SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

SEPTEMBER 29, 2009

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Friedman, Moskowitz, Renwick, Freedman, JJ.

929 The People of the State of New York, Ind. 5633/05
Respondent,

-against-

Marcus Wilson,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (John J. Song of counsel), for appellant.

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

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Appeal from judgment, Supreme Court, New York County (Rena K. Uviller, J.), rendered January 31, 2007, convicting defendant, after a jury trial, of coercion in the first degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, held in abeyance and the matter remitted to Supreme Court for a *Batson* hearing for the People to articulate neutral explanations for the exercise of their peremptory challenges and for the court to determine whether the proffered reasons are pretextual.

The court erred in its determination that defense counsel

failed to make a prima facie case of sexual discrimination in the prosecutor's exercise of peremptory challenges. In this case against a defendant accused of physical and sexual abuse of his girlfriend, during the first round of challenges, the prosecution used five peremptory challenges all against men (including two African-Americans and one Hispanic male). Defense counsel accused the People of using their challenges discriminatorily when they challenged "all male[s]" and "[did] not "challenge[] a single female." We disagree with the court's finding that "no pattern [was] established ... in any of these challenges." The People's use of their challenges constituted prima facie discrimination, and the trial court erred in failing to require the prosecutor to give neutral explanations for those challenges *(People v Luciano*, 44 AD3d 123 [2007], *affd on other grounds*, 10 NY3d 499 [2008] [Defendant's exercise of peremptory challenges against all five female panelists constituted a discriminatory pattern based on gender]; *see People v Harris*, 283 AD2d 520, 520 [2001] [the People "established a prima facie case of discrimination" when "defense counsel peremptorily challenged four of the five remaining white venirepersons in the second round of jury selection"); *People v Vega*, 198 AD2d 56, 56 [1993], *lv denied* 82 NY2d 932 [1994] [the People "established a prima facie case of purposeful racial discrimination in the use of

peremptory challenges when they established that the defense used 7 of its 8 challenges to exclude all but one of the white persons on the panel of 16"]; *see also People v Rosado*, 45 AD3d 508 [2007] [numerical argument sufficient to raise inference of discrimination although not accompanied by other evidence]; *cf. People v Guardino*, 62 AD3d 544, 545 [2009] ["While a purely numerical argument may give rise to a prima facie showing of discrimination," the numerical argument that four of six black female prospective jurors had been stricken by the prosecutor did not warrant the finding of a prima facie case). Accordingly, we remand this matter for a *Batson* hearing for the People to articulate neutral explanations for the exercise of their peremptory challenges and for the court to determine whether the proffered reasons are pretextual.

All concur except Gonzalez, P.J. and Friedman, J. who dissent in a memorandum by Gonzalez, P.J. as follows:

GONZALEZ, J. (dissenting)

I would conclude that the court properly denied defendant's *Batson* challenge. It is unclear from both the minutes of the voir dire and defendant's appellate brief exactly what cognizable group or groups were the subject of defendant's *Batson* application. In any event, with regard to any type of unlawful discrimination in the exercise of peremptory challenges by the prosecutor, the defense did not meet its initial burden of establishing an exercise of peremptory challenges in a manner suggesting either gender- or race-based discrimination (*see Batson v Kentucky*, 476 US 79, 96-98 [1986]). In the first round of jury selection, 16 prospective jurors were empaneled. Two were disqualified by the court. Nine of the remaining 14 individuals were men, and five were women. The record does not indicate the racial composition of the venire. Each side had a total of 15 peremptory challenges, and the People used five in the first round, striking five of the nine men. Two of these men were African-American; one was Hispanic. The defense also used five challenges in the first round, striking three men and two women of unknown race.

After the People exercised their last peremptory strike, defense counsel stated:

"Your honor, I'm going to raise a *Batson* challenge at this

> point in time. Prosecution has challenged Prospective Juror Number One ... male African American.
>
> ".... [T]he fourth challenge was for a Hispanic male... And now they are challenging another African American male.
>
> "In other words your Honor, the pattern that I see is the prosecution is discriminatorily using their challenges to exclude men of a minority class, both Hispanic and [] African American."

Defense counsel also faulted the prosecution for striking a disproportionate number of men, concluding that "they are excluding all the men and we're getting left with an all female jury." The court noted that the People had not challenged two minority males who were in the venire. Defense counsel then stated that the People's challenges were

> "all male. They haven't challenged a single female. They're all male. And 50 percent are directed against minority males. My client is African American male. We would like a fair jury."

Finding no discernable pattern of discrimination, the court denied defendant's *Batson* claim, over a defense objection.

The court then empaneled the second venire, and the prosecutor exercised a peremptory challenge against an African-American woman. Defense counsel stated:

> "Your honor, I raise the *Batson* issue again. Another African American, this time female, has been challenged for no apparent neutral reason.
>
> "**THE COURT**: Last time it was men.
>
> "**[Defense Counsel]**: Minority men. This time, minority

female. Used their challenge in a racial manner to exclude --

"**THE COURT**: I don't believe there is a pattern of racial challenge. Denied."

Defense counsel did not object.

In total, the People used seven peremptory challenges. Five of the seven challenges were against men. Two of these men were African-American and one was Hispanic. One of the two women challenged by the People was African-American. The two panels consisted of 13 men and 14 women. The racial composition of the panels is unclear. The record of the voir dire does not contain any statements indicating bias or prejudice.

In *Batson v Kentucky*, the United States Supreme Court held that the equal protection clause prohibits a prosecutor from exercising peremptory challenges to strike prospective jurors on the basis of race (476 US 79, 89 [1986]). The Supreme Court has extended the *Batson* rationale to gender (*J.E.B. v Alabama ex rel. T.B.*, 511 US 127, 130-131 [1994]). In New York, the Court of Appeals has broadly stated that "[e]limination of a potential juror because of generalizations based on race, gender or other status that implicates equal protection concerns is an abuse of peremptory strikes" (*People v Allen*, 86 NY2d 101, 108 [1995]).

*Batson* sets forth a three-step process for determining whether the People's peremptory challenges have been exercised in

a discriminatory manner (*see Allen*, 86 NY2d at 104). First, the defense "must allege sufficient facts to raise an inference that the prosecution has exercised peremptory challenges for discriminatory purposes" (*id.*). Our Court of Appeals has further instructed that the defense must "articulate and develop all of the grounds supporting the claim, both factual and legal, during the colloquy in which the objection is raised and discussed" (*see People v Childress*, 81 NY2d 263, 268 [1993]). If the defendant makes a prima facie showing, the burden shifts to the prosecution to articulate a neutral explanation for striking the jurors in question. Finally, the trial court must determine whether the proffered reasons are pretextual (*see Allen* at 104).

There are no "fixed rules" for determining whether the proponent of a *Batson* claim has made a prima facie showing (*People v Bolling*, 79 NY2d 317, 323-324 [1992]). However, in *Batson*, the Supreme Court provided two examples of circumstances that may satisfy the challenger's initial burden: (1) a pattern of strikes against certain jurors included in the particular venire and (2) questions and statements during voir dire examination which support or refute an inference of discriminatory purpose (*see* 476 US at 97). The Supreme Court has given trial judges broad discretion to act as primary gatekeepers

for *Batson* challenges (*see id; see also People v Hache*, 174 AD2d 309, 310 [1991], *lv denied* 78 NY2d 923 [1991]).

Defendant contends that the inference of discrimination can be drawn from the pattern of the prosecutor's strikes. It is his claim that the record indicates a discriminatory bias against any or all of three possible groups: (1) men; (2) minority men; and (3) minorities. In *Jones v West* (555 F3d 90 [2d Cir 2009]), the Second Circuit addressed the issue of when the composition of stricken jurors alone can establish or refute a "pattern" of discrimination under *Batson*. The court discussed two statistical measurements that may be made. The first, referred to as the "exclusion rate," measures whether "members of the racial group are completely or almost completely excluded from participating on the jury" (*id.* at 98; *see e.g. Johnson v California*, 545 US 162 [2005] [prima facie *Batson* claim established where all three black prospective jurors removed from the jury]). The second, referred to as the "challenge rate," measures whether "a party exercise[d] a disproportionate share of its total peremptory strikes against members of a cognizable racial group compared to the percentage of the racial group in the venire" (*Jones*, 555 F3d at 98). To determine the "challenge rate," the record must indicate the number of peremptory challenges used against the group at issue, the total number of peremptory challenges

exercised, and the percentage of the venire that belongs to the group (*id.*). The proponent of the *Batson* challenge also bears the burden of developing the factual and legal grounds to support the claim (*Overton v Newton*, 295 F3d 270, 279 [2d Cir 2002]). In the absence of a record containing sufficient facts to draw a statistical conclusion, a reviewing court's failure to draw an inference of discrimination cannot be deemed a violation of *Batson* requirements (*People v Pratt*, 291 AD2d 210 [2002], *lv denied* 98 NY2d 654 [2002]).

Here, after the first round of jury selection, defense counsel asserted that the prosecutor was improperly using his challenges to exclude minority men and men in general. The majority accepts this claim, asserting that the fact that five men were challenged by the prosecutor in the first round of jury selection was alone sufficient to establish a prima facie case of discrimination. However, this conclusion fails to consider the composition of the venire. Certainly, if the first 16-person venire contained only five men, and all were stricken an inference of discrimination would be raised. By contrast, since the venire was approximately two-thirds men, the fact that five were stricken has no legal significance. Moreover, in the second round of the voir dire, the defense challenged the prosecutor's exercise of a peremptory challenge to strike an African-American

woman. This challenge undercut the prior claim that the prosecution was attempting to eliminate all the men from the jury.

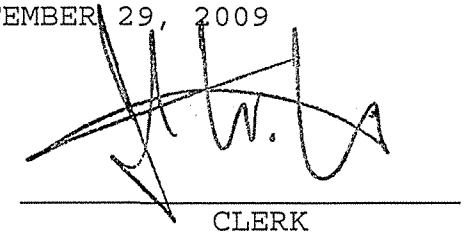
The first venire was composed of approximately 64% men. As the People struck approximately 50% of them from the venire, and there was no other evidence of bias, the court had no reason to draw an inference of gender-based discrimination based upon the exclusion rate or the challenge rate (*see People v Brown*, 97 NY2d 500, 508 [2002] [People's removal of seven African-Americans through exercise of eight peremptory challenges was inadequate, without more, to meet first step under *Batson* where there were 15 African-Americans in the venire]; *People v Williams*, 253 AD2d 901 [1998], *lv denied* 92 NY2d 986 [1998]; *see also People v Childress*, 81 NY2d at 267).

With respect to defendant's race-based challenge, the defense did not make a record of the total number of "minority" men, whether black or Hispanic, in the jury pool, and the racial composition of the venire is not otherwise indicated. However, the record does indicate that there were at least two minority members on the jury. Thus, it is impossible to determine whether the prosecutor disproportionately struck minority males in the first round or whether it disproportionately struck minorities in

the totality of the jury selection process. Accordingly, the Court also properly denied defendant's race-based *Batson* challenge.

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

ENTERED: SEPTEMBER 29, 2009



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Saxe, J.P., Nardelli, Moskowitz, DeGrasse, Freedman, JJ.

4567 Louis J. Baldwin, Index 14993/04
Plaintiff-Appellant-Respondent,

-against-

Cablevision Systems Corp.,
Defendant-Respondent-Appellant.

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Queller, Fisher, Dienst, Serrins, Washor & Kool, LLP, New York (Alan Serrins of counsel), for appellant-respondent.

Morgan, Lewis & Bockius LLP, New York (Amber L. Kagan of counsel), for respondent-appellant.

