs on which she slipped appeared to be recently mopped as they were wet and soapy. She also submitted an affidavit from her brother-in-law, who said that shortly before plaintiff's fall he noticed the soapy condition of the stairs. These affidavits are insufficient to defeat defendant's motion, as they contradict plaintiff's deposition testimony and appear to be tailored to avoid the consequences of her earlier testimony (*see e.g. Telfeyan v City of New York*, 40 AD3d 372, 373 [2007]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). Furthermore, the submission of the brother-in-law's affidavit, a previously undisclosed notice witness, for the first time in opposition to the motion for summary judgment is improper (*see Rodriguez v New York City Hous. Auth.*, 304 AD2d 468 [2003]).

We have considered plaintiff's remaining arguments, including that the motion court should not have considered the porter's affidavit, and find them unavailing.

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1356 James Wolfgeorge, Index 17708/07
Plaintiff-Respondent,

-against-

William Ambrister, Jr., et al.,
Defendants-Appellants,

Delta Funding Corporation,
Defendant.

Vozza & Huguenot, Bronx (Marie R. Hodukavich of counsel), for appellants.

Burns & Harris, New York (Christopher J. Donadio of counsel), for respondent.

Order, Supreme Court, Bronx County (Sallie Manzanet-Daniels, J.), entered January 6, 2009, which, insofar as appealed from in this action for personal injuries allegedly sustained when plaintiff was attacked by defendants-appellants' employees, denied appellants' motion to dismiss the complaint and for costs and disbursements pursuant to CPLR 8303-a and 22 NYCRR 130-1.1, unanimously affirmed, without costs.

In their motion, appellants asserted that plaintiff had released all claims against them in exchange for the payment of $1,500 and submitted the general release. In opposition, plaintiff submitted an affidavit in which he stated that he never signed any document giving up his legal rights with respect to the alleged assault, never received any money in consideration for allegedly giving up those rights and that the signature on

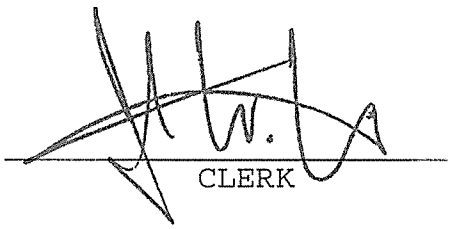
the purported general release did not belong to him. Plaintiff also submitted a notarized document signed by him in connection with a request for medical records, and the signature on this document was unlike the signature on the purported release, but resembled the signature on plaintiff's affidavit submitted in opposition to the motion. We also note that there is no independent proof that $1,500 was actually paid.

Under the circumstances, the court properly denied appellants' motion as they failed to conclusively resolve all factual issues concerning whether the signature on the release was plaintiff's. Furthermore, we see no basis for an award of sanctions in view of the uncertainty concerning the authenticity of the release (*see e.g. McGill v Parker*, 179 AD2d 98, 111-112 [1992]).

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

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

ENTERED: NOVEMBER 5, 2009



Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1357 The People of the State of New York, Ind. 3830/06
Respondent,

-against-

James Henderson,
Defendant-Appellant.

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

James Henderson, appellant pro se.

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered February 21, 2007, convicting defendant, upon his plea of guilty, of attempted burglary in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

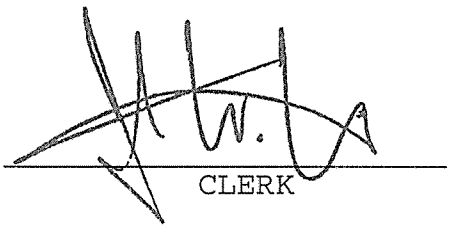
The court properly denied defendant's motion to withdraw his guilty plea (*see People v Frederick*, 45 NY2d 520 [1978]). The allocution record establishes that the plea was knowingly, intelligently and voluntarily entered, and it completely refutes defendant's assertion that, because of a hearing impairment, he was unable to understand the court's questions. Moreover, defendant signed a written waiver of his right to appeal, acknowledging he was receiving a favorable plea and sentence agreement.

The surcharges and fees were properly imposed (*see People v Guerrero*, 12 NY3d 45 [2009]), and the plea was not rendered involuntary by the court's failure to mention these assessments during the allocution (*see People v Hoti*, 12 NY3d 742 [2009]).

We have considered and rejected defendant's ineffective assistance of counsel claim (*see People v Ford*, 86 NY2d 397, 404 [1995]). Defendant's other pro se claims are foreclosed by his valid waiver of the right to appeal, as well as by the guilty plea itself, and are without merit in any event.

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

ENTERED: NOVEMBER 5, 2009



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Mazarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1358 Caesar Zengotita, Index 18175/04
Plaintiff-Appellant,

-against-

JFK International Air Terminal, LLC,
Defendant-Respondent.

Gorayeb & Associates, P.C., New York (Mark H. Edwards of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, New York (Judy C. Selmeci of counsel), for respondent.

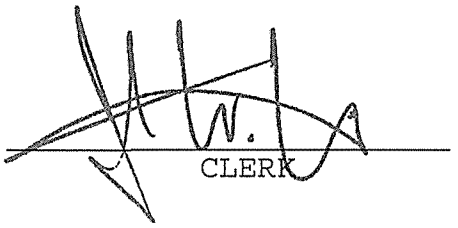
Order, Supreme Court, Bronx County (Betty Owen Stinson, J.), entered July 17, 2008, which, insofar as appealed from, denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff established, through his deposition testimony and his affidavits, that he fell from a scaffold platform because the scaffold moved, despite the fact that the wheels were securely locked, when he bent down to begin his descent from the platform. Defendant failed to present any evidence to support its contention that plaintiff fell because he was climbing down the scaffold in an improper manner. The uncontroverted evidence that the scaffold failed and that no other safety device was provided either to prevent the scaffold from moving or to prevent plaintiff from falling demonstrates as a matter of law that the

statute was violated and that the violation was a proximate cause of plaintiff's injuries (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Williams v 520 Madison Partnership*, 38 AD3d 464, 464-465 [2007]; *Orellano v 29 E. 37th St. Realty Corp.*, 292 AD2d 289 [2002]).

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

ENTERED: NOVEMBER 5, 2009



Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1359 The People of the State of New York, Ind. 4024/06
Respondent,

-against-

Wilkin Beliard,
Defendant-Appellant.

Lucas E. Andino, New York, for appellant.

Robert M. Morgenthau, District Attorney, New York (Brian E. Rodkey of counsel), for respondent.

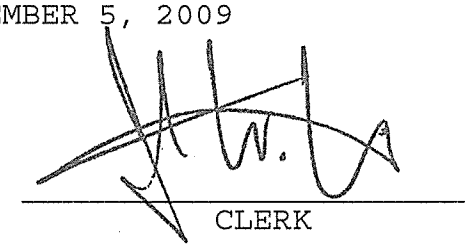
Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 31, 2007, convicting defendant, upon his plea of guilty, of attempted rape in the first degree, and sentencing him to a term of 3½ years, unanimously affirmed.

The court properly denied defendant's motion to dismiss the indictment based on preindictment delay (*see People v Singer*, 44 NY2d 241 [1978]; *People v Taranovich*, 37 NY2d 442, 445 [1975]). Although the five-year delay was significant, the crime was very serious, the absence of prejudice to defendant was demonstrated by his statements acknowledging his memory of the event as well as by the conclusiveness of the DNA evidence linking him to the crime, and the delay in arresting him was inadvertent rather than designed to obtain a tactical advantage. The primary cause of the delay was defendant's flight to another country, and the

inability of the police to locate him more promptly was satisfactorily explained (*see People v Suero*, 235 AD2d 357 [1997], *lv denied* 89 NY2d 1101 [1997]).

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1360-
1361-
1361A Hafez Fine Rugs & Antique Arts, Inc., et al.,
Plaintiffs-Appellants,

-against-

Parvizian, Inc. of Texas, et al.,
Defendants-Respondents.

Index 114898/07

Glenn J. Wurzel, Hempstead (Sharman Shabab of counsel), for appellants.

Hartman & Craven LLP, New York (Michael S. Paradise of counsel), for respondents.

Judgment, Supreme Court, New York County (Charles E. Ramos, J.), entered February 17, 2009, dismissing the complaint, unanimously reversed, on the law, with costs, and the complaint reinstated. Appeals from orders, same court and Justice, entered January 29, 2009, which granted defendants' motion for summary judgment, and June 3, 2009, which, to the extent appealable, denied plaintiffs' motion to renew, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Local wholesale rug merchants sued for breach of contract to recover the cost of goods allegedly sold and/or consigned to non-domiciliaries. In opposition to defendants' motion for summary dismissal for lack of personal jurisdiction, plaintiffs submitted an affidavit noting, inter alia, that the individual defendant regularly met with plaintiffs to purchase rugs or take them on

consignment, that he visited plaintiffs' New York store just before the purchase of the rugs in question, that these rugs were shipped shortly thereafter, that a small portion of them were returned and some minimal payments made on this transaction, and that a larger number of rugs was later returned but heavily damaged in transit.

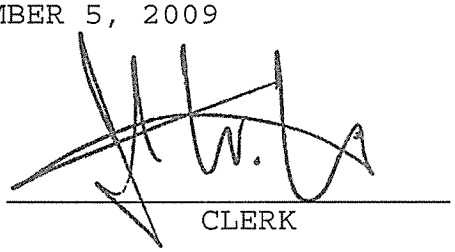
These allegations, which are presumed true on defendants' motion for summary judgment, support a finding that defendants transacted business within this state through purposeful activities bearing a substantial relationship to the claim asserted (*see Deutsche Bank Sec., Inc. v Montana Bd. of Invs.*, 7 NY3d 65, 72 [2006], *cert denied* 549 US 1095 [2006]; *Fabrikant & Sons v Adrianne Kahn, Inc.*, 144 AD2d 264 [1988]). The exercise of jurisdiction under these circumstances comports with due process (*see LaMarca v Pak-Mor Mfg. Co.*, 95 NY2d 210, 218-219 [2000]).

With regard to the individual defendant, plaintiffs do not allege that he agreed to pay for the corporate defendant's debts, which would be an unenforceable claim in the absence of his written acknowledgment to that effect (*see* General Obligations Law § 5-701[a]), but rather that his obligation to plaintiffs was a primary and independent one outside the purview of the statute of frauds (*see Slavenburg Corp. v Rudes*, 86 AD2d 517, 518 [1982]). In support of this position, plaintiffs asserted that

prior to their shipment of $2 million worth of rugs to Texas, the individual defendant disclosed his personal wealth to them and personally agreed to take on responsibility for payment and/or return of the rugs, an agreement repeated during the parties' dealings. These claims, which must be treated as true on the motion, create a triable question of fact as to whether the individual defendant's promise to pay was an original primary obligation or a secondary one (*see Rowan v Brady*, 98 AD2d 638 [1983]).

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1362 John Shufeldt, et al., Index 18229/95
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent.

Candice A. Pluchino, Perrineville, NJ, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Julian L. Kalkstein of counsel), for respondent.

Order, Supreme Court, Bronx County (Alexander W. Hunter, Jr., J.), entered October 21, 2008, which granted defendant's motion in limine to preclude plaintiffs from asserting theories of liability not asserted in the notice of claim, and, upon said order of preclusion, dismissed the complaint on the basis that plaintiffs cannot meet the prima facie burden of showing prior written notice of the defect at issue, unanimously affirmed, without costs.

Plaintiff John Shufeldt was injured in a single-car accident in March 1982. Plaintiff served a notice of claim in April 1982 and alleged that he was injured when he drove his vehicle "over severely broken pavement...into a hole," causing his car to go out of control. A hearing was conducted pursuant to General Municipal Law § 50-h in February 1983, where plaintiff testified that there had been construction in the vicinity of his accident, and that he had seen "repaired holes" "right at" the site of his

accident. Plaintiff's complaint asserted causes of action in negligence due to defendant's keeping the roadway in a "state of disrepair." Defendant answered and demanded a bill of particulars in June 1983, which plaintiff did not serve until November 1992. In the bill of particulars, plaintiff expanded upon allegations set forth in the complaint, reiterating that defendant had permitted the roadway to fall into a "state of disrepair."