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Order, Supreme Court, Bronx County (Dianne T. Renwick, J.), entered July 12, 2007, which denied so much of defendant's summary judgment motion to dismiss the claim for employment discrimination, but granted so much of that motion to dismiss the claim based on unlawful retaliation, modified, on the law, to dismiss the employment discrimination claim insofar as it is based on the allegation that plaintiff was denied promotions due to racial discrimination, and, except as thus modified, affirmed, without costs.

Plaintiff, an African American who held managerial positions from 1992 to 2005 with defendant Cablevision Systems Corp., claims that, as a result of his employer's discriminatory practices, he was passed over for three vice president positions for which he was as qualified as the successful candidates.

Plaintiff also alleges that, after he complained internally about Cablevision's alleged discrimination and then filed this lawsuit, Cablevision retaliated and further discriminated against him by first "constructively" demoting him, next by giving him unfairly negative performance evaluations, and finally by terminating him. In his complaint, plaintiff asserts causes of action for employment discrimination and retaliation in violation of both the State Human Rights Law (Executive Law § 296 *et seq.*) and the New York City Human Rights Law (Administrative Code of City of NY § 8-101 *et seq.*).

Plaintiff now appeals and Cablevision cross-appeals from the July 2007 order which granted Cablevision's motion for summary judgment dismissing the retaliation claims but denied its motion dismissing the discrimination claims.[1] For the reasons set forth below, we modify the order of the motion court by limiting the discrimination claim to plaintiff's termination.

In February 1992, plaintiff began working for Cablevision as Director of Human Resources for the company's New York City operation. He held this position until 1999, when, as part of the reorganization of Cablevision's human resources functions, he

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[1]Supreme Court also denied defendant's motion to dismiss plaintiff's claims based on "after-acquired evidence" that plaintiff allegedly obtained by misappropriating defendant's confidential employment files and emails.

was promoted to Area Director of Employee Relations for Connecticut, Westchester, and New York City. Plaintiff states that, in his first 11-plus years with Cablevision, he consistently received excellent performance evaluations.

In 2002, plaintiff applied for the position of Vice President of Employee and Labor Relations - Madison Square Garden. However, John Moran, a Caucasian, was hired for the position.

As part of a reorganization of Cablevision's Human Resources operations, in late 2002 Cablevision eliminated the four Area Director of Employee Relations positions, including plaintiff's, and created two new vice president positions. Cablevision promoted Robert Doodian (a Caucasian), another of the Area Directors, to one of the new positions (Corporate Vice President of Employee Relations and Staffing). Plaintiff alleges that Cablevision never posted nor announced this position. Plaintiff applied for the other new position of Vice President of Employee Relations for Cable & Communications, but another Area Director, Susan Crickmore (a Caucasian), was given the job. Thereafter plaintiff's attorney notified Cablevision by letter addressed to James Dolan, the company's President and CEO, that he had been retained to represent plaintiff in connection with Cablevision's alleged discrimination.

After his Area Director position was eliminated, plaintiff was appointed to the newly created position of Director of Human Resources of Field Operations in New York City, which according to plaintiff, constituted a demotion.[2] He remained in this position until he was terminated in July 2005.

In his new position, plaintiff was supervised by Dan Timoney, who in turn reported to Thomas Monaghan, Vice President of Field Operations for New York City. In June 2003, plaintiff's supervisor for the prior review period gave plaintiff an "Overall Performance Rating" of 4 for "Exceeded Expected Performance," the second-highest rating. Timoney, plaintiff's new supervisor, wrote that he looked forward to working with him in the coming year.

According to Cablevision, one of plaintiff's primary responsibilities in his new position was to make sure the employees understood that they had an advocate and that their concerns were being heard, to reduce the likelihood that they would turn to a third party, like a union, for intervention. In late 2003, Timoney directed plaintiff to conduct meetings with employees in the New York City area concerning company benefit

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[2]The fourth Area Director left the company after her position was eliminated and she was passed over for a vice president position.

plans. Timoney believed there was a need to go out and "sell" the plans, but by January 2004, according to Timoney, plaintiff had not executed this directive, and no benefit meetings had been held.

That month, Timoney downgraded plaintiff's Overall Performance Rating from 4 to 3, for "Achieved Expected Performance." Timoney complimented plaintiff's performance in some areas but criticized him for missing deadlines, being "reactive" rather than "proactive," and for other perceived shortcomings. Plaintiff appealed the evaluation but it was not changed.

In April 2004, plaintiff filed this action alleging racial discrimination.

In the January 2005 evaluation of plaintiff's performance in 2004, Timoney gave plaintiff a grade of 2, for "Partially Achieved Expected Performance," out of a possible 5. Timoney indicated a unionization campaign that Cablevision thwarted in 2004 might have been averted entirely if plaintiff had been more proactive in holding employee meetings in early 2003 concerning the company benefits available to the employees without a union. He also criticized plaintiff's failure to implement supervisor and manager training. Of particular significance was the observation that plaintiff was unwilling to create and implement

initiatives that Timoney had requested. Timoney wrote, "The overall review rating is not a reflection of [plaintiff's] inability to do the technical requirements of the job; it is however, a reflection of a lack of leadership and hesitation to support the local management team's vision."

In February 2005, plaintiff wrote to James Dolan to challenge his review, stating that "Dan Timoney treats whites and minorities differently and seems to be making a concerted effort to remove minorities from his immediate management team." He believed he was being "set up for termination," and that "this Performance Appraisal is in retaliation for appealing my January 1, 2004 Performance Appraisal, for complaining . . . about Dan Timoney and for filing a discrimination lawsuit against Cablevision." Dolan did not respond.

In March 2005, Thomas Monaghan replaced Timoney as plaintiff's supervisor. Monaghan testified that one of his primary goals was to avoid another union organizing campaign in the Bronx. As part of this initiative, Monaghan ordered plaintiff and other directors to interact with employees on a daily basis, both informally, such as interacting in the hallways, and formally, such as organizing breakfast meetings. Based on his observations, Monaghan testified that he did not believe that plaintiff had been sufficiently mingling, and so he

directed plaintiff to have daily contacts, and to document the details of those meetings.

On July 19, 2005, plaintiff was called into a meeting with Monaghan and Crickmore, and informed that he was being terminated primarily for not interacting with employees, and for providing insufficient detail of the conversations he did have.

Thereafter, Cablevision moved both for an order dismissing plaintiff's discrimination and retaliation claims and for a declaratory summary judgment limiting his damages, if any, based on the "after-acquired evidence" defense (*see McKennon v Nashville Banner Publ. Co.*, 513 US 352, 362 [1995]).

Supreme Court denied cablevision's motion to dismiss plaintiff's discrimination claims, finding that plaintiff had established a prima facie case of discrimination and that there was an issue of fact as to whether the race-neutral reasons were pretextual both as to the promotion and termination claims.

The court granted Cablevision's motion to dismiss the claims of retaliation on the ground that the time lapse between plaintiff's complaint to Dolan in September 2003 and his poor evaluation in January 2005 was too great for them to be causally connected, and no other evidence established causation.

Finally, the court denied Cablevision's motion based on after-acquired evidence, because such evidence would not entitle

a defendant to summary judgment, but would only limit a plaintiff's damages should the defendant be found liable.

Each party appeals from those aspects of the order which were adverse to it.

In order to make out a claim of racial discrimination, the plaintiff bears the initial burden of making a prima facie showing that the plaintiff is a member of a protected class, was qualified for the position, and was terminated or suffered some other adverse employment action, and that the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004], citing *Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]). After the plaintiff has met his obligation, the burden shifts to the employer to rebut the presumption by setting forth "legitimate, independent and nondiscriminatory reasons to support its employment decision" (*Ferrante* at 629). If that showing is made, "the plaintiff must prove that the legitimate reasons proffered by the defendant were merely a pretext for discrimination by demonstrating both that the stated reasons were false and that discrimination was the real reason" (*Forrest* at 305).

In response to plaintiff's prima facie showing of discrimination, Cablevision gave race-neutral, facially

legitimate reasons for denying plaintiff the three promotions in 2002 and then terminating him in 2005. As for the promotions, Cablevision asserted that the candidates it hired for the positions that plaintiff had sought were more qualified. John Moran, who was hired as Vice President of Employee and Labor Relations - Madison Square Garden, had been the Vice President for Human Resources with CBS/Viacom Inc. for seven years, and before that, had been the Vice-President of Human Resources and Administration with Group W Westinghouse Broadcasting, Inc. Moreover, Moran held a Bachelor's Degree in Economics, a Master's Degree in Business Administration from the Wharton Graduate Division of the University of Pennsylvania, and a law degree, while plaintiff only had a Bachelor's Degree in Business Administration. Robert Doodian, who was appointed Corporate Vice President of Employee Relations and Staffing, had been Area Director for Cablevision's Corporate Division and had received outstanding performance reviews in that position. His appointment to Vice President constituted a promotion within the area of responsibility in which he worked. Finally, Susan Crickmore, who was given the position of Vice President of Employee Relations for Cable & Communications had previously been a Vice President of Human Resources for a chain of retail stores, reported to the chain's Chief Executive Officer, and had prior

experience with working directly with a chief executive officer.

The circumstances surrounding all three of these employment actions make it clear that an inference of racial discrimination is unwarranted. Plaintiff has clearly not made the requisite showing of a factual issue as to whether the reasons offered by Cablevision for each of these selections were pretextual. All three of the successful candidates had credentials which justified the favorable treatment of their applications. Based on their credentials, the successful candidates were as qualified as, if not more qualified than, plaintiff. Moreover, although Cablevision did not promote plaintiff to Vice President, it had promoted him to a managerial position in 1999. Without a showing that a plaintiff was passed over for a position due to racial discrimination, this Court should "not sit as a super-personnel department that reexamines an entity's business decisions" (*Dale v Chicago Tribune Co.*, 797 F2d 458, 464 [7th Cir 1986], *cert denied* 479 US 1066 [1987]).

We do find, however, that the statistical evidence raises an issue of fact as to whether Cablevision's reason for firing plaintiff was pretextual. Although Cablevision claims that it fired plaintiff solely because of inadequate performance, plaintiff submits statistical reports which allegedly demonstrate that his termination exemplified a pattern of racial

discrimination by Cablevision against black managers. Plaintiff proffers sections of Employer Information Reports that Cablevision filed with the Equal Employment Opportunity Commission. The reports tally the number of Cablevision employees companywide as of the first two weeks of both September 2001 and September 2002, when Cablevision underwent a reorganization and planned "reduction in force." The total employee figures are broken down into categories of occupation--including as "Officials and Managers," which was plaintiff's occupational category -- and categories of sex and race. The data indicates that, during the one-year period separating the reports, the number of black "Officials and Managers" at Cablevision fell about 41.6% (from 308 to 180), while the number of white "Officials and Managers" fell only by about 8.1% (from 1,874 to 1,722).

In discrimination cases, "[s]tatistics are valuable and often demonstrate more than the testimony of witnesses, and they should be given proper effect by the courts" (*State Div. Of Human Rights v Killian Mfg. Corp.*, 35 NY2d 201, 210 [1974][internal quotation marks and citations omitted]; *see also Murphy v American Home Prods. Corp.*, 159 AD2d 46, 49-50 [1990] ["evidence indicating discriminatory treatment by the employer of employees, other than the plaintiff . . . is highly probative of the

employer's actual state of mind"]). Plaintiff's statistics indicate that in the course of a year the number of black Officials and Managers at Cablevision dropped at more than five times the rate as that of white Officials and Managers (41.6% vs. 8.1%). This disparity supports an inference that the personnel reductions at Cablevision were affected by considerations of race, and suffices to raise a triable issue on the discriminatory termination claim. However, the statistical evidence has no bearing on the issue of why Cablevision failed to promote plaintiff because it only reflects personnel reductions.