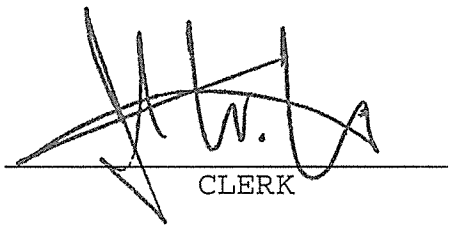
In August 2004, in response to a discovery request by plaintiff, defendant produced an affidavit attesting that it had performed a search for records relating to construction in the vicinity of the accident for the two years prior to March 1982, but that any responsive documents had been destroyed. In May 2005, plaintiff served an amended bill of particulars, asserting for the first time that defendant had itself created the hole he drove into, and that defendant had been negligent in failing to take adequate steps to cover or otherwise warn drivers about the hole.

Supreme Court properly granted defendant's motion in limine and dismissed the complaint. The notice of claim gives no indication that the defect in question was affirmatively created by defendant, rather than being a pothole resulting from neglect. Under the circumstances of this case, where 25 years had passed since commencement of the action, and plaintiff waited more than

two decades before seeking construction-related records, it cannot be said that the court abused its discretion in declining to permit plaintiff to supplement the facially deficient notice of claim by reference to testimony elicited at the section 50-h hearing (*see* General Municipal Law § 50-e[6]; *cf. D'Allesandro v New York City Tr. Auth.*, 83 NY2d 891, 893 [1994]).

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

ENTERED: NOVEMBER 5, 2009



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Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1363 The People of the State of New York, Ind. 5962/05
Respondent,

-against-

Hector Alvarado,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Frank Glaser of counsel), for respondent.

Judgment, Supreme Court, New York County (John Cataldo, J.), rendered July 15, 2007, convicting defendant, after a jury trial, of assault in the second degree, and sentencing him, as a persistent violent felony offender, to a term of 12 years to life, unanimously affirmed.

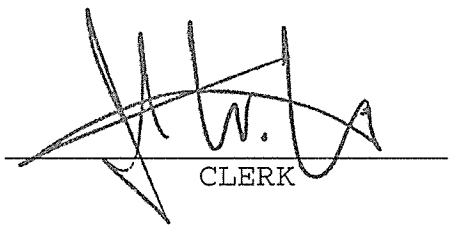
Although the court should have permitted defendant to introduce the original civilian complainant's hospital records demonstrating his alleged intoxication into evidence, the error was harmless under the standards for constitutional or nonconstitutional error (*see People v Crimmins*, 36 NY2d 230 [1975]). There was overwhelming evidence that defendant assaulted a police officer with intent to prevent him from performing a lawful duty (*see* Penal Law § 120.05[3]). The question of the original complainant's intoxication was tangential, and introduction of the records at issue could not

have affected the verdict.

Defendant waived his present challenge to the constitutionality of his 2001 predicate felony by failing to raise the same issue at the time of his adjudication as a persistent violent felony offender (*see* CPL 400.15[7][b]; *People v Odom*, 61 AD3d 896 [2009], *lv denied* 13 AD3d 747 [2009]). In any event defendant's prior conviction was not "obtained in violation of the rights of the defendant under the applicable provisions of the constitution of the United States" (CPL 400.15[7][b]). Accordingly, we conclude that defendant received effective assistance of counsel under the state and federal standards (*see People v Benevento*, 91 NY2d 708, 713-714 [1998]; *see also Strickland v Washington*, 466 US 668 [1984]) in connection with his persistent violent felony offender adjudication.

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

ENTERED: NOVEMBER 5, 2009



Mazzarelli, J.P., Andrias, Friedman, Nardelli, Moskowitz, JJ.

1364 Jericho Group Ltd., Index 600566/07
Plaintiff-Appellant,

-against-

Midtown Development, L.P., et al.,
Defendants-Respondents.

Heller, Horowitz & Feit, P.C., New York (Stuart A. Blander of counsel), for appellant.

Phillips Nizer LLP, New York (George Berger of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered September 16, 2008, which, to the extent appealed from as limited by the briefs, granted defendants' motion to dismiss the complaint on the ground of res judicata and collateral estoppel and granted the motion of defendant Midtown Development L.P. (Midtown) to cancel the notices of pendency filed by plaintiff, unanimously affirmed, with costs.

Based on this Court's two prior orders and the judgment entered thereon dismissing plaintiff's first action alleging, inter alia, fraud and breach of contract, the motion court properly determined that this action was barred by collateral estoppel and res judicata. The two actions are based on the same transaction, namely the sale of real property, and the prior action was dismissed on the merits, and not merely because of

technical pleading defects (*see Heritage Realty Advisors, LLC v Mohegan Hill Dev., LLC*, 58 AD3d 435 [2009], *lv denied* 12 NY3d 830 [2009]; *Lampert v Ambassador Factors Corp.*, 266 AD2d 124 [1999]). Even though this Court, in granting defendant Midtown's motion to dismiss the complaint in the prior action, did not state that it was dismissing the action on the merits (32 AD3d 294 [2006]), an examination of our ruling clearly demonstrates that the claims were dismissed on the merits (*see Feigen v Advance Capital Mgt. Corp.*, 146 AD2d 556, 558 [1989]).

Contrary to plaintiff's contention, this Court's subsequent order denying its motion to, inter alia, vacate the judgment of dismissal (47 AD3d 463 [2008], *lv dismissed* 11 NY3d 801 [2008]), has preclusive effect for purposes of res judicata, especially since it resulted in the reentry of the judgment of dismissal. This Court's ruling that plaintiff "fails to show fraud in the underlying transaction" (47 AD3d at 464), was not mere dicta and acts as a bar to plaintiff's claim of willful and deliberate breach of the contract (*see O'Brien v City of Syracuse*, 54 NY2d 353, 357-358 [1981]). Indeed, the claims are based on the same alleged misconduct, namely, defendants' failure to provide documents on an oil spill near the subject property and information regarding the nonexistence of certain exhibits referenced in the contract of sale. With respect to plaintiff's claims that it is entitled to specific performance because it

cancelled the contract as a result of defendants' alleged willful and deliberate misconduct and because its attorney did not have the authority to cancel the contract, those claims are barred under the doctrine of res judicata because they could have been raised in the prior action (*see Fifty CPW Tenants Corp. v Epstein*, 16 AD3d 292, 293-294 [2005]).

Because plaintiff had reviewed the documents illustrating defendants' alleged fraud prior to commencing the first action, it cannot elude issue or claim preclusion "under the rubric of fraud" (*Smith v Russell Sage Coll.*, 54 NY2d 185, 193 [1981]).

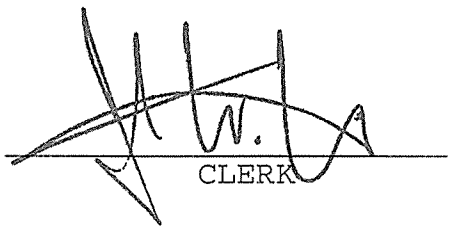
While plaintiff's Judiciary Law § 487 claim against defendant Imperatore was not time-barred, it was properly dismissed on the ground of res judicata because it is predicated on the same alleged fraud on the court that this Court rejected in its order declining to vacate the judgment of dismissal (47 AD3d at 463-464; *see Fifty CPW Tenants Corp.*, 16 AD3d at 294).

Since the motion court properly dismissed plaintiff's claims for specific performance, it properly granted Midtown's motion to cancel the notices of pendency that were filed with this action (*see* CPLR 6514[a]; *Freidus v Sardelli*, 192 AD2d 578, 580 [1993]).

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

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

ENTERED: NOVEMBER 5, 2009



Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1366 The People of the State of New York, Ind. 1394/07
Respondent,

-against-

Rochelle Buie,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Christos G. Yatrakis of counsel), for respondent.

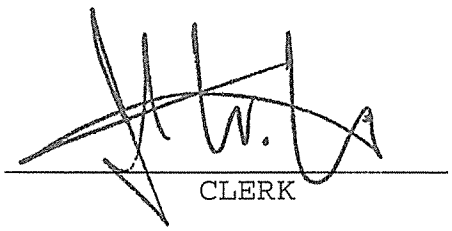
Judgment, Supreme Court, New York County (Robert Stolz, J.), rendered September 24, 2007, convicting defendant, after a jury trial, of attempted assault in the second degree and menacing in the second degree, and sentencing her to a term of 6 months, with 5 years' probation, unanimously affirmed.

The evidence was legally sufficient to establish that the liquid bleach defendant threw at the victim was a dangerous instrument (*see* Penal Law § 10.00[10], § [13]). Despite the absence of expert testimony, the jury could have reasonably concluded, from the victim's injuries, from the damage to a carpet and to the victim's clothing, and from its own knowledge

and experience regarding the properties of bleach (*see e.g. Havas v Victory Paper Stock Co.*, 49 NY2d 381, 386 [1980]), that the bleach was readily capable of causing serious injury such as disfiguring burns.

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

ENTERED: NOVEMBER 5, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1367 In re Edwin Fermin, Index 400168/08
Petitioner,

-against-

The New York City Housing Authority, et al.,
Respondents.

Manhattan Legal Services, New York (Morton B. Cohen of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Seth E. Kramer of counsel), for respondents.

Determination of the New York City Housing Authority, dated September 19, 2007, adopting the decision of the hearing officer, which dismissed petitioner's remaining-family member grievance, unanimously confirmed, petition denied and the proceeding brought pursuant to CPLR article 78, (transferred to this Court by order of the Supreme Court, New York County [Herman Cahn, J.], entered August 22, 2008), dismissed, without costs.

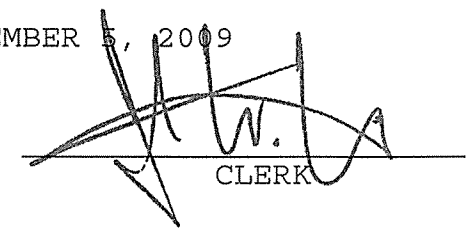
The determination is supported by substantial evidence (*see 300 Gramatan Ave. Assoc. v State Div. Of Human Rights*, 45 NY2d 176, 180-181 [1978]; *Matter of Pell v Board of Educ. of Union Free School Dist. No. 1 of Towns of Scarsdale & Mamaroneck, Westchester County*, 34 NY2d 222, 231 [1974]). Petitioner did not qualify as a remaining family member, since, although he originally entered the household lawfully, he left in 1993, and thereafter was not included in the tenants' annual income

reports. This evidence is sufficient to support the Housing Authority's determination (*see Matter of Aponte v New York City Hous. Auth.*, 48 AD3d 229 [2008]; *Matter of Abdil v Martinez*, 307 AD2d 238, 242 [2003]). Moreover, petitioner's 2003 request that he be granted permission to join the household permanently, which indicated that petitioner was not living in the subject apartment, was denied, and no grievance was filed or appeal taken (*see Matter of Davis v Franco*, 270 AD2d 55, 56 [2000]). We reject petitioner's assertion that the hearing officer should have considered the totality of the circumstances, such as mitigating factors and hardship to petitioner (*see Matter of Featherstone v Franco*, 95 NY2d 550, 554 [2000]; *Matter of McFarlane v New York City Hous. Auth.*, 9 AD3d 289, 290 [2004]; *Matter of Wooten v Finkle*, 285 AD2d 407, 408-409 [2001]). Moreover, petitioner's evidence did not establish that he continuously resided in the premises, or that the agency was aware of such residence and acquiesced in it (*see McFarlane*, 9 AD3d at 291).

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

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

ENTERED: NOVEMBER 5, 2009



CLERK

Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1368 In re Aniya P.,

A Dependent Child Under the Age
Of Eighteen Years etc.,

Imani B.,
Respondent-Appellant,

Episcopal Social Services,
Petitioner-Respondent.

Susan Jacobs, The Center for Family Representation, New York (Carolyn Walther of counsel), for appellant.

Magovern & Sclafani, New York (Joanna M. Roberson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Claire V. Merkine of counsel), Law Guardian.

Order, Family Court, New York County (Sara P. Schechter, J.), entered on or about February 21, 2008, which terminated respondent mother's parental rights to her daughter on grounds of abandonment, and awarded custody and guardianship of the child to the New York City Commissioner of Social Services and petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Pursuant to Social Services Law § 384-b[4][b], a finding of abandonment is required if, in the six-month period preceding the filing of the guardianship proceeding, the

> parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not

> prevented or discouraged from doing so by the agency. In the absence of evidence to the contrary, such ability to visit and communicate shall be presumed.

This makes it the parent's duty to maintain contact with her child (*see Matter of Gabrielle HH.*, 1 NY3d 549 [2003]).

Because the intent of the parent is the focus of the inquiry, minimal contact during the abandonment period will not defeat a finding of abandonment unless such contact is so meaningful as to be "construed as an expression of interest in preserving parental rights" (*Matter of Crawford*, 153 AD2d 108, 110 [1990]). Contrary to respondent's assertion, findings of abandonment have been upheld where the contact between the parent and the child or the agency during the relevant time period was "too minimal" to evince an intent to preserve parental rights (*Matter of Female W.*, 271 AD2d 210 [2000]; *see also Matter of "Male" M.*, 18 AD3d 215 [2005]).

The record established that respondent intended to forego her parental rights as to her daughter by failing to have any meaningful contact with the child or the agency during the period from April 2 to October 2, 2006. The case worker testified that during this period, respondent had no contact with the agency, nor did she send any cards, gifts or letters to the agency for her daughter. Nor did she financially support her daughter. Respondent admitted that she met with the case supervisor at the agency within the first few weeks of her daughter's placement,

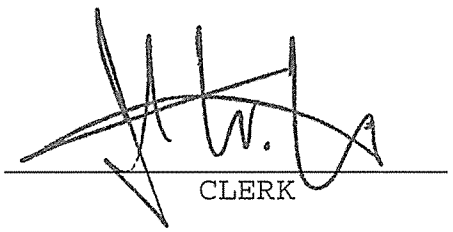
yet had no further contact with the agency until 2007. Meanwhile, the foster mother never discouraged respondent's contact with her daughter, either in person or by telephone.

Respondent's lack of interest in her daughter was not limited to the abandonment period, but was evident throughout her daughter's life. While a parent's conduct outside the abandonment period is not determinative in an abandonment proceeding, it may be relevant to assessing parental intent (*see Matter of Annette B.*, 4 NY3d 509, 514-515 [2005]). Clear and convincing evidence established that respondent abandoned her daughter (*see Matter of Christie A.M.*, 57 AD3d 225 [2008]; *cf. Matter of Medina Amor S.*, 50 AD3d 8 [2008], *lv denied* 10 NY3d 709 [2008]).

Respondent's remaining arguments are unavailing.

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

ENTERED: NOVEMBER 5, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1369 Janet Chang, etc., Index 406575/07
Plaintiff-Appellant,

-against-

Michael G. Zapson,
Defendant-Respondent,

David Galanter,
Defendant.

- - - - -

1370 Golden City Commercial Bank, Index 104319/93
Plaintiff,

-against-

207 Second Avenue Realty Corp.,
Defendant-Appellant,

Wilson Wei Chang,
Defendant,

Michael G. Zapson,
Non-Party Respondent.

Andrew Lavoott Bluestone, New York, for Janet Chang, appellant.

Vernon & Ginsburg, LLP, New York (Mel B. Ginsburg of counsel), for 207 Second Ave. Realty Corp., appellant.

Kantor, Davidoff, Wolfe, Mandelker, Twomey & Gallanty, P.C., New York (Lawrence A. Mandelker of counsel), for respondent.

Orders, Supreme Court, New York County (Milton A. Tingling, J.), entered April 3 and September 25, 2008, which respectively approved the successor temporary receiver's final accounting in this consolidated action and dismissed plaintiff Janet Chang's complaint alleging malfeasance against the successor temporary

receiver, unanimously modified, on the facts, the award of fees to the receiver's attorneys vacated, the matter remanded for a hearing on the reasonable value of legal services rendered to the receivership, and otherwise affirmed, with costs in favor of defendant Zapson, payable by Chang.

The plenary action, in which 50% owner Janet Chang alleged malfeasance against the successor temporary receiver, was properly dismissed because Chang had been denied leave of court to bring the action (*see Copeland v Salomon*, 56 NY2d 222, 228 [1982]; *Collins v Vickers*, 296 AD2d 320 [2002], *lv denied* 98 NY2d 615 [2002]), and was thus without legal capacity to file such a suit (CPLR 3211[a][3]). Dismissal was also appropriate because there was another action pending between these parties involving the same causes of action (CPLR 3211[a][4]). Chang's reliance on *San Ysidro v Rabinow* (1 AD3d 185, 186 [1st Dept. 2003]), is misplaced. In *San Ysidro*, we held that a summons with notice can not suffice as a predicate for the "prior pending action" requirement of CPLR 3211(a)(4). Such is not the case here where the "prior pending action" is the New York County action commenced years before Chang's Westchester filing of a summons with notice.

Having considered the evidence of record, including the papers submitted in support of the motion for an order settling the successor temporary receiver's final account, we reject

Chang's contention that the commission awarded to the successor temporary trustee for the rents and profits of the subject premises in the underlying mortgage foreclosure actions was excessive. The commission paid was within the legal limit of no more than 5% of the amount collected and disbursed by the receiver (CPLR 8004[a]), and was justified in light of the complexities of the receivership. The receiver rendered a proper accounting documenting his services in adequate detail (*see New York State Mtge. Loan Enforcement & Admin. Corp. v Milbank Site One Houses*, 151 AD2d 424 [1989]).

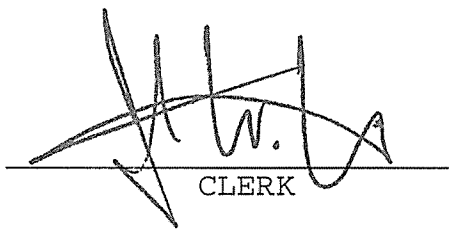
The court properly determined that the successor temporary receiver was entitled to recover those attorney fees and costs incurred in retaining outside counsel starting in August 2004, which were based upon court orders expressly authorizing the retention of such counsel, and were undisputably supported by proper affidavits of services rendered.

We conclude, from this record, that the court was authorized to approve nunc pro tunc the appointment of outside counsel to assist the receiver from 1996 through 2002 (*see Bozewicz v Nash Metal Ware Co.*, 280 AD2d 443 [2001]). However, the court lacked adequate information from which to assess the value of the legal services rendered during that time (*see Bankers Fed. Sav. Bank v Off W. Broadway Devs.*, 224 AD2d 376 [1996]; *Matter of Ronan Paint Corp.*, 98 AD2d 413, 419-420 [1984]). A hearing is necessary to

determine whether the amount of fees paid by the receiver from 1996 through 2002 was reasonable in light of the legal services rendered.

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

ENTERED: NOVEMBER 5, 2009



Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1372 The People of the State of New York, Ind. 5964/06
Respondent,

-against-

John Josiah, etc.,
Defendant-Appellant.

Steven Banks, The Legal Aid Society, New York (Bonnie B. Goldburg of counsel), for appellant.

Judgment, Supreme Court, New York County (Renee White, J.), rendered on or about May 8, 2007, unanimously affirmed.

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

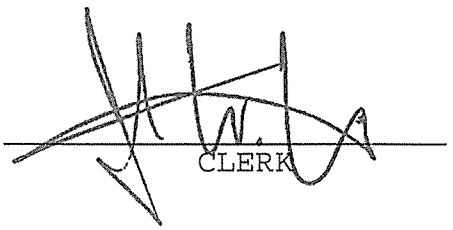
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department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

Denial of the application for permission to appeal by the

judge or justice first applied to is final and no new application may thereafter be made to any other judge or justice.

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

ENTERED: NOVEMBER 5, 2009



Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1373 In re Ciara Lee C.,

A Dependent Child Under The
Age of Eighteen Years etc.,

Lourdes R.,
Respondent-Appellant,

Episcopal Social Services, et al.,
Petitioners-Respondents.

Nancy Botwinik, New York, for appellant.

Rosin Steinhagen Mendel, New York (Douglas H. Reiniger of counsel), for respondents.

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

Order, Family Court, Bronx County (Allen G. Alpert, J.), entered on or about November 5, 2008, which denied respondent mother's motion to vacate the court's prior order entered on or about August 4, 2008, upon respondent's default, which, upon finding that respondent permanently neglected the subject child, terminated her parental rights and transferred custody and guardianship of the child to the petitioner agency for the purpose of adoption, unanimously affirmed, without costs.

Respondent's vacatur motion was properly denied on the ground that she failed to demonstrate a reasonable excuse for her belated appearance when she was aware of the date for the fact-finding and dispositional hearing almost three months earlier, took no steps to ascertain the time she was required to appear in

court, and failed to notify the court or her attorney that she was going to her methadone program before she was due in court and that she was delayed. The motion was properly denied on the additional ground that respondent failed to demonstrate a meritorious defense to the neglect petition in that she provided no evidence that she was drug-free almost four years after her child was removed due to her drug use (*see Matter of Tanya Alexis G.*, 273 AD2d 19 [2000]).

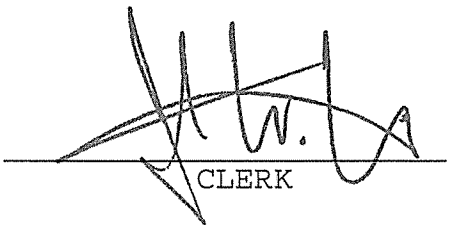
Clear and convincing evidence established that the agency satisfied its statutory obligation to make diligent efforts to encourage and strengthen the parental relationship by providing appropriate referrals to various programs, scheduling visitation, and encouraging respondent to become drug-free; and that respondent failed to plan for her child's future by failing to complete a drug treatment program after almost four years.

With respect to the termination of her parental rights, respondent failed to present evidence that it was in her child's best interests to be removed from the only home she has known almost since birth, where the record indicates the child is safe, secure and loved. Since her foster mother has expressed a desire

to adopt the child, it is not in the child's best interests to wait until respondent makes sufficient progress in addressing her drug problem (*see Matter of Mykle Andrew P.*, 55 AD3d 305 [2008]).

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

ENTERED: NOVEMBER 5, 2009



Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1374 In re Cornisha Cherry, Index 113221/07
Petitioner-Appellant,

-against-

New York City Housing Authority,
Respondent-Respondent.

Cardozo Bet Tzedek Legal Services, New York (Toby Golick of counsel), for appellant.

Sonya M. Kaloyanides, New York (Corina L. Leske of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Kibbie F. Payne, J.), entered June 2, 2008, which denied petitioner's application to annul respondent New York City Housing Authority's determination refusing to open an administrative default that resulted in the termination of petitioner's public housing tenancy, and dismissed the petition, unanimously affirmed, without costs.

The proceeding cannot be maintained because the result petitioner ultimately seeks -- restoration of her tenancy -- would nullify a judgment of the Civil Court, entered during the pendency of this appeal, awarding possession of the apartment to the Housing Authority (*see* 73 NY Jur 2d, Judgments § 273). It does not avail petitioner that, unlike *Matter of Bobian v New York City Hous. Auth.* (55 AD3d 396, 396 [2008]), Civil Court's judgment was based solely on her remaining in the apartment after

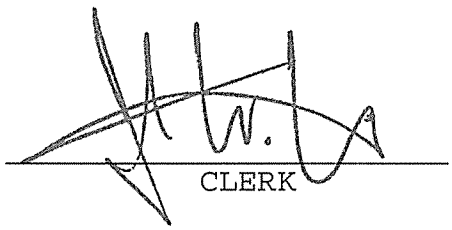
the Housing Authority had terminated her tenancy. There can be no article 78 relief unless and until Civil Court's judgment awarding possession to the Housing Authority is vacated. In the latter regard, we note that two motions for a stay of the Civil Court proceeding by the then pro se petitioner were denied by this Court, and that petitioner's attorney appeared herein before petitioner was evicted.