The court properly dismissed the retaliation claim. To establish a prima facie case of retaliation, the plaintiff must show participation in a protected activity known to the employee, an adverse employment action based upon that protected activity, and a causal connection between the protected activity and the adverse employment action (*see Forrest*, 3 NY3d at 312-313). The only evidence of a causal connection between the January 2004 evaluation (which plaintiff claims was made in retaliation) and plaintiff's protected acts (i.e., a letter written by his attorney in September 2003) is the evaluation's temporal proximity. We conclude that the events were not temporally proximate enough to satisfy the causality element of plaintiff's retaliation claim (*see Clark County School Dist. v Breeden*, 532

US 268, 273 [2001]). Furthermore, the 2004 evaluation, while less favorable than previous ones, was still favorable overall.

Finally, the court properly held that Cablevision was not entitled to summary judgment or a declaratory judgment based on after-acquired evidence that plaintiff had misappropriated confidential personnel files in violation of company policy (*see generally McKennon v Nashville Banner Publ. Co.*, 513 US at 362-363). Such evidence is not a bar to litigation and does not warrant summary judgment, but only affects the plaintiff's damages if and when the employer is found liable (*McCarthy v Pall Corp.*, 214 AD2d 705 [1995]).

All concur except Saxe, J.P. and Nardelli, J. who concur as to result only in a separate memorandum by Nardelli, J. as follows:

NARDELLI, J. (concurring as to result only)

I agree with the determination reached by the majority, except with regard to its rationale for remanding the matter for trial on the termination claim, i.e., that statistical evidence offered by plaintiff indicates that Cablevision's reason for firing him was pretextual.

The justification offered by Cablevision for its termination of plaintiff's employment was that he was not "proactive" enough in meeting with employees to listen to their concerns in the hope of averting a unionization campaign, and that he did not meet deadlines or did not provide his superiors with requested information in a timely manner. Plaintiff denies those claims, and claims that the real reason for his termination was racial discrimination. The only evidence he offers to bolster this claim are statistics resulting from a retrenchment at Cablevision three years before his employment was ended.

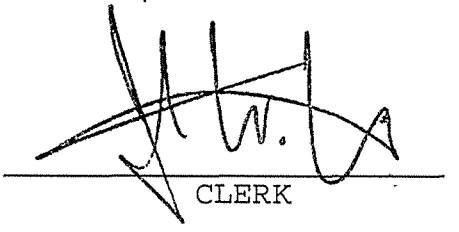
To the extent these statistics are relevant, they are ancillary to the principal issue which divides the parties - was plaintiff performing his duties competently. Thus, before plaintiff can rely on any statistics, he must first establish that his job performance was satisfactory. It would then be incumbent on Cablevision to establish otherwise in rebuttal. If plaintiff does not meet his burden, the statistics are

irrelevant.

This is not a class action involving those employees who were terminated in 2002. It is an action by an individual who was terminated in 2005, notwithstanding his claim that his performance was satisfactory, and did not warrant termination. Concededly, the statistics may be relevant to credibility, or may be probative of animus. In the first instance, however, our remand should make clear that the framed issue is whether Cablevision was justified in terminating plaintiff because of his unsatisfactory performance.

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

ENTERED: SEPTEMBER 29, 2009



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Mazzarelli, J.P., Friedman, Moskowitz, Acosta, JJ.

214 Lillian Velazquez, Index 127055/02
Plaintiff-Appellant,

-against-

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

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

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

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Judgment, Supreme Court, New York County (Nicholas Figueroa, J.), entered October 23, 2007, which dismissed the complaint pursuant to a trial order granting defendants' motion at the conclusion of plaintiff's case for judgment as a matter of law, unanimously reversed, on the law, without costs, the motion denied, the complaint reinstated, and the case remanded for a new trial.

Plaintiff, a home attendant, allegedly was injured in a mishap that occurred as her client was carried down a stairway by two emergency medical services (EMS) workers employed by the municipal defendants. The EMS workers (Awilda Gomez and Jacqueline Martinez) were responding to the 911 call plaintiff placed when her client, a severely disabled 85-year-old woman,

suffered a seizure. Plaintiff testified that the EMS workers said that they were at the end of a long shift, and one of them (Ms. Gomez) appeared to be drowsy. Plaintiff suggested that the EMS workers call for help moving the client, who weighed about 200 pounds and shook due to her Parkinson's disease. Although the EMS workers had the option to call for help, they told plaintiff that they would take the client down the stairs themselves. The EMS workers moved the client while she was strapped into a chair, with her oxygen tank placed in her lap. Ms. Martinez was in front of the chair, lifting it from the bottom with both hands, while Ms. Gomez was behind the chair, lifting it by the handles on the back. According to plaintiff's testimony, as the EMS workers were carrying the client down the stairs in this fashion and plaintiff was locking the door to the apartment, plaintiff heard Ms. Gomez call out, "Help, I'm falling." Plaintiff ran to the stairway to help and grabbed one of the back handles of the chair, whereupon Ms. Gomez "let go of the chair." The next thing plaintiff knew, she was lying on the landing at the bottom the stairs, with her client (who was not injured) strapped into the chair on top of her. The deposition testimony of the EMS workers (which was read into the record) differed; Ms. Gomez claimed that plaintiff had bumped into the chair and caused the fall when she tripped on a mat, while Ms.

Martinez attributed the accident to Ms. Gomez's slipping, but said that plaintiff was not involved in it.

At the jury trial of this action, defendants moved for judgment as a matter of law at the close of plaintiff's case (*see* CPLR 4401) on the grounds that (1) defendants were protected from liability by governmental immunity, (2) even if governmental immunity did not apply, defendants' employees, the EMS workers, did not owe plaintiff (as opposed to her client) any duty of care, and, in any event, (3) plaintiff failed to present any evidence of negligence by defendants' employees. The court granted the motion and, upon plaintiff's motion for reargument, adhered to that determination. Upon plaintiff's appeal from the ensuing judgment, we reverse, reinstate the complaint, and remand for a new trial.

To begin, the doctrine of governmental immunity does not insulate defendants from liability for the negligence of their employees, if any, in carrying an ill person down a stairway, as such an act is plainly ministerial in nature, rather than discretionary or quasi-judicial (*see Haddock v City of New York*, 75 NY2d 478, 484 [1990]; *see also Fonville v New York City Health & Hosps. Corp.*, 300 AD2d 623, 624 [2002] [although plaintiff stated no claim based on the alleged failure by EMS to timely respond to a call to assist decedent, "assuming EMS workers

undertook the affirmative action to treat the decedent, they were required to do so with due care"]; *Schempp v City of New York*, 25 AD2d 649 [1966], *affd* 19 NY2d 728 [1967] [reinstating jury verdict for plaintiff in action alleging, inter alia, that "the city was negligent in the manner of transporting the decedent from his apartment to the ambulance"]).

Assuming that there was evidence in this case that negligence by the EMS workers endangered plaintiff's client (a point discussed below), plaintiff is entitled to recover from defendant for any injury she incurred in attempting to rescue the client from that danger. Under the "danger invites rescue" doctrine, there exists "a duty of care toward a potential rescuer where a culpable party has placed another person in a position of imminent peril which invites a third party, the rescuing plaintiff, to come to [the] aid" of the imperiled person (*Villoch v Lindgren*, 269 AD2d 271, 273 [2000]; *see also Provenzo v Sam*, 23 NY2d 256, 260 [1968]). "The doctrine . . . appl[ies] . . . where a potential rescuer reasonably believes that another is in peril," which "determination is made on the facts and circumstances of each case" (*Gifford v Haller*, 273 AD2d 751, 752 [2000] [citations omitted]). Contrary to defendants' argument that they had no "special relationship" with plaintiff from which a duty of care could arise, the assumption of a duty of care

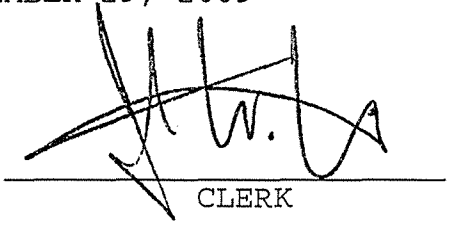
toward plaintiff's client by the EMS workers (when they undertook to carry her down the stairs) gave rise to a duty of care to plaintiff when she sought to rescue the client from the peril in which the latter was allegedly placed by the alleged negligence of the EMS workers (*see Wagner v International Ry. Co.*, 232 NY 176, 180 [1921] ["The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to h(er) rescuer"]).

Finally, bearing in mind that the determination of whether plaintiff has made out a prima facie case is "'guided by the rule that the facts adduced at the trial are to be considered in the aspect most favorable to [plaintiff] and that [plaintiff is] entitled to the benefit of every favorable inference which can reasonably be drawn from those facts'" (*McCummings v New York City Tr. Auth.*, 81 NY2d 923, 926 [1993], *cert denied* 510 US 991 [1993], quoting *Sagorsky v Malyon*, 307 NY 584, 586 [1954]; *see also Villoch v Lindgren*, 269 AD2d at 272), we conclude that the evidence presented by plaintiff gave rise to an issue of fact as to whether negligence by the EMS workers contributed to the accident in question. Based on the evidence in the trial record, the jury, had it credited plaintiff's account of how the accident occurred, could reasonably have concluded that the EMS workers were negligent in attempting to carry plaintiff's client down the stairs themselves rather than calling their dispatcher to request

assistance. Since determining whether the EMS workers acted with due care in this regard "required only consideration of [their] common sense and judgment" in undertaking to carry a person of the client's obviously heavy bulk (along with her oxygen tank) down the stairs, plaintiff was not required to offer expert testimony to reach the jury on the issue of negligence (*Reardon v Presbyterian Hosp. in City of New York*, 292 AD2d 235, 237 [2002] [expert evidence was not required to reach the jury on the question of whether physician was negligent in helping patient off an examining table by himself, without the assistance of another hospital employee]). Of course, we reiterate that, on this record, whether the accident happened in the manner described by plaintiff is also a question for the factfinder.

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Tom, J.P., Andrias, Saxe, Moskowitz, DeGrasse, JJ.

484 Joseph Armacida, Index 108517/04
Plaintiff-Appellant,

-against-

D.G. Neary Realty Ltd.,
Defendant-Respondent,

Thomas J. Wray, Jr.,
Defendant.

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Jonathan M. Landsman, New York, for appellant.

Hawkins Feretic & Daly, LLC, New York (Beth A. Kennelly of counsel), for respondent.

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Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered January 14, 2008, which granted defendant Neary Realty's motion for summary judgment dismissing the complaint as against it, unanimously affirmed, without costs.

Plaintiff, a patron at a real estate brokerage, alleged that he was the victim of a battery committed by defendant Wray, a salesperson associated with the broker. Plaintiff seeks to hold the brokerage firm vicariously liable for the attack on the ground that Neary was Wray's employer. In another case involving a broker's relationship to salespersons, the Court of Appeals held that a determination that an employer-employee relationship exists must rest upon evidence that the broker exercises control over the results produced by the salespersons or the means used

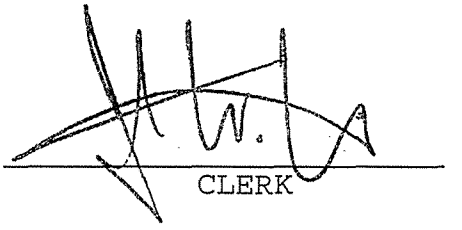
to achieve those results (*Matter of 12 Cornelia St. [Ross]*, 56 NY2d 895 [1982]). While associated with Neary, Wray was permitted to work whatever hours he chose, he did not report to or receive directions from anyone at the brokerage, he was provided with no health insurance benefits and he was compensated strictly on the basis of commissions. These factors are characteristic of a relationship with an independent contractor as opposed to an employee (*id.*). Neary's office manual proffered by plaintiff merely sets forth guidelines that are not indicative of the control needed to establish an employer-employee relationship.

Notwithstanding plaintiff's argument, the statutory and regulatory schemes affecting brokers and salespersons under Article 12-A of the Real Property Law and Part 175 of the Rules of the Department of State shed no light on the employment issue. Real Property Law § 440(5) provides that nothing in Article 12-A shall be deemed or construed to be indicative or determinative of the legal relationship of a salesperson to a broker. Similarly, 19 NYCRR 175.27 disclaims that "Nothing in this Part is intended to be, or should be construed as, an indication that a salesperson is either an independent contractor or employee of a broker." Supreme Court thus correctly concluded that Wray was not Neary's employee, but rather an independent contractor.

We have reviewed plaintiff's remaining arguments and find them without merit.

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Tom, J.P., Saxe, Sweeny, Acosta, Abdus-Salaam, JJ.

700 Barton Mark Perlbinder, et al., Plaintiffs-Appellants, Index 100974/08

-against-

Board of Managers of the 411 East 53rd Street Condominium, Defendant-Respondent.

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Herrick, Feinstein, LLP, New York (M. Darren Traub of counsel), for appellants.

Meyers, Tersigni, Feldman & Gray, LLP, New York (Anthony L. Tersigni of counsel), for respondent.

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Judgment, Supreme Court, New York County (Marilyn Shafer, J.), entered October 1, 2008, dismissing the complaint and bringing up for review an order, same court and Justice, entered October 1, 2008, which, inter alia, denied plaintiffs' motion for summary judgment, and granted defendant's cross motion for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the judgment vacated in its entirety, the motion granted and cross motion denied. The matter is remanded for a determination as to damages.

Plaintiffs were partners in East 85th Street Company when it began to convert the building it owned at 411 East 53rd Street to condominium ownership. The conversion was completed in 1986, at which time plaintiffs acquired title to 16 unsold units in the

newly formed condominium.

In November 1987, the condominium held its first Board elections. Pursuant to § 2.7 of the condominium by-laws, plaintiff Barton Mark Perlbinder (Perlbinder) was designated by the Sponsors' "designees" to be a "Sponsor Representative" on the Board. He remains a board member to this date.

In April 1988, an 11th Amendment to the offering plan was filed, identifying which partners had received unsold units in 1986, and providing that each such partner is a "designee" of the sponsor. A 12th Amendment, filed in November 1989, contained similar information.

On October 25, 2007, Perlbinder faxed a letter to the condominium's managing agent, advising that, pursuant to § 5.8 (C)of the by-laws, plaintiffs intended to install a 24" x 30" sign on the building, advertising the availability for sale of one of the remaining 6 original units still held by them. On October 29, the managing agent responded by letter requesting additional information about the sign - specifically, a drawing, dimensions, proposed location, type of material, and method of attachment to the building. This request went unanswered, and on November 13, plaintiffs, purporting to act as sponsor designees, had the sign installed next to an existing sign placed on the building by the management company. According to plaintiffs,

their sign was designed to "coordinate" with the management company's sign and be installed at the same elevation so as to complement the existing sign.

Shortly thereafter, defendant's executive committee conducted an "informal poll" of all the board members, except for Perlbinder. Defendant directed that the sign be removed. Perlbinder was not consulted because the executive committee considered him to be an "interested party in the matter." On November 14, 2007, the sign was removed.

Plaintiffs thereafter commenced this action seeking, inter alia, a declaration that they have the right to place signs on the building as provided in the by-laws of the condominium as well as injunctive relief barring defendant from removing or interfering with any signs erected pursuant to those by-laws. Plaintiffs also sought damages for breach of defendant's fiduciary duty by unjustifiably interfering with their right to advertise the unsold units. Issue was joined, consisting of denials and affirmative defenses; one such affirmative defense contended that plaintiff's claims were barred by the business judgment rule. Defendants did not seek any affirmative relief.

In denying plaintiffs' motion and granting defendant's cross motion for summary judgment, the court determined that the right of the sponsor set forth in the declaration to put up "for sale"

signs was distinct from the broader right to use the condominium common elements, thus giving the right to post sales signs solely to the Sponsor and not its designees. Noting that the by-laws provided that in the event of inconsistent provisions, the Declaration would control, the court ruled that § 5.8(C), relied on by plaintiffs, was overruled by the declaration's exclusive reservation of that right to the original Sponsor.

In construing a contract, "An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 196 [1995]). Therefore, "where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect" (*Proyecfin de Venezuela v Banco Indus. De Venezuela*, 760 F2d 390, 395-396 [2d Cir 1984]; *see G&B Photography v Greenberg* 209 AD2d 577, 581 [1994]). Furthermore,, "agreements executed at substantially the same time and related to the same subject matter are regarded as contemporaneous writings and must be read together as one" (*Flemington Natl. Bank & Trust Co. [N.A.] v Domler Leasing Corp.*, 65 AD2d 29, 32 [1978], *affd*, 48 NY2d 678 [1979]).

To apply these principles here, it is necessary to examine the provisions of the various condominium documents relied on by

the parties.

Article 10(c) of the condominium declaration provides, in pertinent part, that

> the Sponsor and it successors, assignees, invitees, licensees, contractors, employees, agents and tenants shall have an easement in, over, under, through and upon the [Building's] Common Elements to use the same, without being subject to any fee or charge, for all purposes and activities in connection with the sale or renting of Unsold Units . . . In addition, the Sponsor reserves the right, to the extent permitted by Law, to use one or more portions of the Common Elements, as designated by the Sponsor in its sole discretion, for sales, rental, or display purposes, which right shall include, without limitation, the right to place "for sale", "for rent" and other signs and promotional materials, of such size and content as the Sponsor shall determine, in, on, about and adjacent to the Building (including on the exterior walls thereof) and the Property.

Section 5.8(C) of the by-laws, in turn provides, in pertinent part:

> The Sponsor or its designee shall have the right, without charge of limitation, to: (i) Erect and maintain signs, of any size or content determined by the Sponsor or such designee, on or about any portion of the General Common Elements chosen by the Sponsor or such designee, including, without limitation, on the exterior walls of the Building or adjacent to the main entrance thereof; . . . and (iii) do all things necessary or appropriate, including the use of the General Common Elements, to sell, lease, manage or operate Unsold Units . . . In no event, however, shall the Sponsor or such designee be entitled to use any Common Elements in such a manner as will unreasonably interfere with the

use of any Unit for its permitted purposes.

Here, the declaration and the by-laws were executed as part of the same transaction and cross-reference one another. The by-laws are incorporated as Exhibit D to the declaration. Together, the declaration, by-laws and condominium rules and regulations are expressly defined as the "Condominium Documents." The declaration and by-laws, thus, "constitute part of the same transaction" and "must be interpreted together" *(BWA Corp. v Alltrans Express U.S.A.*, 112 AD2d 850, 852 [1985]).

Instructive in this regard is *Two Guys from Harrison-N.Y., Inc. v S.F.R. Realty Assoc.* (63 NY2d 396 [1984]), which involved construction of two lease provisions - one permitting the tenant to make "any interior non-structural alterations" (paragraph 6[a]) and the other permitting the tenant to subdivide the premises (paragraph 12). The question was whether the tenant had the power to make structural changes in order to facilitate the authorized subdivision. The court, noting that the goal was to "avoid an interpretation that would leave contractual clauses meaningless" (*id.* At 403) held that the lease's grant of power to make "non-structural alterations" impliedly withheld the power to make structural changes. To hold otherwise would render paragraph 6(a) meaningless.

Arguing here that the last sentence of Article 10(C)

reserves the right to post signs to the original sponsor alone would render meaningless § 5.8(c)'s express extension of that power to the sponsor and its designees. Indeed, the term "designee" has a generally accepted legal meaning and is defined in Black's Law Dictionary as "a person who has been designated to perform some duty or carry out some specific role". These two provisions can be harmonized by construing article 10(c) as simply reserving to the sponsor the right to post signs without intending it to preclude others. Section 5.8(c) would supplement article 10(c) by granting that power to the sponsor's designees as well as the sponsor itself. Moreover, the declaration, being a more basic document, expressly designed to comply with "the provisions of the Condominium Act and establish a regime" for condominium ownership, would of necessity be less detailed than the by-laws which supply information not contained in the declaration.

When viewed together, the by-laws and declaration grant the sponsor or "designee" the right to post signs advertising the availability of unsold units, provided that such signs do not unreasonably interfere with the permissible use of any unit. There being no issue of fact relevant to the interpretation of either the declaration or the by-laws, plaintiff's motion for summary judgment should have been granted.

Plaintiffs also assert that defendant breached its fiduciary duty when it refused to permit them to erect their "for sale" sign on the facade of the building. Defendant asserts as an affirmative defense that its decision is protected by the business judgment rule.

The business judgment rule is applicable to the board of directors of cooperative and condominium corporations (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Helmer v Comito,* 61 AD3d 635 [2009]). Under that rule, a court's inquiry "is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision" (*Schoninger v Yardarm Beach Homeowners' Assn., Inc.*, 134 AD2d 1, 9 [1987]). However, the rule will not serve to shield boards from actions that have no legitimate relationship to the welfare of the condominium, or that deliberately single out individuals for harmful treatment (*see Katz v 215 W. 91st St. Corp.*, 215 AD2d 265, 266-267 [1995]).

It is uncontroverted that the CEO of the condominium's management company is also a board member. The wife of another

Board member is in the real estate business. Nor is it in question that Perlbinder, although a board member, was not notified that the executive committee had made a decision to remove the sign. Although the board defended this action on the basis that Perlbinder was an "interested party", the same could be said of the other two board members.

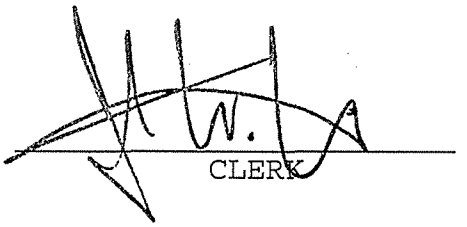
Additionally, defendant's justification for removing the sign - i.e., because it detracts from the building's appearance - is belied by the fact that the management company's sign is also annexed to the building. Defendant does not assert that plaintiffs' sign was unreasonably large or otherwise interfered with the use of the building by the tenants; nor does it deny that plaintiff's sign was compatible with that of the management company.

Therefore, defendant's refusal to allow plaintiffs to place a sign on the building while keeping the managing company's sign in place did not further any legitimate corporate purpose and unfairly singled out plaintiffs. This action, coupled with defendants action in excess of its authority in refusing to recognize plaintiffs' rights as "designees" of the sponsor to place signage without board approval places its actions beyond the protection of the business judgment rule. Plaintiffs were

entitled to summary judgment on this cause of action. A hearing is necessary to determine the amount of damages with respect to the third cause of action for breach of fiduciary duty.

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

ENTERED: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1064 The People of the State of New York, Respondent, Ind. 5958/06

-against-

Oscar Sierra, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Seon Jeong Lee of counsel), for appellant.

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

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Judgment, Supreme Court, New York County (Maxwell Wiley, J.), rendered October 31, 2007, convicting defendant, after a jury trial, of bribery in the third degree, and sentencing him, as a second felony offender, to a term of 2 to 4 years, unanimously affirmed.

The court properly declined to deliver an entrapment charge. There was no reasonable view of the evidence that the police officers induced or encouraged defendant to commit bribery, or that their conduct created a substantial risk that the crime would be committed by a person not otherwise disposed to do so (*see* Penal Law § 40.05; *People v Brown*, 82 NY2d 869 [1993]; *People v Butts*, 72 NY2d 746 [1988]). Defendant initiated the chain of events by making a series of bribe offers, including an offer of a specific sum of money. The ensuing police activity

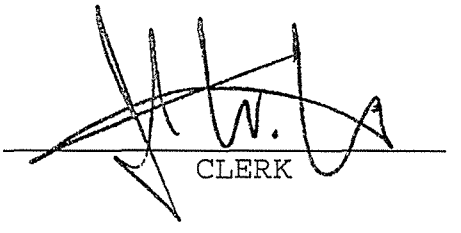
merely gave defendant an opportunity to commit the crime. Additionally, in a taped conversation made after delivery of the bribe money, defendant confirmed that, from the inception, he had intended to offer a bribe.