In any event, the application court properly refused to annul respondent's refusal to open petitioner's default in appearing at the termination-of-tenancy hearing since, as petitioner concedes, she failed to provide a reasonable excuse for the default and documentation supporting her defense (*see Matter of Daniels v Popolizio*, 171 AD2d 596 [1991]; *see generally McLaughlin*, 16 AD3d at 45). Due process does not mandate that a hearing be held on an application to open an administrative default; petitioner was given notice of the charges against her and an opportunity to be heard, and due process requires no more (*see Matter of Hall v Municipal Hous. Auth. for City of Yonkers*, 57 AD2d 894, 894-895 [1977], *lv denied* 42 NY2d 805 [1977], *appeal dismissed* 42 NY2d 973 [1977]). Contrary to petitioner's contention, the application court based its decision on grounds cited by the hearing officer, namely, petitioner's failure to provide a reasonable excuse for the default and a meritorious defense. The hearing officer, prior to entering the default, was

not required to conduct an inquest to determine whether the facts warranted termination of petitioner's tenancy (*see Walker v New York City Hous. Auth.*, 1991 WL 285614 at *3-4, 1991 US Dist LEXIS 18331, *6-11 [SD NY 1991]).

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

ENTERED: NOVEMBER 5, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1375-
1375A Sloan Giampa, Index 104070/04
Plaintiff-Appellant,

-against-

Marvin L. Shelton, M.D., P.C., et al.,
Defendants-Respondents.

Richard L. Giampa, P.C., Bronx (Richard L. Giampa of counsel), for appellant.

Benvenuto, Arciero & McAndrew, Roslyn (James W. Tuffin of counsel), for Shelton respondents.

Heidell, Pittoni, Murphy & Bach, LLP, White Plains (Garrett Lewis of counsel), for Columbia Presbyterian Medical Center, respondent.

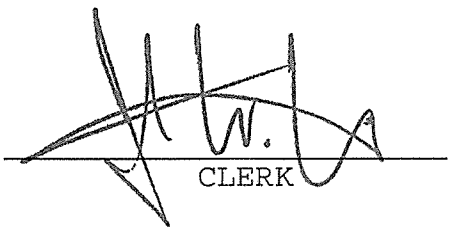
Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered May 29, 2008, dismissing the complaint, pursuant to an order, same court and Justice, entered April 29, 2008, which granted defendants' motions for summary judgment, unanimously affirmed, without costs. Appeal from the aforesaid order unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

Medical experts' affirmations established prima facie that the treatment provided by defendants to the injured plaintiff following the surgery on her ankle comported with good and accepted practice. In opposition, plaintiff submitted the conclusory affirmation of an expert who did not address the specific assertions of defendants' experts, particularly with

respect to the issues of malpractice and causation (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Ramirez v Columbia-Presbyterian Med. Ctr.*, 16 AD3d 238 [2005]), and whose ultimate assertions were speculative or unsupported by any evidentiary foundation (*see (Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]; *Wong v Goldbaum*, 23 AD3d 277, 279 [2005]).

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

ENTERED: NOVEMBER 5, 2009



Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1377 The People of the State of New York, Ind. 498/07
Respondent,

-against-

Jose Rosa, etc.,
Defendant-Appellant.

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

Robert M. Morgenthau, District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

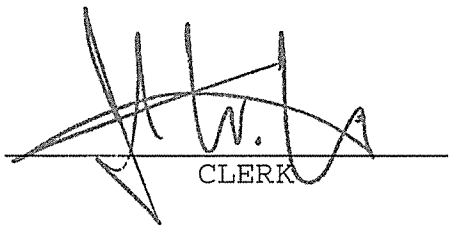
Judgment, Supreme Court, New York County (Charles H. Solomon, J. at suppression hearing; Marcy L. Kahn, J. at plea and sentence), rendered January 2, 2008, as amended January 15, 2008, convicting defendant of attempted murder in the second degree, and sentencing him to a term of 15 years, unanimously affirmed.

The court properly denied defendant's suppression motion. An officer heard shots, and, in very close temporal and spatial proximity to the gunfire, saw several people pointing at defendant, who walked quickly away, frequently looking back over his shoulder. The officer also saw a man lying on the ground with other people gathering around him. These circumstances clearly provided, at least, reasonable suspicion justifying a forcible detention. Under circumstances such as these, pointing is readily interpreted as a nonverbal accusation that has often been recognized as a significant factor justifying police action

(*see e.g. People v Burgos*, 300 AD2d 256 [2002], *lv denied* 99 NY2d 626 [2003]; *People v Sonds*, 287 AD2d 319, 320 [2001], *lv denied* 97 NY2d 709 [2002]; *People v Nash*, 227 AD2d 125 [1996], *lv denied* 88 NY2d 1070 [1996]).

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

ENTERED: NOVEMBER 5, 2009



Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1379 Celia Singer, etc., Index 107499/06
Plaintiff-Appellant,

-against-

The New York City Transit Authority,
Defendant-Appellant.

Ginsberg & Broome, P.C., New York (Alvin H. Broome of counsel), for appellant.

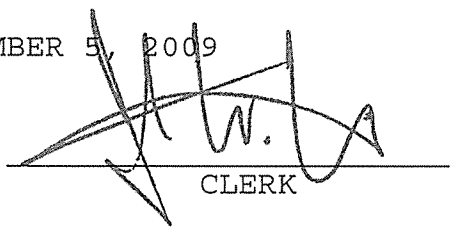
Wallace D. Gossett, Brooklyn (Lawrence Heisler of counsel), for respondent.

Order, Supreme Court, New York County (Joan B. Carey, J.), entered April 22, 2009, which denied plaintiff's motion to impose sanctions on defendant, unanimously affirmed, without costs.

Supreme Court providently exercised its discretion in denying plaintiff's motion for sanctions, which was brought eight months after the trial had concluded with a verdict in plaintiff's favor. While the trial court had stated that plaintiff could move for sanctions "whenever [she] wish[ed] to," this remark did not provide plaintiff with an unlimited period of time to bring the motion, and as the court found, the eight-month delay was unreasonable.

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

ENTERED: NOVEMBER 5, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1381 The People of the State of New York, Ind. 2512/06
Respondent,

-against-

Ceasar Tineo,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Mugambi Jouet of counsel), for appellant.

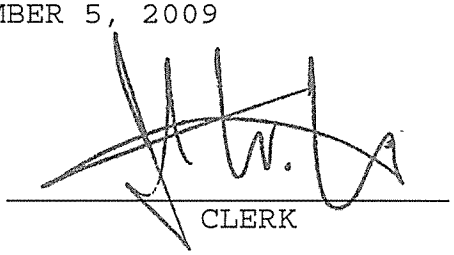
Robert M. Morgenthau, District Attorney, New York (Timothy C. Stone of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Micki Scherer, J.), rendered on or about April 5, 2007,

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

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

ENTERED: NOVEMBER 5, 2009



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

Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1382 Nicole Tausend, etc., Index 602926/08
Petitioner-Appellant,

-against-

N.J.R. Associates, etc., et al.,
Respondents-Respondents.

Dewey & LeBoeuf LLP, New York (John G. Nicolich of counsel), for appellant.

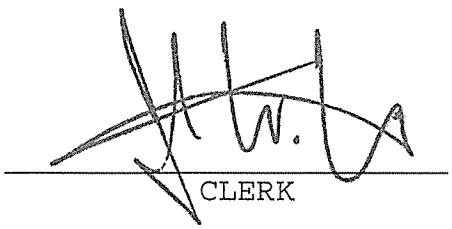
Siller Wilk LLP, New York (Alan D. Zuckerbrod of counsel), for respondents.

Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 30, 2009, dismissing the petition to stay arbitration, unanimously affirmed, with costs.

The court correctly granted respondents' motion to dismiss the petition to stay arbitration. There is insufficient evidence of record to substantiate petitioner's claim that she was induced by fraud to enter into the arbitration agreement, and it has not been shown that the entire partnership agreement was permeated by fraud so as to invalidate the arbitration provision (*see Matter of Weinrott [Carp]*, 32 NY2d 190, 197 [1973]).

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

ENTERED: NOVEMBER 5, 2009



CLERK

Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1383 In re Kendra Edwards, Petitioner, Index 108159/07

-against-

New York City Housing Authority, Respondent.

Joan L. Beranbaum, DC 37 Municipal Employees Legal Services, New York (Stephen Shepard of counsel), for petitioner.

Sonya M. Kaloyanides, New York (Bryon S. Menegakis of counsel), for respondent.

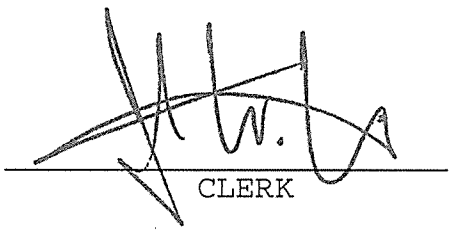
Determination of respondent New York City Housing Authority dated February 21, 2007, denying petitioner's grievance seeking remaining-family-member succession rights to the public housing apartment previously leased to her deceased grandmother, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to his court by order of the Supreme Court, New York County [Richard F. Braun, J.], entered April 16, 2008), dismissed, without costs.

The determination is supported by substantial evidence, including the grandmother's affidavits of income, admittedly prepared by petitioner, listing the grandmother as the only occupant of the apartment, and petitioner's admission that she was aware of respondent's requirement that she obtain written

permission to reside in the apartment but disregarded it (*see Matter of Aponte v New York City Hous. Auth.*, 48 AD3d 229 [2008]). It would not avail petitioner even if respondent were aware of her occupancy (*see Matter of Schorr v New York City Dept. of Hous. Preserv. & Dev.*, 10 NY3d 776 [2008]). We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: NOVEMBER 5, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1384 Russell Peacock, et al., Index 105392/07
Plaintiffs-Respondents,

-against-

Herald Square Loft Corp., et al.,
Defendants-Appellants.

Wolf Haldenstein Adler Freeman & Herz LLP, New York (Steven D. Sladkus of counsel), for appellants.

Charles E. Boulbol, New York, for respondents.

Order, Supreme Court, New York County (Louis B. York, J.), entered August 22, 2008, which, to the extent appealed from, denied defendants' motion to dismiss the second and third causes of action, and so much of the fourth cause of action as sought specific performance on a March 8, 1994 agreement, unanimously modified, on the law, the second and third causes of action dismissed, and otherwise affirmed, without costs.

Co-op penthouse owners sued the co-op and certain directors for refusing permission to demolish their one-story rooftop structure and replace it with a two-story unit. As pertinent here, plaintiffs alleged breach of fiduciary duty against the co-op corporation and the director defendants, as well as breaches of their proprietary lease and the 1994 agreement.

As amplified in an affidavit in opposition to defendants' motion, plaintiffs asserted discrimination against them by refusal to approve their proposed project, in light of a past

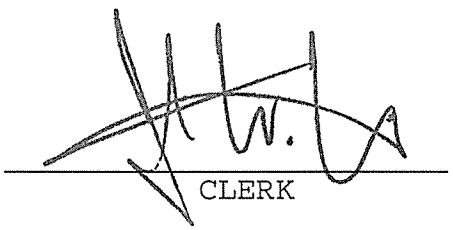
history of permitting extensive work on many of the building's other units. Although an allegation of unequal treatment of shareholders may be sufficient to overcome the protections of the business judgment rule, plaintiffs are still subject to the requirement of pleading independent tortious acts (*see DeCastro v Bhokari*, 201 AD2d 382, 383 [1994]). Since plaintiffs made no assertion that in discriminating against them, the directors were acting outside their official capacity, the unspecified allegation of unequal treatment failed to state a claim (*see Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 9-10 [2006]). The allegation that the director defendants rejected plaintiffs' proposal due to the self-interest of one or more of the directors also lacked the specificity required to adequately state a claim for breach of fiduciary duty (*see* CPLR 3016[b]; *Pelton*, 38 AD3d at 11). As to the co-op corporation, defendants correctly point out that "a corporation does not owe fiduciary duties to its members or shareholders" (*Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [2007]). Accordingly, the second and third causes of action, sounding in breach of fiduciary duty, must be dismissed.