The court properly declined to redact a portion of the taped conversation that referred to the possibility that defendant may have purchased marijuana in the past. This innocuous conversation provided background and context (*see generally People v Till*, 87 NY2d 835, 837 [1995]), demonstrating that defendant was freely conversing with the officer, a matter that was relevant to issues presented at trial. In any event, during this conversation defendant denied that he had made previous marijuana purchases, and this evidence was not unduly prejudicial.

Defendant's challenge to the imposition of the mandatory surcharge is without merit (*see People v Guerrero*, 12 NY2d 45 [2009]).

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

ENTERED: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1065 Melanie M. Colon, Index 7519/07
Plaintiff-Appellant,

-against-

Bernardin Gutierr Bernabe, et al.,
Defendants-Respondents.

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Pollack, Pollack, Isaac & DeCicco, New York (Michael H. Zhu of counsel), for appellant.

Hardin, Kundla, McKeon & Poletto, New York (Stephen P. Murray of counsel), for respondents.

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Order, Supreme Court, Bronx County (Howard H. Sherman, J.), entered November 3, 2008, which, inter alia, granted defendants' motion for summary judgment dismissing the complaint on the ground that plaintiff did not sustain a serious injury as defined by Insurance Law § 5102(d), unanimously modified, on the law, to the extent of denying defendants' motion in part and reinstating plaintiff's claims that she sustained a permanent consequential limitation of use of a body organ or member and/or a significant limitation of use of a body function or system, and remanding the matter for a determination of that prong of defendants' motion for summary judgment dismissing the action as against defendant Salem Truck Leasing, Inc. (Salem) and on plaintiff's cross motion to amend the complaint to assert a negligent entrustment claim as against Salem, and otherwise affirmed, without costs.

Defendants established a prima facie entitlement to summary judgment by submitting the affirmed reports of an orthopedic surgeon and a neurologist who, after conducting independent examinations of plaintiff, concluded that plaintiff had full range of motion in her neck, back and upper and lower extremities, and suffered from no neurological disability. Defendants also submitted the affirmed report of a radiologist, who, upon reviewing plaintiff's MRI films and CT scan, concluded that the disc bulges and/or herniations revealed through those tests were consistent with degenerative disc disease and not caused by the automobile accident at issue. Defendants also submitted plaintiff's deposition testimony, where she stated that she returned to work within two or three days of the accident.

Contrary to the determination of the motion court, plaintiff's opposition raised triable issues of fact that she sustained a serious injury. The affidavit of plaintiff's treating chiropractor contains objective, quantitative evidence with respect to diminished range of motion in the cervical and lumbar spine based on testing performed both immediately after the accident and then again, approximately 20 months after the accident. The chiropractor's range of motion findings conflict with those of defendants' expert, who found no restriction in range of motion, and thus, raise an issue of fact as to whether

plaintiff sustained a significant limitation in use or permanent consequential limitation of use of her cervical and lumbar spine. Plaintiff's MRIs also showed bulging and herniated discs in the cervical and lumbar spine and the EMG studies revealed radiculopathies. Evidence of range of motion limitations, especially when coupled with positive MRI and EMG test results, are sufficient to defeat summary judgment (*see Wadford v Gruz*, 35 AD3d 258 [2006]; *Brown v Achy*, 9 AD3d 30 [2004]).

Plaintiff also submitted sufficient evidence to raise a triable issue of fact as to whether her serious injury was causally related to the accident. In response to the findings of defendants' expert that the disc bulges and/or herniations were consistent with degenerative disease, plaintiff's experts stated, based upon objective medical testing and their physical examinations of plaintiff, who was 22 years old at the time of the accident and had never sustained any injury to her back either before or after the accident, that the injuries were causally related to the accident (*see June v Akhtar*, 62 AD3d 427 [2009]).

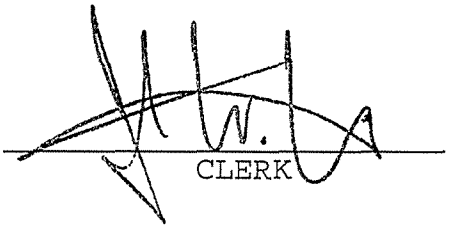
Plaintiff did, however, fail to raise a triable issue of fact with respect to the 90/180-day prong of Insurance Law § 5102(d). Plaintiff's self-serving assertions in her affidavit that her ability to do everyday activities has been significantly

limited, are insufficient without any objective medical evidence to substantiate her claims (*see Nelson v Distant*, 308 AD2d 338, 340 [2003]). Furthermore, plaintiff testified that she returned to work within two or three days of the accident (*see Ronda v Friendly Baptist Church*, 52 AD3d 440, 441 [2008]).

Having concluded that a portion of plaintiff's claims should be reinstated, the issues of whether the action should be dismissed as against Salem pursuant to the Graves Amendment (49 USC § 30106), and whether plaintiff's cross motion to amend the complaint to assert a negligent entrustment claim as against Salem, become viable. Since the motion court did not make a determination on these issues, they are remanded to that court for a determination in the first instance.

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

ENTERED: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1066 Max Pellegrini, et al., Index 104117/08
Plaintiffs-Appellants,

-against-

Kelly Brock, etc.,
Defendant-Respondent,

Enrico Pellegrini,
Defendant.

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Riconda & Garnett LLP, Valley Stream (Michael T. Sullivan of counsel), for appellants.

Kelly Brock, respondent pro se.

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Order, Supreme Court, New York County (Harold B. Beeler, J.), entered January 12, 2009, which, insofar as appealed from as limited by the briefs, in this action where plaintiffs seek, inter alia, a declaratory judgment that the monies they transferred to defendant Enrico Pellegrini and defendant-respondent constituted a loan rather than a gift, denied plaintiffs' motion for summary judgment, unanimously affirmed, with costs.

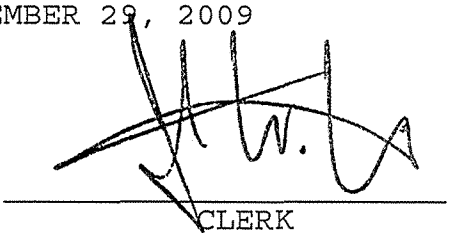
"On a motion for summary judgment, the court should accept as true the evidence submitted by the opposing party" (*O'Sullivan v Presbyterian Hosp. in City of N.Y. at Columbia Presbyt. Med. Ctr.*, 217 AD2d 98, 101 [1995]). Here, defendant-respondent submitted evidence in admissible form which raised a triable

issue of fact as to whether the money at issue was a gift or a loan, including, inter alia, an affidavit from a non-party who said that plaintiff Roberta Pellegrini had told her that plaintiffs had given defendants money to buy a house.

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

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

ENTERED: SEPTEMBER 29, 2009



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Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1067 In re Joshua C.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Dona B. Morris of counsel), for presentment agency.

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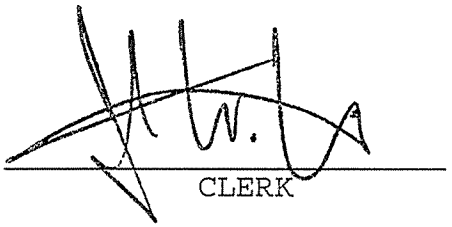
Order of disposition, Family Court, Bronx County (Robert R. Reed, J.), entered on or about August 20, 2008, which adjudicated appellant a juvenile delinquent, upon his admission that he committed an act which, if committed by an adult, would constitute the crime of grand larceny in the fourth degree, and placed appellant on probation for a period of 12 months, with restitution in the amount of $195, unanimously affirmed, without costs.

The court properly exercised its discretion in directing appellant to pay restitution, and by providing that if appellant is unable to make restitution, he may then petition the lower court to rescind the restitution provision. The court's calculation of the amount of restitution was supported by the record, which included a signed victim impact statement

specifying the amount the victim paid to replace the stolen property. This evidence was material and relevant, and the court properly considered it at the dispositional hearing (*see Matter of Nathan N.*, 56 AD2d 554 [1977]). We have considered and rejected appellant's remaining claims.

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1068 Hazel Mignott, Index 100173/01
Plaintiff-Appellant,

-against-

Melvin Kreidman,
Defendant-Respondent,

Jerry Slater, et al.,
Defendants.

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Schwartz & Ponterio, PLLC, New York (John Ponterio of counsel), for appellant.

Ephrem J. Wertenteil, New York, for respondent.

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Order, Supreme Court, New York County (Walter B. Tolub, J.), entered March 24, 2005, which granted defendants' motion for summary judgment dismissing the complaint, unanimously affirmed, with costs.

Defendant attorneys were not negligent for failing to anticipate an appellate development (*see Darby & Darby v VSI Intl.*, 95 NY2d 308 [2000]; *Gabrielli v Dobson & Pinci*, 51 AD3d 571, 572 [2008]). Although their position was later rejected in *Baez v New York City Health & Hosps. Corp.* (80 NY2d 571 [1992]) and on appeal in the underlying medical malpractice action (*Mignott v New York City Health & Hosps. Corp.*, 250 AD2d 165 [1998], *lv denied* 93 NY2d 807 [1999]), defendants were not negligent in assuming at the time of their representation that

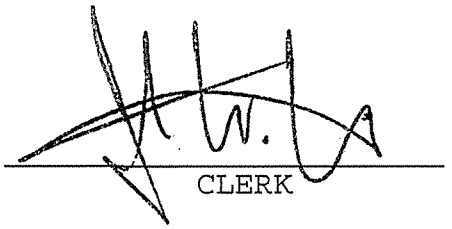
the statute of limitations was tolled pending a General Municipal Law § 50-h examination, since the only analogous authority at the time supported their understanding (*see Serravillo v New York City Tr. Auth.*, 51 AD2d 1027 [1976], *affd* 42 NY2d 918 [1977]). The inapposite authorities relied upon by plaintiff to demonstrate the attorneys acted unreasonably involved municipalities, not public authorities or public benefit corporations, where the governing statute contained an express provision that the pendency of a § 50-h examination did not toll or extend the limitations period. Plaintiff's contract cause of action, based on the same facts and seeking the same damages as the insufficient malpractice claim, was duplicative (*see Rivas v Raymond Schwartzberg & Assoc., LLC*, 52 AD3d 401 [2008]; *Turk v Angel*, 293 AD2d 284 [2002], *lv denied* 100 NY2d 510 [2003]).

In view of the foregoing, it is unnecessary to address plaintiff's contention that there was an issue of fact as to

whether defendants' alleged negligence was the "but for" cause of her loss.

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1070 The People of the State of New York, Ind. 188/07
Respondent,

-against-

Keith Cartwright,
Defendant-Appellant.

---

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Ronald A. Zweibel, J.), rendered November 21, 2007, convicting defendant, after a jury trial, of criminal possession of a weapon in the second degree (two counts) and criminal possession of a weapon in the fourth degree, and sentencing him to an aggregate term of 15 years, unanimously affirmed.

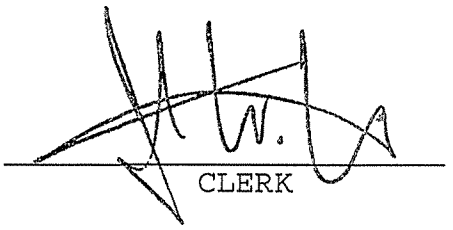
The court properly denied defendant's suppression motion without a hearing, since his motion papers did not raise an issue of fact as to probable cause for his arrest (*see People v Mendoza*, 82 NY2d 415 [1993]). Defendant's assertion that he was "committing no visible crime" at the time of his confrontation with police did not controvert the specific information that was provided by the People concerning the basis for the arrest. In discovery materials that included a bill of particulars, the

People set forth a detailed account of the chain of events leading up to defendant's arrest, including both a complaint by a civilian informant and observations made by the police. Defendant did not address these allegations, assert any basis for suppression, or raise a factual dispute requiring a hearing (*see People v Jones*, 95 NY2d 721, 728-729 [2001]).

The court properly admitted testimony regarding the contents of a 911 call, accompanied by thorough limiting instructions. The evidence was not received for its truth, but for the legitimate nonhearsay purpose of completing the narrative, explaining police conduct, and "prevent[ing] undue speculation and unfair inferences by the jury." (*People v Barnes*, 57 AD3d 289, 290 [2008], *lv denied* 12 NY3d 781 [2009]). Defendant's remaining challenges to this evidence, including his Confrontation Clause claim, are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1072 The People of the State of New York, Respondent, Ind. 3856/07

-against-

Juan Anderson, Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel), for appellant.

---

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered on or about June 2, 2008, 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.

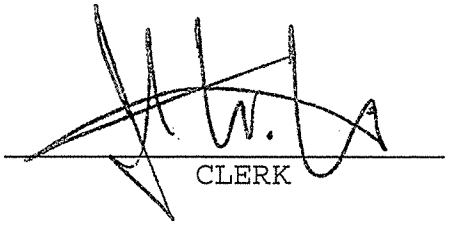
Pursuant to Criminal Procedure Law § 460.20, defendant may apply for leave to appeal to the Court of Appeals by making application to the Chief Judge of that Court and by submitting such application to the Clerk of that Court or to a Justice of the Appellate Division of the Supreme Court of this Department 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: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1074 The People of the State of New York, Ind. 4709/06
Respondent,

-against-

Yacouba Haidara,
Defendant-Appellant.

---

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

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

---

Judgment, Supreme Court, New York County (Daniel P. FitzGerald, J.), rendered September 26, 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 12½ to 25 years, unanimously affirmed.

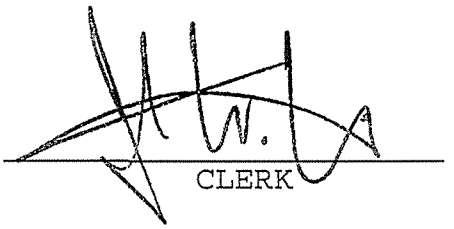
The court properly received evidence of uncharged crimes to complete the victim's narrative, describe the events leading up to the charged crime and explain the relationship between defendant and the victim (*see People v Leeson*, 12 NY3d 823, 827 [2009]; *People v Dorm*, 12 NY3d 16, 19 [2009]), as well as to place the events in question in a believable context and explain the victim's delay in reporting defendant's conduct (*see People v Rosario* 34 AD3d 370 [2006], *lv denied* 8 NY3d 949 [2007]). Although the evidence was extensive, it was not unduly

inflammatory and the court's thorough limiting instruction was sufficient to minimize any possible prejudice.

Defendant's arguments concerning the prosecutor's opening statement and summation are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we find no basis for reversal.

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

ENTERED: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1075 Algomod Technologies Corp., Index 602492/07
Plaintiff-Appellant,

-against-

Kevin Price, et al.,
Defendants-Respondents.

---

Danzig Fishman & Decea, White Plains (Yenisey Rodriguez-McCloskey of counsel), for appellant.

Kirkland & Ellis LLP, New York (Matthew Dexter of counsel), for respondents.

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Judgment, Supreme Court, New York County (Richard B. Lowe III, J.), entered June 19, 2008, dismissing the complaint pursuant to an order, same court and Justice, entered June 18, 2008, which, in an action by a seller of information technology consulting services against two employees of one its customers (Verizon) for, inter alia, tortious interference with prospective business relations, granted defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

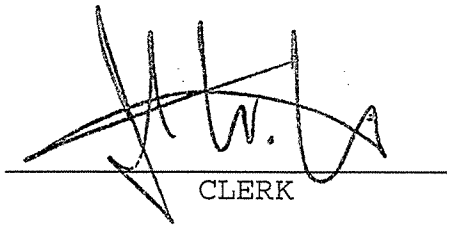
With respect to the cause of action for tortious interference with prospective business relations, the complaint fails to correct the deficiencies in plaintiff's prior complaint, which was dismissed for failure to plead the elements of that cause of action in a nonconclusory manner, and therefore was properly dismissed as precluded by the prior dismissal (*see 175*

*E. 74th Corp. v Hartford Acc. & Indem. Co.*, 51 NY2d 585, 590 n 1 [1980]). While the complaint contains additional allegations concerning defendants' purported role in the downgrading of plaintiff's vendor status with Verizon, it fails to plead, in nonconclusory language (*see Bonanni v Straight Arrow Publs.*, 133 AD2d 585, 586-587 [1987]), that defendants' acts were accompanied by the use of wrongful means (*see NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]), and that but for such acts plaintiff would have entered into new relationships with Verizon (*see Vigoda v DCA Prods. Plus*, 293 AD2d 265 [2002]). The complaint also fails to set forth facts showing that defendants acted for personal interests rather than those of Verizon (*see Joan Hansen & Co. v Everlast World's Boxing Headquarters Corp.*, 296 AD2d 103, 110 [2002]). Plaintiff's cause of action for conversion, which alleges that a competitor, aided by defendants, hacked into Verizon's procurement Web site and stole plaintiff's proprietary information, was properly dismissed for lack of nonconclusory allegations showing that the alleged hacking occurred or, if it did, that plaintiff's proprietary information

was compromised. In the absence of any viable causes of action, the conspiracy claims cannot stand as an independent tort (*see Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424, 425 [2006]).

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1076 The People of the State of New York, Respondent, Ind. 2486/05

-against-

Leroy Johnson, Defendant-Appellant.

---

Steven Banks, The Legal Aid Society, New York (Arthur H. Hopkirk of counsel), for appellant.

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

---

Judgment, Supreme Court, New York County (Renee A. White, J.), rendered June 27, 2006, convicting defendant, after a jury trial, of burglary in the first degree, robbery in the first degree (two counts), rape in the first degree (two counts), and sodomy in the first degree (three counts), and sentencing him to consecutive terms of 25 years on each count, unanimously affirmed.

The court properly denied defendant's motion to dismiss the action as time-barred. Defendant raises a statute of limitations claim that is indistinguishable from a claim this Court rejected in *People v Rolle* (59 AD3d 169 [2009], *lv denied* __NY3d__ [Jun 10, 2009], 2009 NY Slip Op 98368U), and we decline to revisit our prior holding.

Defendant claims that his trial counsel rendered ineffective

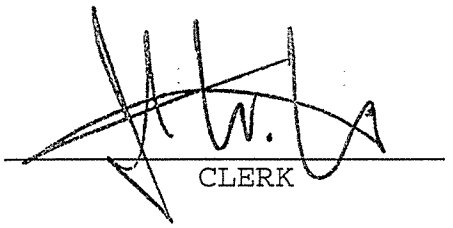
assistance by failing to present a statute of limitations defense to the jury after the court denied his pretrial motion to dismiss the indictment. This claim is unreviewable on direct appeal because it involves matters outside the record concerning counsel's strategy (*see People v Rivera*, 71 NY2d 705, 709 [1988]; *People v Love*, 57 NY2d 998 [1982]). We note that the record suggests legitimate reasons for not pursuing a statute of limitations defense, and that counsel's statements to the court do not, under the circumstances, render a postconviction motion unnecessary. On the existing record, to the extent it permits review, we find that defendant received effective assistance 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]). Even were we to assume that defense counsel erred in determining that the particular statute of limitations issue in this case, i.e., a reasonable diligence issue, was a matter of law to be decided only by the court, defendant has not shown that his counsel's decision affected the outcome of the proceeding or caused him any prejudice.

Defendant is not entitled to any reduction in his sentence as a matter of law, and we perceive no basis for reducing the sentence as a matter of discretion. To the extent that defendant is challenging the constitutionality of the statutory sentencing scheme as it applies to his situation, such claim is unpreserved

(*see People v Ianelli*, 69 NY2d 684 [1986], *cert denied* 482 US 914 [1987]), and we decline to review it in the interest of justice. As an alternative holding, we also reject it on the merits.

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

ENTERED: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1077 235 E.4th Street, LLC, Index 100575/08
Plaintiff-Respondent.

-against-

Dime Savings Bank of Williamsburgh,
Defendant-Appellant.

---

Conway, Farrell, Curtin & Kelly, P.C., New York (Jonathan T. Uejio of counsel), for appellant.

Platzer, Swergold, Karlin, Levine, Goldberg & Jaslow, LLP, New York (Steven D. Karlin of counsel), for respondent.

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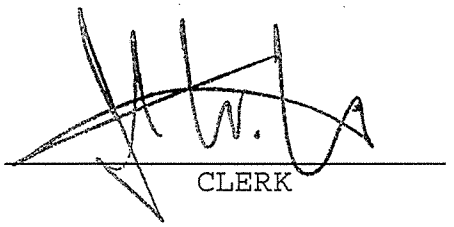
Order, Supreme Court, New York County (Carol Edmead, J.), entered July 21, 2008, which, insofar as appealed from, denied defendant's motion to dismiss plaintiff's cause of action for breach of contract and demand for punitive damages, unanimously modified, on the law, to strike the demand for punitive damages, and otherwise affirmed, without costs.

The motion court correctly held that a cause of action for breach of contract is stated by plaintiff mortgagor's allegations that defendant mortgagee's payoff letter demanded a prepayment penalty that was not called for in the mortgage, and that plaintiff's payment of the demanded penalty under constraint of closing the transaction was not an acceptance of what was a modification of the mortgage. Plaintiff's demand for punitive damages, however, should have been stricken since its alleged

damages arose from a breach of contract and there is no allegation of tortious conduct and no evidence of any egregious or morally reprehensible conduct (*see New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]).

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1078 The People of the State of New York, Ind. 2881/05
Respondent,

-against-

Manuel Guillen,
Defendant-Appellant.

---

Joseph C. Heinzmann, White Plains, for appellant.

Robert M. Morgenthau, District Attorney, New York (Sylvia Wertheimer of counsel), for respondent.

---

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered May 31, 2007, convicting defendant, after a jury trial, of assault in the first degree and criminal possession of a weapon in the second degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

Defendant's claim that the evidence was legally insufficient to establish the element of serious physical injury (Penal Law § 10.00[10]) is unpreserved and we decline to review it in the interest of justice. As an alternative holding, we find the verdict was based on legally sufficient evidence. We also find it was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). The evidence supports the conclusion that the victim's gunshot wound, which caused a pneumothorax, created a substantial risk of death (*see e.g.*

*People v Thompson*, 224 AD2d 646 [1996], *lv denied* 88 NY2d 970 [1996])

The court properly declined to submit third-degree assault under a theory of criminal negligence (Penal Law § 120.00[3]) as a lesser included offense, since there was no reasonable view of the evidence, viewed most favorably to defendant, to support that charge. The evidence established that the shooting was not only intentional but premeditated. There was no testimony or other evidence to support the alternative scenario posited by defense counsel, under which defendant merely pointed his weapon at the victim, who grabbed at the weapon, resulting in its discharge. This incident was recorded on surveillance videotapes, which show that even if the victim initially made a grabbing or swatting gesture toward the firearm, it did not discharge at that point. Instead, defendant stepped back and again aimed the weapon at the victim, who now put his hands in front of his face in a self-protective gesture that could not have made contact with defendant or his weapon, and defendant fired. Accordingly, there was nothing but speculation to support the request for a lesser included offense (*see People v Negron*, 91 NY2d 788, 792 [1998]; *compare e.g. People v Fernandez*, __AD3d__, 879 NYS2d 74 [2009]).