As to the fourth cause of action, the 1994 agreement provided for review only "after the Board approves plaintiffs' scope of work." Since the Board of Directors never approved plaintiffs' scope of work, defendants argue they cannot be in

breach of the 1994 agreement. This argument is undercut by defendants' apparent concession in their brief that the proprietary lease would proscribe the board from unreasonably withholding its approval of the scope of work under the 1994 agreement. Even if the 1994 agreement does not, on its face, set limits on the board's ability to refuse to approve the scope of work, the contract's implied covenant of good faith and fair dealing would prevent defendants from exercising that power arbitrarily (*see Dalton v Educational Testing Serv.*, 87 NY2d 384, 389 [1995]). Whether defendants acted arbitrarily or unreasonably in refusing to approve the scope of work presents questions of fact that cannot be resolved on this motion to dismiss (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]).

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

ENTERED: NOVEMBER 5, 2009



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Sweeny, J.P., Buckley, Catterson, Acosta, Freedman, JJ.

1386N Evangelos Gatzonis, individually and suing derivatively on behalf of Top Cove Associates, Inc., Plaintiff-Appellant, Index 602552/08

-against-

Efstathios Valiotis, Defendant-Respondent,

Vincent Acquista, Esq., etc., Defendant.

Steiner & Kostyn LLP, White Plains (Kevin F. Kostyn of counsel), for appellant.

Law Offices of Santo Golino, New York (Santo Golino of counsel), for respondent.

Order, Supreme Court, New York County (Eileen Bransten, J.), entered April 22, 2009, which denied plaintiff's motion for a preliminary injunction, unanimously affirmed, without costs.

The court properly denied plaintiff's motion as he failed to show a likelihood of success on his claim that the loan agreement with defendant was unenforceable. The agreement provided that, in the event of a default, the parties' would value plaintiff's minority stake in their closely held company pursuant to a formula. Defendant would pay plaintiff the difference between this valuation and the amount owed on the loan, and defendant would then own the shares. Contrary to plaintiff's contention, this was not a liquidated damages clause, but a means of valuing

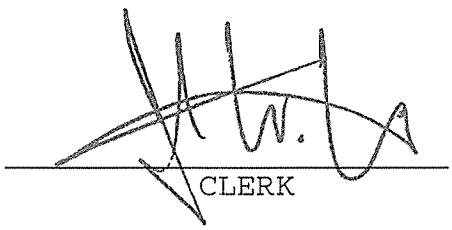
the consideration plaintiff offered for repayment (*cf. Bui v Industrial Enters. Of Am., Inc.*, 41 AD3d 238 [2007]; *Quaker Oats Co. v Reilly*, 274 AD2d 565 [2000]).

Furthermore, the agreement was neither procedurally nor substantively unconscionable (*see Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10-11 [1988]). The record demonstrates that plaintiff, a sophisticated businessman, was not forced into the loan, as his desire for the funds was not some emergent need, but rather so that he could, inter alia, pursue investment opportunities (*see Gillman v Chase Manhattan Bank*, 73 NY2d, 11 [1988]). Moreover, although plaintiff showed he might suffer a 35% discount for his minority share in the closely held corporation, whose sole asset was a parcel of commercial real estate, such discount was not unreasonable under the circumstances (*see Truck Rent-A-Ctr. v Puritan Farms* 2nd, 41 NY2d 420, 424-426 [1977]).

We have considered plaintiff's remaining contentions, including that the court should have held an evidentiary hearing, and find them unavailing.

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

ENTERED: NOVEMBER 5, 2009



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NOV 5 2009

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luiz A. Gonzalez, P.J.
Peter Tom
John W. Sweeny, Jr.
James M. Catterson
Dianne T. Renwick, JJ.

274
Index 603756/07

x

Amaranth LLC, et al.,
Plaintiffs-Appellants-Respondents,

-against-

J.P. Morgan Chase & Co., et al.,
Defendants-Respondents,

J.P. Morgan Futures, Inc.,
Defendant-Respondent-Appellant.

x

Cross-appeals from an order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered November 10, 2008, which, to the extent appealed from as limited by the briefs, denied defendant J.P. Morgan Futures, Inc.'s motion to dismiss the first cause of action, and granted defendants' motion to dismiss the second, fourth, and fifth causes of action.

Kleinberg, Kaplan, Wolff & Cohen, P.C., New York (Marc R. Rosen and David Parker of counsel) and Bartlit Beck Herman Palenchar & Scott LLP, Chicago, IL (James B. Heaton, III of the Illinois Bar, admitted pro hac vice, of counsel) for appellants-respondents.

Paul, Weiss, Rifkind, Wharton & Garrison, LLP, New York (Mark F. Pomerantz, Eric S. Goldstein and Daniel J. Toal of counsel), for respondents and respondent-appellant.

CATTERSON, J.

The instant appeal arises from events that the Wall Street Journal in January 2007 described as "the biggest hedge fund failure ever." To stem billions of dollars in losses in 2006, Amaranth LLC executed trades to transfer its high-risk positions to the parent company of its clearing broker, J.P. Morgan, which received substantial benefits from the transaction. Both parties appeal from portions of an order that, inter alia, dismissed Amaranth's claims for tortious interference and denied J.P. Morgan's motion for dismissal of a claim for breach of contract. We find that the plaintiffs did not plead a valid cause of action for breach of contract, but that their claim for tortious interference should be reinstated.

The plaintiffs are Amaranth LLC (hereinafter referred to as the "Fund"), a hedge fund involved in natural gas derivatives trading, and Amaranth Advisors LLC (hereinafter referred to as "Advisors"), the trading advisor that planned and executed the Fund's investment strategy. The defendants J.P. Morgan Futures, Inc. (hereinafter referred to as "JPMFI"), the Fund's clearing broker, and J.P. Morgan Chase Bank, N.A. (hereinafter referred to as "JPMB") are subsidiaries of defendant J.P. Morgan Chase & Co. (hereinafter referred to as "JPMC").

The following facts are undisputed:

In 2005 and 2006, the Fund made huge gains trading in energy derivatives, reaching a value of $9.2 billion in July 2006. However in late August 2006, the Fund lost hundreds of millions of dollars, and by September 15, 2006, it was in danger of being unable to satisfy its obligations on its open trading positions. As the Fund's clearing broker, JPMFI was, effectively, the guarantor for trades if the Fund defaulted. To shield clearing brokers from ultimate responsibility for their clients' losses, exchange regulations require commodities traders to maintain funds as a deposit for performance on their contracts. These funds are known as margin. A client's account is recalculated at the end of every business day and the resultant gains or losses reflected in the client's account balance. When losses accrue, they are deducted from the client's balance and the client may be required to post additional margin funds. This is known in the industry as a margin call. This process ensures that the account has sufficient funds to satisfy margin requirements and provide adequate protection for clearing brokers against their clients' positions.

The relationship between the Fund and JPMFI is established in the Client Agreement executed by the parties in 2004. The agreement states in relevant part:

> "[¶ 3](e) All transactions by JPMFI on behalf of [the Fund] shall be subject to the applicable constitution, bylaws, rules, regulations, customs, rulings, and interpretations ("Rules") of the exchange and its clearing organization . . . . JPMFI shall not be liable to [the Fund] as a result of any action taken by JPMFI or its agents to comply with any such Rule [...]
>
> "(f) JPMFI shall not be required to execute any new order for [the Fund] if, in JPMFI's reasonable discretion, the state of [the Fund's] account does not justify such execution; provided, however, that JPMFI shall execute orders that would have the effect of reducing JPMFI's exposure to [the Fund], and such [sic] and provided further that such execution would not violate any exchange or regulatory rule or applicable law."

At the close of business on Friday, September 15, 2006, the Fund's margin requirement was $2.513 billion. At the time, the Fund had $2.518 billion in its futures account at JPMFI, leaving it with just $5 million in unencumbered cash.

To protect themselves from further losses that could threaten the Fund's survival, the plaintiffs sought to transfer the risk associated with the Fund's natural gas portfolio to other banks or funds. On Saturday, September 16, the Fund reached a deal under which Merrill Lynch (hereinafter referred to as "Merrill") would assume about a quarter of the Fund's open natural gas positions. These trades were cleared through JPMFI the next business day, Monday, September 18, without incident.

At the same time, the Fund was in negotiations with Goldman

Sachs (hereinafter referred to as "Goldman") to transfer most of their remaining open positions. On Sunday, September 17th, the Fund reached a deal with Goldman under which Goldman would accept a payment of $1.85 billion to assume most of the remaining risk in the Fund's portfolio. Unlike the Merrill deal, Goldman required this payment in advance. The Fund had little unencumbered cash on hand, and the Goldman deal would necessarily require the release of its margin funds to complete the deal.

The proposed trade was discussed in a conference call the next morning, Monday, September 18, among officials from Advisors, Goldman, JPMFI, and the New York Mercantile Exchange (hereinafter referred to as "NYMEX"). Despite the endorsement of the NYMEX officials, JPMFI refused to release the necessary $1.85 billion from the Fund's margin account. As a result, the deal with Goldman fell through.

Later that Monday, Advisors was contacted by Citadel Investment Group LLC (hereinafter referred to as "Citadel"). Negotiations with Citadel led to a similar deal, in which Citadel would receive $1.85 billion as a concession for taking on most of the Fund's remaining risk. The only differences were that Citadel would accept payment after the trade was executed and that the Fund would absorb two-thirds of the losses from Monday's trading.

However, the plaintiffs allege that, on Tuesday, September 19, 2006, two executives for JPMC, Steve Black and Bill Winters, called Citadel and told them that "Amaranth is not as solvent as they are telling you they are." The plaintiffs further allege that JPMC was displeased that the Fund was negotiating with other firms instead of JPMC, and that in making the false statement, Mr. Black and Mr. Winters intentionally and maliciously sought to derail the trade between the Fund and Citadel.

It is undisputed that Citadel declined to pursue the deal with the Fund. The Fund claims that as a result it sustained over $1 billion in losses and Advisors claims that it suffered severe losses as well. Following the collapse of the Citadel deal, the Fund reached an agreement for JPMC to take on the risky positions in exchange for a payment of $2.5 billion.

On or about November 13, 2007, the Fund and Advisors commenced the instant action against JPMC and its subsidiaries alleging, inter alia, a breach of contract on the grounds that JPMFI was obligated to release margin funds for the Goldman deal under paragraph 3(f) of the Client Agreement because it would have decreased JPMFI's exposure. The complaint also contained an allegation of tortious interference with prospective economic advantage under Connecticut law by the Fund against JPMC, and a similar tortious interference claim by Advisors.

On or about March 3, 2008, JPMC and its subsidiaries moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). The plaintiffs opposed the motion arguing that they had adequately pleaded their complaint, and that the documentary evidence presented by the defendants merely raised issues of fact for trial.

The motion court observed that under CPLR 3211(a)(7) the relevant inquiry is whether the plaintiffs' complaint states a valid cause of action on its face, giving the plaintiffs the benefit of every possible favorable inference. See Leon v. Martinez, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972, 974, 638 N.E.2d 511, 513 (1994). The court cited Asgahar v. Tringali Realty Inc., 18 A.D.3d 408, 409, 795 N.Y.S.2d 68, 70 (2d Dept. 2005), for the proposition that where the defendants have presented documentary evidence the court must determine whether the plaintiff actually "has a cause of action, not whether [he or] she has stated one." See also CPLR 3211(a)(1).