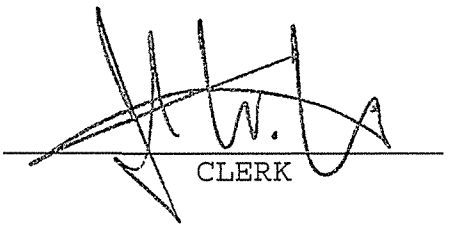
The court properly exercised its discretion in precluding defendant from eliciting from his mother, who was called as a

defense witness, that after defendant's arrest the victim had a conversation with defendant's mother which included discussion of the victim's music business and financial situation. Defendant's offer of proof was insufficient to establish any basis for eliciting this testimony as evidence of the victim's bias against defendant (*see People v Thomas*, 46 NY2d 100, 105-106 [1978], *appeal dismissed* 444 US 891 [1979]). Defendant's claim that the victim was asking defendant's mother for a bribe in return for exculpating her son rested entirely on speculation. Furthermore, the court's ruling did not deprive defendant of a fair trial or affect the outcome of the case.

We perceive no basis for reducing the sentence, or for substituting a youthful offender adjudication.

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

ENTERED: SEPTEMBER 29, 2009



Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1079 The People of the State of New York, Ind. 638/06
Respondent,

-against-

George Rawls,
Defendant-Appellant.

---

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

Robert M. Morgenthau, District Attorney, New York (Aaron Ginandes of counsel), for respondent.

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Judgment, Supreme Court, New York County (Charles J. Tejada, J.), rendered August 22, 2006, convicting defendant, after a jury trial, of robbery in the third degree, and sentencing him, as a second felony offender, to a term of 3 to 6 years, unanimously modified, on the law, to the extent of vacating the second felony offender adjudication and remanding for resentencing, and otherwise affirmed.

The court properly declined to submit petit larceny as a lesser included offense. In light of the victim's integrated testimony establishing defendant's use of force in attempting to retain the stolen items, there was no reasonable view of the evidence, viewed most favorably to defendant, that he was guilty

of larceny but not robbery (*see People v Tucker*, 41 AD3d 210 [2007], *lv denied* 9 NY3d 882 [2007], *cert denied* __US__, 128 S Ct 1094 [2008]).

Defendant's request for a missing witness charge was properly denied. The court properly concluded that the witness's casual acquaintance with the victim did not place him within the People's control for purposes of such an instruction (*see e.g. People v Nieves*, 294 AD2d 152 [2002], *lv denied* 98 NY2d 700 [2002]).

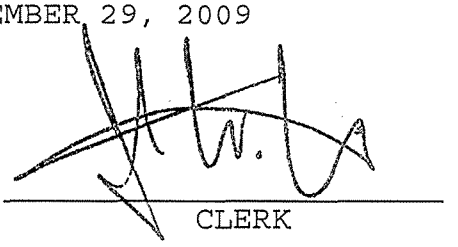
All of defendant's claims concerning both the defense and prosecution summations are unpreserved and we decline to review them in the interest of justice. As an alternative holding, we also reject them on the merits.

Any error in the receipt of testimony suggesting or indicating that defendant was identified from police photographs, or with regard to related evidentiary matters, was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

As the People concede, defendant's New Jersey convictions did not qualify as predicate felonies for the purpose of enhanced sentencing.

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P. Saxe, Moskowitz, Renwick, Richter, JJ.

1081 The People of the State of New York, Ind. 1625/07
Respondent,

-against-

William Loyd,
Defendant-Appellant.

---

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

Robert M. Morgenthau, District Attorney, New York (Sara M. Zausmer of counsel), for respondent.

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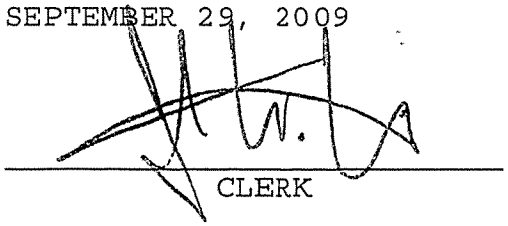
An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Bonnie G. Wittner, J.), rendered on or about November 9, 2007,

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: SEPTEMBER 29, 2009



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

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1082N The Second Presbyterian Church in the City of New York, Plaintiff-Appellant, Index 127667/02

-against-

Cenpark Realty LLC, Defendant-Respondent,

The Argo Corp., et al., Defendants.

---

White & Case LLP, New York (Lydia Emily Lin of counsel), for appellant.

Putney, Twombly, Hall & Hirson LLP, New York (Philip H. Kalban of counsel), for respondent.

---

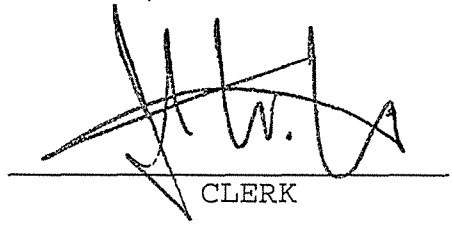
Order, Supreme Court, New York County (Leland DeGrasse, J.), entered March 14, 2003, which, to the extent appealed from as limited by the briefs, granted defendants' cross motion for an order compelling arbitration between plaintiff and defendant Cenpark Realty, LLC, unanimously modified, on the law, the cross motion granted to the extent of limiting the arbitration to matters involving Cenpark's breach of contract claims accruing within six years of the cross motion to compel arbitration, and otherwise affirmed, without costs.

The motion court properly determined that the subject lease required arbitration of the dispute over Cenpark's claim to payments for increased property taxes. Plaintiff's argument that

although the parties agreed to arbitrate a dispute as to the amount of an increase in real estate taxes caused by a change in the tax exemption enjoyed by plaintiff, there was no agreement to arbitrate the issue of whether any change had occurred in the first instance, is unpersuasive since the lease provision required arbitration of "any dispute" that may arise in this regard (*see Reed Elsevier Inc. v Watch Holdings, LLC*, 30 AD3d 222 [2006]). Nevertheless, to the extent Cenpark seeks relief for tax payments made beyond the six-year statute of limitations period for breach of contract claims (CPLR 213[2]; 7502[b]), such claims are, accordingly, time-barred (*see Matter of Smith Barney, Harris Upham & Co. v Luckie*, 85 NY2d 193, 202 [1995], *cert denied* 516 US 811 [1995]).

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

ENTERED: SEPTEMBER 29, 2009



CLERK

Mazzarelli, J.P., Saxe, Moskowitz, Renwick, Richter, JJ.

1083N Dominic Brown, etc., et al., Index 102900/08
Plaintiffs-Respondents,

-against-

Jill Dawson, et al.,
Defendants,

Simon Kokkinakis,
Defendant-Appellant.

---

Belair & Evans LLP, New York (John Gizunterman of counsel), for appellant.

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

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Order, Supreme Court, New York County (Sheila Abdus-Salaam, J.), entered June 3, 2008, which, in an action for medical malpractice, denied defendant-appellant's motion to change venue from New York County to Richmond County, unanimously affirmed, without costs.

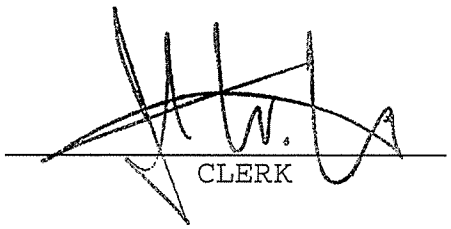
Plaintiff properly placed venue in New York County based upon St. Vincent's Hospital and Medical Center's designation of New York County as its corporate residence on its certificate of incorporation (*see* CPLR 503[c]; *Krochta v On Time Delivery Serv., Inc.*, 62 AD3d 579, 580 [2009]; *Velasquez v Delaware Riv. Val. Lease Corp.*, 18 AD3d 359, 360 [2005]).

Nor does the record support a discretionary change of venue

pursuant to CPLR 510(3), inasmuch as appellant failed to detail the identity and availability of proposed witnesses, the nature and materiality of the anticipated testimony and the manner in which they would be inconvenienced by the designated venue (*see Parker v Ferraro*, 61 AD3d 470 [2009]).

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

ENTERED: SEPTEMBER 29, 2009



SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Luis A. Gonzalez, P.J.
John T. Buckley
James M. Catterson
James M. McGuire
Dianne T. Renwick, JJ.

475-475A-475B-475C
Index 603121/07

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Dan Rather,
Plaintiff-Respondent-Appellant,

-against-

CBS Corporation,
Defendant-Appellant-Respondent,

Viacom, Inc., et al.,
Defendants-Respondents.

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Plaintiff Dan Rather appeals from a judgment of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 14, 2008, dismissing the complaint as against the individual defendants, and bringing up for review an order, same court and J.H.O., entered April 11, 2008, which, inter alia, granted defendants' motion to dismiss the complaint to the extent of dismissing the causes of action for fraud, breach of the implied covenant of fair dealing, and tortious interference with prospective business relations, and denied the motion to the extent it sought to dismiss the causes of action for breach of contract and breach of fiduciary duty, and from a judgment, same

court and J.H.O., entered September 30, 2008, dismissing the amended complaint as against Viacom, Inc. and dismissing the causes of action for fraud and tortious interference with contract as against CBS Corporation, and bringing up for review an order, same court and J.H.O., entered September 23, 2008, which granted CBS and Viacom's motion to the extent it sought to dismiss the causes of action for fraud and tortious interference with contract and denied the motion to the extent it sought to dismiss the cause of action for breach of fiduciary duty. Cross appeals from the aforesaid orders.

Weil, Gotshal & Manges LLP, New York (James W. Quinn, Mindy J. Spector and Yehudah L. Buchweitz of counsel), and CBS Law Department, New York (Anthony M. Bongiorno and Mary Catherine Woods of counsel), for appellant-respondent and respondents.

Sonnenschein Nath & Rosenthal LLP, New York (Martin R. Gold, Gary Meyerhoff, Edward J. Reich, Daniel Pancotti, and Zhubin Parang of counsel), for respondent-appellant.

CATTERSON, J.

This action asserting breach of contract and related tort claims arises out of a September 8, 2004 broadcast that plaintiff Dan Rather narrated on the CBS 60 Minutes II television program about then President George W. Bush's service in the Texas Air National Guard. Rather alleges that CBS disavowed the broadcast after it was attacked by Bush supporters, and fraudulently induced him to apologize personally for the broadcast on national television as well as to remain silent as to his belief that the broadcast was true. Rather alleges that, following President Bush's re-election, CBS informed him that he would be removed as anchor of the CBS Evening News. Rather claims that although his employment agreement required that, in the event he was removed as anchor, CBS would make him a regular correspondent on 60 Minutes or immediately pay all amounts due under the agreement and release him to work elsewhere, CBS kept him on the payroll while denying him the opportunity to cover important news stories until May 2006 when it terminated his contract, effective June 2006.

Rather commenced this action against CBS Corporation, Viacom Inc., and individual defendants Leslie Moonves, Sumner Redstone and Andrew Heyward in September 2007. He asserted, inter alia, claims of breach of contract and breach of fiduciary duty against

CBS; claims of fraud against CBS and the individual defendants and a claim of tortious inducement of breach of contract against Viacom and the individual defendants.

Now, Rather appeals and defendants CBS Corporation and Viacom Inc. cross-appeal from orders entered by Supreme Court on April 11, 2008 and September 25, 2008, which granted defendants' motion to dismiss the claims for fraud, breach of the implied covenant of good faith and fair dealing and tortious interference with contract, and denied defendants' motion to dismiss the claims for breach of contract and breach of fiduciary duty.

For the reasons set forth below, this Court finds that the motion court erred in denying the defendants' motion to dismiss the claims for breach of contract and breach of fiduciary duty, and therefore we find the complaint must be dismissed in its entirety.