Supreme Court denied the motion to dismiss the Fund's claim for breach of contract against JPMFI, finding that the documentary evidence submitted by the defendants did not conclusively establish that the Goldman deal would not have reduced JPMFI's exposure, in which case JPMFI would have been obligated to carry out the deal.

The motion court dismissed both claims for tortious interference. The court held that, even though the plaintiffs alleged economic harm, the fact that they asserted that harm was done to their reputation required the application of the one-year statute of limitations applicable to defamation claims. Therefore, it found the Fund's claim for tortious interference to be time-barred. It also found that the claim asserted by Advisors against JPMC failed to allege either that Advisors was defamed or that it had a business relationship with JPMC that could support a claim for tortious interference.

Finally, the motion court considered claims under the Connecticut Unfair Trade Practice Act, and determined that it did not apply to the instant case under the appropriate choice of law rules. We uphold this element of the ruling.

For the reasons set forth below, we find that the court erred in holding that the plaintiffs stated a claim for breach of contract because paragraph 3(f) of the aforementioned Client Agreement required JPMFI to reduce its exposure to the Fund. In fact, the plain language of paragraph 3(f) establishes that the plaintiffs had no contractual right to demand that JPMFI increase its risk.

It is well settled that "a court should not adopt an interpretation which will operate to leave a provision of a

contract without force and effect." FCI Group, Inc. v. City of New York, 54 A.D.3d 171, 177, 862 N.Y.S.2d 352, 356 (1st Dept. 2008), lv. denied, 11 N.Y.3d 716, 874 N.Y.S.2d 5 (2009) (internal quotation marks and citations omitted). In interpreting paragraph 3(f) of the Client Agreement, we find that it explicitly grants JPMFI the right to refuse execution of those deals that would expose JPMFI to additional risk, irrespective of whether they are good or bad transactions for the Fund, while placing some limit on its ability to refuse. Therefore, JPMFI must have been able to refuse to execute transactions that posed *any* risk to it even if these had a high likelihood of reducing its exposure in the long-term; otherwise paragraph 3(f) would be rendered meaningless.

It is immaterial whether the Goldman deal, taken as a whole, was likely or unlikely to decrease the exposure of JPMFI to the plaintiffs because JPMFI was not presented with the completed deal. Rather, the Fund requested the release of margin in anticipation of further transactions that were arguably likely to decrease JPMFI's exposure and the Fund's risk. However, the plaintiffs' complaint admits that *this first step would expose JPMFI to an "overnight settlement risk of $1.85 billion" (emphasis added)*. Whether it was prudent or not for JPMFI to take this chance is not relevant in finding that JPMFI was under no

contractual obligation to expose itself to this or any additional risk, irrespective of what the result of their refusal might be. Because the plaintiffs, in their complaint, admit that JPMFI would be more exposed as an immediate result of the release of margin, they have failed to plead a cause of action for breach of contract. Therefore, we dismiss that claim.

Dismissal is also warranted under CPLR 3211(a)(1) based on documentary evidence presented by the defendants including the full Client Agreement and excerpts from the NYMEX and Intercontinental Exchange Rules. Paragraph 3(e) of the Client Agreement provides that "[a]ll transactions by JPMFI on behalf of [the Fund] shall be subject to the applicable constitution, by-laws, rules, regulations, customs, usages, rulings and interpretations of the exchange." The relevant exchange rules require that the minimum margin be maintained at all times in trading accounts. For example, NYMEX Rule 4.01(F) provides that "[w]ithdrawals of margin from a customer's account may only be permitted by a Member Firm carrying such account if the remaining funds in such account are equal to or in excess of the then prevailing initial margin required of the applicable open positions."

At the time the Fund requested the release of its margin, it had only $5 million excess margin in its account, with a minimum

margin requirement of approximately $2.514 billion. The release of $1.85 billion would, therefore, place the Fund below its margin requirements under the rules of NYMEX. Although the plaintiffs argue that this is irrelevant because the margin would be replaced the next day, rules require that adequate margin be maintained *at all times*. Therefore, the Fund fails to allege that the release of margin would not violate the rules of the exchange as incorporated into the Client Agreement. Thus, even if the Goldman deal would have the effect of reducing JPMFI's exposure, the plaintiffs have failed to allege a cause of action for breach of contract. See Asqahar, 18 A.D.3d at 409, 795 N.Y.S.2d at 70.

We turn next to counts two and four of the plaintiffs' complaint alleging tortious interference with prospective economic advantage. To prevail on a claim for tortious interference with business relations in New York, a party must prove 1) that it had a business relationship with a third party; 2) that the defendant knew of that relationship and intentionally interfered with it; 3)that the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) that the defendant's interference

caused injury to the relationship with the third party. See Carvel Corp v. Noonan, 3 N.Y.3d 182, 189, 785 N.Y.S.2d 359, 361-62, 818 N.E.2d 1100, 1102-03 (2004); NBT Bankcorp v. Fleet/Norstar Fin. Group, 87 N.Y.2d 614, 641 N.Y.S.2d 581, 664 N.E.2d 492 (1996); Guard-Life Corp. v. Parker Hardware Mfg. Corp., 50 N.Y.2d 183, 428 N.Y.S.2d 628, 406 N.E.2d 445 (1980).

Defamation is a predicate wrongful act for a tortious interference claim. See Stapleton Studios LLC v. City of New York, 26 A.D.3d 236, 810 N.Y.S.2d 657 (1st Dept. 2006). The motion court found that because the alleged defamation caused reputational injury to the Fund, that the allegations sounded in defamation and were subject to a one-year statute of limitations. See CPLR 215(3). We disagree.

It is well settled that "[i]n applying a Statute of Limitations [...] 'We look for the reality, and the essence of the action and not its mere name.'" Morrison v. National Broad. Co., 19 N.Y.2d 453, 459, 280 N.Y.S.2d 641, 644, 227 N.E.2d 572, 574 (1967) (quoting Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937)). The three-year statute of limitations for tortious interference applies when the gravamen of a complaint is economic injury, rather than merely

reputational harm. See Mannix Indus. v. Antonucci, 191 A.D.2d 482, 483, 594 N.Y.S.2d 327, 329 (2d Dept. 1993), lv. dismissed, 82 N.Y.2d 846, 606 N.Y.S.2d 597, 627 N.E.2d 519 (1993); Classic Appraisals Corp v. DeSantis, 159 A.D.2d 537, 552 N.Y.S.2d 402 (2d Dept. 1990).

In DeSantis, the Court found that the plaintiff's complaint sounded in tortious interference when it alleged that the defendant's conduct had interfered with prospective appraisal contracts. 159 A.D.2d at 537, 552 N.Y.S.2d at 403. In contrast, in Pasqualini v. Mortgage IT Inc. (498 F. Supp. 2d 659 (S.D.N.Y 2007) when the plaintiff alleged harm to her professional reputation that had an indirect effect on her ability to form business relationships, the court found that the complaint sounded in defamation and applied the associated one-year statute of limitations. Id., at 669-71. The instant case more closely resembles DeSantis as the plaintiffs have alleged a specific business relationship - the prospective deal between the Fund and Citadel - that has been harmed. Because the complaint does not rely merely on generalized reputational harm, we find that it sounds in tortious interference. Therefore, the plaintiffs' complaint was timely under the applicable three-year statute of limitations.

Moreover, we find that the Fund has adequately pleaded the

elements of tortious interference with prospective economic advantage (the second cause of action). It is well settled that where a statement impugns the basic integrity or creditworthiness of a business, an action lies and injury is conclusively presumed. See John Langenbacher Co. v. Tolksdorf, 199 A.D.2d 64, 605 N.Y.S.2d 34 (1st Dept. 1993). Thus, the argument that the alleged statement, which disparages the Fund's solvency and possibly Advisors' honesty in business, is nonactionable opinion is without merit. The alleged statement has a precise meaning, and whether or not the Fund was solvent at the time the statement was made is a fact capable of being proven true or false by a fact-finder. The Fund pleads the underlying defamation with the required specificity, setting forth the particular words that were said, who said them and who heard them, when the speaker said them, and where the words were spoken. See CPLR 3016(a); Dillon v. City of New York, 261 A.D.2d 34, 37-38, 704 N.Y.S.2d 1, 5 (1st Dept. 1999). Finally, the Fund sufficiently pleads injury and causation. Specifically, the complaint alleges that the false statement made by JPMC's executives caused Citadel to withdraw from the trade agreed upon earlier in the day and that losing the proposed trade with Citadel caused the Fund more than $1 billion in losses. Accordingly, we would reinstate the Fund's tortious interference claim against JPMC.

However, we find that the motion court correctly found no sufficient business relationship between Advisors and JPMC so as to support a claim for tortious interference (the fourth cause of action). Advisors relies on TVT Records v. Island Def Jam Music Group (279 F. Supp. 2d 366 (S.D.N.Y. 2003), rev'd on other grounds, 412 F.3d 82 (2d Cir. 2005)) for the proposition that Advisors had a sufficient business relationship to allege tortious interference because it would have received a share of the benefit of the Fund's transactions. Id., at 383-384. However, Advisors disregards the fact that in TVT Records, the plaintiff was a wholly-owned subsidiary of a company whose copyrights were infringed. Id. In the instant case, even assuming that Advisors received substantially all of its revenue from the Fund, the two are nevertheless legally separate entities.

More on point is the holding in Kirch v. Liberty Media Corp., 449 F.3d 388 (2d Cir. 2006). In Kirch, the plaintiff's sole purpose was to act as the exclusive American agent of a foreign corporation which was defamed. The court distinguished that case from TVT Records, observing that although a wholly-owned subsidiary may be directly impacted by harm to its parent company, the harm suffered by an exclusive agent was merely derivative, and therefore too attenuated to support a cause of

action for tortious interference. Kirch, 449 F.3d at 400-401. Lacking an ownership relationship with the Fund, the most Advisors can claim is to be its exclusive agent. Therefore, we find that Advisors failed to plead a sufficient business relationship to support a tortious interference claim.

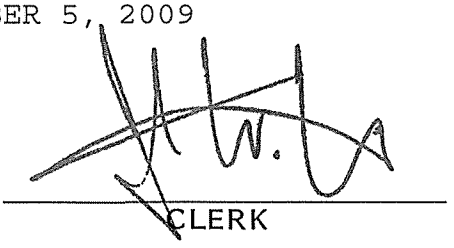
We have considered the parties' remaining contentions for affirmative relief and find them unavailing.

Accordingly, the order of the Supreme Court, New York County (Richard B. Lowe III, J.), entered November 10, 2008, which, to the extent appealed from as limited by the briefs, denied defendant JPMFI's motion to dismiss the first cause of action and granted defendants' motion to dismiss the second, fourth, and fifth causes of action, should be modified, on the law, to grant JPMFI's motion with respect to the first cause of action for breach of contract, and to deny defendants' motion with respect to the second cause of action, and otherwise affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 5, 2009



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SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Eugene Nardelli
John W. Sweeny, Jr.
James M. McGuire
LeLand G. DeGrasse, JJ.

4457
Index 49939/02

x

Paula N. Frye, etc.,
Plaintiff-Respondent,

-against-

Montefiore Medical Center, et al.,
Defendants-Appellants,

Franlina Umali, M.D., et al.,
Defendants.

x

Defendants Montefiore Medical Center, Jack D. Weiler Hospital, Weiler/Einstein Hospital, Barbara Girz, D.O., Norbert Berger, M.D. and Cathy Jarosz, M.D., appeal from an order of the Supreme Court, Bronx County (Yvonne Gonzalez, J.), entered August 6, 2007, which denied their motions for summary judgment.

Heidell, Pittoni, Murphy & Bach, LLP, New York (Daniel S. Ratner of counsel), for Montefiore Medical Center appellants and Barbara Girz, D.O., appellant.

Leahey & Johnson, PC, New York (Peter James Johnson, Jr., Peter James Johnson, James P. Tenney, Joanne Filiberti and Rosa M. Batista of counsel) for Norbert Berger, M.D., appellant.

Rende, Ryan & Downes, LLP, White Plains (Roland T. Koke of counsel), for Cathy Jarosz, M.D., appellant.

Meagher & Meagher, P.C., White Plains (Christopher B. Meagher of counsel), for respondent.

SWEENY, J.

This is a medical malpractice action where the Montefiore Medical Center defendants (WHAECOM) and Drs. Berger, Girz and Jarosz have perfected appeals from the denial of their respective motions for summary judgment dismissing the complaints against them. The facts are as follows:

On October 28, 1999, plaintiff presented at the New York Medical Group (NYMG) and was treated by defendant Dr. Franlina Umali, an internist employed by NYMG. Dr. Umali diagnosed plaintiff with diabetes and prescribed Glucophage, an oral diabetes medicine that helps control blood sugar levels.

Approximately one month later, after presenting at Bronx Lebanon Hospital for vaginal bleeding, plaintiff learned she was pregnant. She returned to NYMG on December 2, 1999 and was seen by defendant Dr. Park, an obstetrician, who ordered a Level 1 sonogram to determine whether the pregnancy was viable[1]. This sonogram was supervised and evaluated by defendant Berger, a radiologist, who reported a normal 7-week, 5-day pregnancy.

On December 3, Dr. Park ordered plaintiff's admission to WHAECOM due to complications with her pregnancy. At his deposition, Dr. Park stated that NYMG and WHAECOM "co-manage"

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[1]A Level 1 sonogram determines only the presence of the fetus, its age, and the amount of amniotic fluid.

high-risk diabetic pregnancies such as plaintiff's, and that the purpose of plaintiff's admission to WHAECOM was to place her on insulin and have her "hooked up into the system" that NYMG has with WHAECOM's high-risk perinatologists.

Upon her admission to WHAECOM, plaintiff was examined by an obstetrics resident who reported that the admission was for evaluation of "diabetes in pregnancy." The resident recommended that plaintiff be taken off Glucophage and switched to insulin to better control her blood sugar levels. The resident's report also noted that plaintiff's blood sugar levels were elevated and that the case would be discussed with the director of WHAECOM's obstetrics and perinatology department. There is no indication in the record that this discussion ever took place.

Blood glucose testing was ordered and two units of insulin were administered to stabilize plaintiff's blood sugar levels. This was the only insulin administered during plaintiff's stay at WHAECOM. She was not seen by any of WHAECOM's perinatologists.

On December 4, plaintiff was examined by defendant Long, an attending obstetrician at WHAECOM, who did not order additional insulin, even though she noted high levels of blood sugar. At her deposition, Dr. Long stated that the result of the blood glucose test was 8.8, a reading that showed plaintiff's diabetes was not under control when she entered WHAECOM. Dr. Long did not

obtain these test results until after plaintiff was discharged from WHAECOM. Dr. Long also stated that uncontrolled diabetes during pregnancy could result in the development of neural tube defects such as encephaloceles, as well as macrosomic fetus development (i.e., the fetus being large for its fetal age).

Plaintiff was discharged from WHAECOM on December 5 after being seen by defendant Jarosz, another attending obstetrician. Dr. Jarosz did not have plaintiff's blood glucose test results prior to discharging her.

Thereafter, plaintiff's pregnancy was monitored by NYMG's doctors, who informed her that the results of WHAECOM's blood glucose test had measured 8.8, indicating that plaintiff's blood glucose levels were not under control for the three-month period prior to the test.

On March 2, 2000, Dr. Park ordered another sonogram. At his deposition, Dr. Park stated that he considered this to be a Level 2[2] sonogram. However, according to Dr. Park, someone unknown to him wrote "pregnancy dates" on the order for the sonogram. On March 16, Dr. Berger supervised a Level 1 sonogram, and reported that the fetus' anatomy was "unremarkable." Dr. Berger contends

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[2]A Level 2 sonogram, also referred to as a fetal anatomy survey, involves a more thorough examination of fetal anatomy than a Level 1 sonogram.

that he did not get an order to perform a Level 2 sonogram, and that the order requesting a sonogram for "pregnancy dates" was, by its terms, a Level 1 sonogram. In any event, according to Dr. Berger and various other defendants at their respective depositions, NYMG did not have the ability to conduct Level 2 sonograms in house. They testified that a patient requiring such a sonogram would have to be referred out to another facility for that purpose. Dr. Jarosz stated at her deposition that while she was employed at NYMG during the period 1999-2000, if a fetus was greater than 17 weeks and a NYMG obstetrician ordered a sonogram, it would automatically be a Level 2 sonogram. She did not state, however, whether that sonogram would be conducted in house or at another facility.

On May 30, 2000, defendant Harris, an obstetrician with NYMG, diagnosed plaintiff with a diabetic condition wherein glucose is excreted through the kidneys. Dr. Harris referred plaintiff to WHAECOM's outpatient Diabetes in Pregnancy Program (DIPP), and ordered a Level 2 sonogram to be performed when plaintiff entered DIPP.

On June 20, plaintiff was seen at DIPP by defendant Girz, an obstetrician/perinatologist employed by WHAECOM. Although Dr. Harris had ordered a Level 2 sonogram, Dr. Girz performed a Level 1 sonogram. Dr. Girz reported no fetal abnormalities and

recommended an additional sonogram on June 27, which, for some reason, was never performed. During her deposition, Dr. Girz stated that a Level 2 or fetal anatomy survey should be performed at approximately 20 weeks. If performed later, the ability to visualize abnormalities could be affected by the position of the fetus, as well as its weight and size. Plaintiff was approximately 37 weeks into her pregnancy on June 20.

Dr. Girz agreed that children of diabetic mothers have an increased risk of developing neural tube defects like encephaloceles. She further testified that prior to June 2000, she diagnosed approximately 10 neural tube defects, 5 of which were encephaloceles. With respect to those cases, Dr. Girz stated they were all diagnosed between 13 and 24 weeks and that the level of the sonogram was not an issue in those cases, since "[y]ou put the transducer on and you see it. It's not that you are particularly doing a level two or Level one ultrasound."

On June 28, with defendant Suarez the attending obstetrician on duty, plaintiff gave birth vaginally to Sherkell, who was quickly diagnosed with occipital encephalocele. This is a sac-like protrusion of the brain and the membranes that cover it through an opening in the back of the skull, and is caused by the neural tube's failure to close completely during fetal development. Dr. Harris testified at her deposition that

Sherkell's encephalocele was caused by plaintiff's uncontrolled diabetes. The birth report also indicates that Sherkell had shoulder dystocia and that the encephalocele was ruptured during birth, causing a loss of spinal fluid. His birth weight was 4,734 grams.

During his deposition, Dr. Suarez stated that diabetics tend to have macrosomic babies. When presented with a macrosomic baby, a caesarian section must be considered as an option for delivery. Dr. Suarez also testified that he discussed with plaintiff that the baby was "good sized" and that if labor did not progress the way it was supposed to, a cesarean delivery would be performed. Plaintiff, at her deposition, stated a cesarean delivery was never discussed with her by anyone. Dr. Suarez estimated the baby's weight to be between 4,100 to 4,200 grams, which he did not consider excessive. However, he also stated that his estimated weight of the baby is considered macrosomic for its gestational age, and because of his concern over possible shoulder problems during delivery due to the baby's size, he arranged for a pediatrician to be present for the delivery. Dr. Suarez stated that there is no point during labor when a cesarean delivery is ruled out, as the delivering physician always has the option in an emergency.

Dr. Suarez further stated that in the case of a fetus

diagnosed pre-delivery with an encephalocele, a cesarean delivery would "probably be a good precaution to prevent compression of the mass." He indicated that the standard of care requires such delivery under those circumstances, since during a vaginal delivery, the muscles in the vagina compress the head and neck of the baby, which in turn increases the likelihood of a rupture of the encephalocele, resulting in the possible loss of spinal fluid and an open lesion. Dr. Suarez stated that he relies on the radiologist's sonogram report and does not review the films himself. The reports of both Drs. Berger and Girz did not indicate any abnormalities.

At the time of delivery, Dr. Suarez was in the physicians lounge, one floor above the delivery room. He was called when delivery commenced and went to the delivery room. When he got there, the baby had already been delivered by a resident.

Sherkell underwent surgeries to repair the ruptured encephalocele. He has been diagnosed with, inter alia, cerebral palsy, spastic quadriplegia and pervasive developmental disorder. At age 4 years 3 months, he was on a developmental par with a 13-month-old child.

At the conclusion of discovery, each defendant timely moved for summary judgment dismissing the complaints, and all of these motions were denied.

WHAECOM and Girz argue that they played no part in plaintiff's prenatal care and diabetes management. They relied on the expert affidavit of Dr. Adiel Fleischer, an obstetrician/gynecologist/perinatologist, who opined that plaintiff's prenatal care was managed entirely by her NYMG physicians, and that the decision not to prescribe insulin was consistent with accepted standards of medical care. However, these statements are directly contradicted by Dr. Park's deposition testimony, wherein he stated that NYMG and WHAECOM co-managed plaintiff's pregnancy and that plaintiff was initially admitted to WHAECOM specifically to be placed on insulin. Dr. Fleischer stated that it was likely the encephalocele predated plaintiff's December 3, 1999 admission to WHAECOM, as the condition occurs at approximately 28 days of gestation when the neural tube fails to close properly. Dr. Fleischer opined that once the condition manifests, the baby is destined to suffer from a plethora of ailments. According to Dr. Fleischer, since plaintiff was 7 weeks and 5 days pregnant when admitted to WHAECOM, the encephalocele already existed and nothing could be done to alleviate its impact.

With respect to Dr. Girz's reading of the sonogram, Dr. Fleischer opined that it was proper, as the encephalocele could not be seen due to the fetus's position and size.

Dr. Girz also submitted the affirmation of Dr. Carol Benson, a board certified radiologist and professor of medicine at Harvard Medical School, who agreed with Dr. Fleischer that the late stage of the pregnancy, as well as the size and position of the infant, particularly the low position of the infant's head within the uterine cavity, precluded Dr. Girz's ability to see the abnormality.

Dr. Jarosz argues that she saw plaintiff only once, on December 5, 1999, just prior to her discharge from WHAECOM, that other physicians decided to control plaintiff's diabetes with diet, and plaintiff's blood glucose test results were not available when she was discharged. Her expert, Dr. James Howard, board certified in obstetrics and gynecology, opined that her treatment of plaintiff and her decision to discharge plaintiff from WHAECOM without having first obtained plaintiff's blood glucose levels was consistent with accepted standards of medical practice. He further stated that the results of the blood glucose test reflected "past diabetic control," i.e., plaintiff's blood glucose levels for the three months prior to the test, and were not a factor is determining whether to discharge plaintiff.

Dr. Berger argues that he was responsible only for supervising, reading and interpreting plaintiff's sonogram tests. Despite Dr. Park's claims to the contrary, Dr. Berger stated that

Dr. Park did not order a Level 2 sonogram on March 16, 2000, as the written request stated only that a sonogram was required for "pregnancy dates." His expert, Dr. Joseph Yee, a radiologist, opined that Berger's actions were within accepted medical standards and were properly supervised and interpreted, and that in reviewing the sonogram films, he saw no evidence of an encephalocele. Dr. Yee also stated that Berger could not be faulted for failing to perform a Level 2 sonogram, as the attending obstetrician did not request it, and it is not within the purview of a radiologist to request such testing.

In response, plaintiff submitted a consolidated opposition, arguing that defendants deviated from accepted standards of medical care. WHAECOM's and Dr. Jarosz's claimed deviations were, inter alia, the failure to treat plaintiff's diabetes with insulin during the first trimester, which led to the development of the encephalocele. Drs. Berger's and Girz's deviations were, inter alia, the failure to detect the encephalocele during their March and June 2000 sonograms, leading to the decision to deliver Sherkell vaginally, the rupture of the encephalocele, and subsequent exacerbation of Sherkell's neurological damage.

In support of her opposition, plaintiff submitted affirmations from a series of medical experts whose names were redacted (CPLR 3101[d][1]). The original affirmations were

examined by the IAS court in camera and accepted.

Medical Expert #1, a physician specializing in diabetes and author of several medical texts, opined that the proximate cause of Sherkell's encephalocele was the failure of various named defendants to properly manage plaintiff's diabetes during the first trimester of her pregnancy. After citing specific deviations from accepted medical practice by Drs. Umali, Long and Park, the expert discussed WHAECOM's and Jarosz's actions. The expert stated it is widely accepted in the medical community that blood glucose levels must be aggressively controlled during the first trimester of pregnancy in order to prevent birth defects such as encephaloceles. The expert opined that WHAECOM and Dr. Jarosz committed the following deviations from accepted medical standards: (1) ordering plaintiff's diabetes to be treated with diet alone, with no aggressive follow-up plan; (2) discharging plaintiff without first examining the results of her blood glucose tests; and (3) discharging plaintiff without prescribing insulin to treat her diabetes.

This expert also commented on plaintiff's delivery. The expert noted that Dr. Suarez's admission notes indicated that shoulder precautions should be taken because of the infant's large size. However, the vaginal delivery caused the infant to suffer a "traumatic delivery," which included shoulder dystocia.

Medical Expert #2, a physician board certified in obstetrics and gynecology, opined that the failure of WHAECOM, Jarosz, Umali, Park, Long and Harris to properly manage plaintiff's diabetes during her pregnancy was the proximate cause of the formation of Sherkell's encephalocele. With respect to WHAECOM and Jarosz, the expert opined those defendants committed the following deviations: (1) not immediately placing plaintiff on insulin, proximately causing the encephalocele to develop; and (2) failing to review the results of plaintiff's blood glucose test - which subsequently revealed a serious diabetic condition - before discharging her.

Medical Expert #2 also opined that Dr. Berger deviated from accepted medical standards by not including the encephalocele in his differential diagnosis based upon the visibility of soft tissue density directly adjacent to the fetal skull when reading the March 16 sonogram film, and that Dr. Girz similarly deviated by failing to detect the encephalocele on June 20. This opinion directly contradicts the opinion of Drs. Yee and Fleischer, the experts for Drs. Berger and Girz, who stated that the encephalocele was not visible on the films. Expert #2 also found the claimed deviations from accepted medical standards by Drs. Berger and Girz in failing to properly interpret the ultrasound films led to the vaginal delivery of Sherkell and the resulting

trauma to the encephalocele and subsequent injuries.

Medical Expert #3, board certified in roentgenology, similarly opined that Dr. Berger deviated from accepted medical standards by failing to report "a radiographic abnormality indicating an extra-cranial soft tissue density in the occipital region of the fetal head," the same soft tissue density mentioned by Expert #2. Expert #3 opined that Dr. Girz's deviations consisted of failing to (1) properly conduct and interpret the June 20 ultrasound to detect the encephalocele; (2) perform the follow-up sonogram on June 27 as she herself recommended; and (3) compare her sonograms with Dr. Berger's March 2000 sonogram. This expert additionally stated that due to Dr. Harris's instruction that a Level 2 sonogram be performed and the late stage of pregnancy, Dr. Girz's June 20 sonogram should have taken 15 to 30 minutes to perform properly, rather than the 8 minutes she spent on the procedure. The expert also contradicted Dr. Girz's claim that a soft tissue mass was not visible in the June 20 sonogram film. The expert specifically took issue with Dr. Benson's opinion that the position of the fetal head precluded a visualization of the extracranial soft tissue that the expert found demonstrated on the film.

Medical Expert #4, a board certified neonatologist, took issue with Dr. Fleischer's opinion that encephaloceles develop by

the 29th day of gestation. Expert #4 opined that this condition is not a static event, but rather develops gradually over the first 10 to 12 weeks of pregnancy, clearly within the time frame of WHAECOM's treatment of plaintiff. The expert further opined that the failure of WHAECOM and Dr. Jarosz to place plaintiff on insulin during her December 1999 admission deviated from accepted standards of medical practice and proximately caused the encephalocele to develop. This expert stated that encephaloceles are diagnosed in utero, and the standard practice is to deliver such infants by cesarean section. He did not state, however, what the standard practice would be in cases where, as here, the encephalocele is not diagnosed prior to delivery.

Medical Expert #5, a board certified pediatric neurologist, likewise opined that the failure to treat plaintiff with insulin was contrary to widely accepted medical practices and proximately caused the development of the encephalocele. This expert also opined that a substantial contributing factor to Sherkell's injuries was the vaginal delivery, which placed undue pressure on the encephalocele and caused it to rupture, resulting in a loss of spinal fluid and neurological damage. This expert lays the failure to recommend a cesarean delivery at the feet of Dr. Girz, resulting from her claimed failure to detect and report the soft tissue density in the vicinity of the fetal head and her failure

to perform a follow-up ultrasound.

To sustain a cause of action for medical malpractice, a plaintiff must prove two essential elements: (1) a deviation or departure from accepted practice, and (2) evidence that such departure was a proximate cause of plaintiff's injury (*Elias v Bash*, 54 AD3d 354, 367 [2008], *lv denied* 11 NY3d 711 [2008]). A defendant physician moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law by establishing the absence of a triable issue of fact as to his alleged departure from accepted standards of medical practice (*Alverez v Prospect Hosp.*, 68 NY2d 320 [1986]). To defeat such a showing, a plaintiff must produce expert testimony regarding specific acts of malpractice, and not just testimony that alleges "[g]eneral allegations of medical malpractice, merely conclusory and unsupported by competent evidence tending to establish the essential elements of medical malpractice" (*id.* at 325). In most instances, the opinion of a qualified expert that the plaintiff's injuries resulted from a deviation from relevant industry or medical standards is sufficient to preclude a grant of summary judgment in a defendant's favor (*Murphy v Conner*, 84 NY2d 969, 972 [1994]). Where the expert's "ultimate assertions are speculative or unsupported by any evidentiary foundation, however, the opinion should be given no probative force and is

insufficient to withstand summary judgment" *(Diaz v New York Downtown Hosp.*, 99 NY2d 542, 544 [2002]).

Initially, we reject defendants' argument that all of plaintiff's experts are unqualified, that their opinions lack evidentiary support and are speculative (*see Williams v Halpern*, 25 AD3d 467 [2006]; *Farkas v Saary*, 191 AD2d 178, 180-181 [1993]). The in camera examination of the unredacted medical expert affirmations revealed that they were signed by the respective experts, who were board certified in their respective disciplines and/or had authored texts in their fields. The determination that a witness is qualified to give expert testimony rests, in the first instance, within the sound discretion of the court, and we see no reason to disturb the IAS court's determination that plaintiff's experts were qualified to give expert opinion testimony (*Guzman v 4030 Bronx Blvd. Assoc. L.L.C.*, 54 AD3d 42, 49 [2008]).

Plaintiff and all defendants on appeal submitted conflicting expert affidavits raising disputed issues of fact as to whether defendants departed from the prevailing standards of medical care by, inter alia, not properly treating plaintiff's diabetic condition or properly ascertaining a severe fetal condition during her pregnancy, whether such deviations proximately caused the child to be born with severe disabilities and whether the

fetal condition had fully manifested itself prior to defendants' administering treatment to plaintiff (*see Frobose v Weiner*, 19 AD3d 258 [2005]).

With respect to defendants WHAECOM and Jarosz, plaintiff provided affirmations by experts in their field who based their opinions upon evidence in the record, including medical reports, charts and records, test results, sonogram images and reports, and EBT testimony. As noted, WHAECOM's contention that it was not responsible for managing plaintiff's diabetes condition was contradicted by Dr. Park's deposition testimony, where he stated, inter alia, that the purpose of plaintiff's admission to WHAECOM was for treatment of that very condition. Plaintiff's Experts #1, #2, #4 and #5 all opined that the failure of defendants, including Dr. Jarosz, to place plaintiff on insulin immediately upon determining that she was pregnant and while in WHAECOM's care proximately caused the development of the encephalocele, and that this failure was a departure from accepted medical standards. Defendants' experts submitted affirmations based upon the same medical reports, charts and records, but their opinions differed from the conclusions drawn by plaintiff's experts. Resolution of issues of credibility of expert witnesses and the accuracy of their testimony are matters within the province of the jury (*Feinberg v* Feit, 23 AD3d 517, 519 [2005]; *Halkias v*

Otolaryngology-Facial Plastic Surgery Assocs, P.C., 282 AD2d 650, 651 [2001]).

Moreover, there is a divergence of opinion among the experts concerning the length of time it takes for an encephalocele to develop, as demonstrated by the affirmations of Dr. Fleischer and plaintiff's Expert #4. The impact of the administering of insulin on such development, the timing of such medication, and the methodology and course of treatment employed to control plaintiff's diabetes are all issues on which the various experts disagreed. The one thing that they seemed to agree upon is that a diabetic pregnancy requires careful monitoring of blood glucose levels, and that failure to do so could result in neural tube defects, including encephaloceles.

Therefore, based upon the record before us, substantial issues of fact and credibility exist, and the IAS court properly denied summary judgment to defendants WHAECOM and Jarosz.

The motions by Drs. Berger and Girz present a closer question, but still compel denial. The facts in the record clearly show that neither doctor was plaintiff's treating physician for either the pregnancy or her diabetes but they were simply performing tests ordered by other physicians. Moreover, plaintiff's claim that they, on their own authority, should have performed a Level 2 sonogram is not supported in the record.

It is not contested that where an encephalocele is diagnosed in utero, the preferred method of delivery is a cesarean section. There is no question that such a diagnosis did not occur here, and is one of the underlying claims plaintiff makes against defendants.

There is a clear difference of opinion among the experts as to whether Drs. Berger and Girz properly interpreted the sonogram films. Drs. Fleischer, Benson and Yee contend the films were properly interpreted according to accepted medical standards. Plaintiff's Experts #2 and #3 not only take issue with these physicians as to whether there was a deviation from accepted standards, but further state that their own respective interpretations of the sonogram films reveal a soft tissue density that should have been visualized and reported. With respect to Dr. Berger, plaintiff's Expert #4 also takes issue with Dr. Fleischer as to the time it takes for an encephalocele to develop, as well as the proper procedures to be followed to mitigate its effects on the fetus. With respect to Dr. Girz, there are conflicting opinions as to whether the information contained in the sonogram interpretations would have caused Dr. Suarez to perform a cesarean, rather than a vaginal, delivery.

Clearly, Dr. Suarez had concerns over the size of the infant and took precautions to have a pediatrician present in the event

of shoulder problems, which did in fact occur during delivery. The delivery records reveal that Sherkell suffered shoulder dystocia during the vaginal delivery. Moreover, plaintiff's Experts #1, #2, #4 and #5 all make reference to a "traumatic" vaginal delivery. Indeed, plaintiff's Expert #5 opined that the failure of Dr. Girz to recommend a cesarean delivery and the "eventual vaginal delivery with associated head trauma, led to the rupture of the encephalocele and loss of cerebral spinal fluid, which significantly exacerbated Sherkell's injuries and resulting physical and cognitive deficits." This trauma caused Sherkell to be immediately transferred to the pediatric intensive care unit where he underwent surgery for repair of the ruptured encephalocele and placement of a shunt. The admissions records from the intensive care unit indicate that the encephalocele was "deflated" and "some leakage" from it was noted, supporting plaintiff's Expert #5's conclusion of a traumatic vaginal delivery. Therefore, the question as to whether the claimed failure to visualize and report a soft tissue density mass was a contributing factor in the decision to deliver Sherkell vaginally as opposed to a cesarean section, as well as the impact of that alleged failure, cannot be resolved at this stage of the proceedings and must be decided by a jury.

Accordingly, the order of the Supreme Court, Bronx County

(Yvonne Gonzalez, J.), entered August 6, 2007, which denied the motions by defendants WHAECOM, Berger, Girz and Jarosz for summary judgment, should be affirmed, without costs.

All concur.

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

ENTERED: NOVEMBER 5, 2009