As a threshold matter, we find that Rather's appeal from the portion of the April 11, 2008 order that dismissed his fraud claims against the individual defendants was not rendered academic by his service of an amended complaint against the remaining defendants. See Velez v. Feinstein, 87 A.D.2d 309, 312-313, 451 N.Y.S.2d 110, 113 (1982), lv. dismissed in part, denied in part, 57 N.Y.2d 737, 454 N.Y.S.2d 987, 440 N.E.2d 1334 (1982). Moreover, for reasons set forth below, we find that

Rather's service of a second amended complaint does not render moot his cross appeal from that portion of the September 25, 2008 order that dismissed his fraud claim. On the record before us, we assume, without deciding, that Rather's claim of breach of the implied covenant of good faith and fair dealing asserted as against CBS in the original complaint may also properly be reviewed. cf. O'Ferral v. City of New York, 8 A.D.3d 457, 459, 779 N.Y.S.2d 90, 91 (1st Dept. 2004) (since court granted leave to file amended complaint that superseded original complaint, issue of disposition of claim included in original but not in amended complaint is academic).

At the outset, we find that Supreme Court erred in declining to dismiss Rather's breach of contract claim against CBS. Rather alleges that he delivered his last broadcast as anchor of the CBS Evening News on March 9, 2005, and that, since he was only nominally assigned to 60 Minutes II and then 60 Minutes, he should have received the remainder of his compensation under the agreement in March 2005. Rather claims that, in effect, CBS "warehoused" him, and that, when he was finally terminated and paid in June 2006, CBS did not compensate him for the 15 months "when he could have worked elsewhere." This claim attempts to gloss over the fact that Rather continued to be compensated at his normal CBS salary of approximately $6 million a year until

June 2006 when the compensation was accelerated upon termination, consistent with his contract.

Contractually, CBS was under no obligation to "use [Rather's] services or to broadcast any program" so long as it continued to pay him the applicable compensation. This "pay or play" provision of the original 1979 employment agreement was specifically reaffirmed in the 2002 Amendment to the employment agreement.

That Amendment also provided, in subparagraph 1(g), that if CBS removed Rather as anchor or co-anchor of the CBS Evening News and failed to assign him as a correspondent on 60 Minutes II or another mutually agreed upon position, the agreement would be terminated, Rather would be free to seek employment elsewhere, and CBS would pay him immediately the remainder of his weekly compensation through November 25, 2006.

We agree that subparagraph 1(g) must be read together with the subparagraph 1(f), which provided that if CBS removed Rather from the CBS Evening News, it would assign him to 60 Minutes II "as a full-time Correspondent," and if 60 Minutes II were canceled, it would assign him to 60 Minutes as a correspondent "to perform services on a regular basis." However, this construction does not render any language of the agreement inoperative, since, consistent with the "pay or play" clause,

neither subparagraph 1(g) nor 1(f) requires that CBS actually *use* Rather's services or broadcast any programs on which he appears, but simply retains the option of accelerating the payment of his compensation under the agreement if he is not *assigned* to either program.

It is clear that subparagraph 1(g) applies only to a situation where CBS removed Rather as anchor of CBS Evening News and then failed to assign him "as a Correspondent on 60 Minutes II." The amended complaint alleges that when Rather no longer performed anchor duties at CBS, he was assigned to 60 Minutes II. Thus, Rather implicitly concedes that CBS fully complied with subparagraph 1(g).

Supreme Court erred in finding that subparagraph 1(g) modified the "pay or play" provision when it ignored the initial prefatory clause to the rest of that subparagraph, which states "[e]xcept as otherwise specified in this Agreement." As the defendants correctly assert, the seven words are crucial because they require subparagraph 1(g) to be read together with the "pay or play" provision, and thus, subparagraph 1(g) cannot modify the "pay or play" provision to mean that CBS must utilize Rather in accordance with some specific standard by featuring him in a sufficient number or types of broadcasts. As the defendants aptly observed, "the notion that a network would cede to a

reporter editorial authority to decide what stories will be aired is absurd."

Rather's claim for lost business opportunities due to CBS's failure to release him to seek other employment is insufficiently supported. Since, according to Rather's own allegations, an immediate result of the September 8, 2004 broadcast was criticism that he was biased against Bush, it would be speculative to conclude that any action taken by CBS would have alone substantially affected his market value at that time. Rather's claim for damages for loss of reputation arising from the alleged breach of contract is not actionable. Dember Constr. Corp. v. Staten Is. Mall, 56 A.D.2d 768, 392 N.Y.S.2d 299 (1st Dept. 1977).

Rather's cause of action for breach of fiduciary duty must also be dismissed. Supreme Court held that the issue of "whether a fiduciary duty has been created in the course of the long relationship between Rather and CBS is really a question of fact." Previously, the court determined that "the length of [Rather's] contractual relationship with [CBS], and the nature of the service that [Rather] performed under his contracts" created an issue of fact that could not be resolved on motion. This was error.

Rather claims that his "four-decade history" with CBS

constituted a "special relationship that imposed fiduciary duties upon CBS toward [Rather]." The law in this Department, and indeed enunciated in every reported appellate-division-level case, is that employment relationships do not create fiduciary relationships. Simply put, "[the employer] did not owe plaintiff, as employee, a fiduciary duty." Angel v. Bank of Tokyo-Mitsubishi, Ltd., 39 A.D.3d 368, 370, 835 N.Y.S.2d 57, 60 (1st Dept. 2007), citing Weintraub v. Phillips, Nizer, Benjamin, Krim & Ballon, 172 A.D.2d 254, 568 N.Y.S.2d 84 (1st Dept. 1991); see Schenkman v. New York Coll. Of Health Professionals, 29 A.D.3d 671, 672, 815 N.Y.S.2d 159, 161 (2d Dept. 2006) ("[employees] failed to plead any facts demonstrating how the arm's-length, employer-employee relationship [...] gave rise to any fiduciary duty."); Cuomo v. Mahopac Natl. Bank, 5 A.D.3d 621, 622, 774 N.Y.S.2d 779, 780 (2d Dept. 2004), lv. denied, 3 N.Y.3d 607, 785 N.Y.S.2d 25, 818 N.E.2d 667 (2004).

The length of Rather's tenure at CBS is irrelevant to, and does not support, this claim of a fiduciary relationship (see e.g., Michnick v. Parkell Prods., 215 A.D.2d 462, 626 N.Y.S.2d 265 (2d Dept. 1995)), nor does Rather's status as "the public face of CBS News after Walter Cronkite retired [...]." See e.g. Maas v. Cornell Univ., 245 A.D.2d 728, 666 N.Y.S.2d 743 (3d Dept. 1997).

Supreme Court's reliance on Apple Records v. Capitol Records (137 A.D.2d 50, 529 N.Y.S.2d 279 (1st Dept. 1988)) and Wiener v. Lazard Freres & Co. (241 A.D.2d 114, 672 N.Y.S.2d 8 (1st Dept. 1998)), was also error. Unlike in Apple Records, where fledgling musicians ultimately became a worldwide music phenomenon known as the Beatles, Rather was an established correspondent represented by a leading talent agent, who negotiated a contract that was extensively amended several times, that paid Rather a lucrative salary, and that detailed, in 50 pages, everything from his assignments and on-air work at CBS Evening News to requirements that he attend rehearsals and join the union. See Faulkner v Arista Records LLC, 602 F.Supp.2d 470, 484 (S.D.N.Y. 2009) ("there are no facts here to suggest that the dealings between the Rollers and Arista were anything other or more than garden-variety arm's length transactions").

The Apple Records court also made plain that the defendant was not only the exclusive distributor of and manufacturer of the Beatles' recordings but also that the Beatles "entrusted their musical talents" to the defendant over a period of many years commencing when the Beatles were "still unacclaimed." Apple Records, supra, 137 A.D.2d at 57, 529 N.Y.S.2d at 283. No such exclusive distributor relationship exists in the instant case. (See e.g. Zimmer-Masiello, Inc. v. Zimmer, Inc., 159 A.D.2d 363,

552 N.Y.S.2d 935 (1st Dept. 1990)), nor can Rather argue that he "entrusted" his particular talents to CBS. Indeed, it may well be that Apple Records will remain a singular holding because of its application to a phenomenon (unacclaimed artists who were also unsophisticated businessmen thrust to the pinnacle of success at warp speed) that's not likely to be seen again, not even on American Idol.

Similarly, Supreme Court improperly relied on Wiener, where we found that the plaintiff specifically alleged that employees of the defendant acted on the plaintiff's behalf in conducting negotiations with a bank, and that they relied on the defendant's "expertise and reputation" as well as certain connections inside the management of the bank. 241 A.D.2d at 123, 672 N.Y.S.2d at 15. It simply cannot be argued that CBS acted as Rather's agent when Rather employed his own agent to negotiate with CBS for Rather's benefit. Any claim to the contrary is belied by both the evidence and common sense.

We affirm dismissal of Rather's fraud claims against CBS and the individual defendants although we find that Supreme Court erred in its rationale for the dismissal as it also erred in rejecting the defendants' other challenges to the fraud claim.

We take judicial notice of Rather's second amended complaint (hereinafter referred to as "SAC") filed by leave of Supreme

Court on July 27, 2009, and by separate order, as a matter of discretion in the interest of judicial economy, we deny Rather's motion to withdraw that portion of his appeal relating to the dismissal of his fraud claim.

The SAC repleads the fraud claim in an attempt to remedy the defects to which Supreme Court pointed in its dismissal of the claim in its September 25, 2008 order. However, Supreme Court erred in its rationale for the dismissal in holding that Rather "failed to allege [...] that his financial compensation at HDNet [...] is less than he would have received had his contract been renewed." Thus, the mere inclusion of Rather's actual annual compensation at HDNet is not helpful to his case, and would not be helpful to his case before this Court at any future date.

Rather alleges that various misrepresentations ( e.g., promises to publicly defend his reputation and to conduct an independent investigation into the 2004 broadcast, and assurances that CBS intended to use his talents fully and to extend his contract, which was due to expire on November 25, 2006) induced him to remain silent about his role in the broadcast and to remain with CBS, where he was allegedly "warehoused" until the completion of his contract. As a result, he alleges he suffered money and reputation damages. Relying on Rather's well-footnoted appellate brief, this Court was already cognizant of his argument

that, following the completion of his CBS contract, his compensation at HDNet was less than the $4 million a year established as an approximate market rate for comparable journalists. However, for reasons set forth here, this information was not required for our analysis, and the lack of it was not the reason for affirming dismissal.

It is hornbook law that,

> "In an action to recover damages for fraud, the plaintiff must prove a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to reply upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury."

Lama Holding Co. v. Smith Barney, 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 80, 668 N.E.2d 1370, 1373 (1996), citing Channel Master Corp v. Aluminum Ltd. Sales, 4 N.Y.2d 403, 176 N.Y.S.2d 259, 151 N.E.2d 833 (1958). Supreme Court properly dismissed Rather's fraud claims for failure to allege pecuniary loss.

> "The true measure of damage is indemnity for the actual pecuniary loss sustained as the direct result of the wrong or what is known as the out-of-pocket rule. Under this rule, the loss is computed by ascertaining the difference between the value of the bargain which a plaintiff was induced by fraud to make and the amount or value of the consideration exacted as the price of the bargain. Damages are to be calculated to compensate plaintiffs for what they lost because of the fraud, not to compensate them for what they might have gained. Under the out-of-pocket rule, there can be no recovery of profits which would have been realized in the absence of fraud." Lama, 88 N.Y.2d at 421, 646 N.Y.S.2d at 80 (internal quotation marks and citations omitted).

Thus, under Lama Holding Co. and its progeny, Rather was required to plead that he had something of value, was defrauded by CBS into relinquishing it for something of lesser value, and that the difference between the two constituted Rather's pecuniary loss.

Rather's claim that, but for CBS' fraud, he could have had more remunerative employment than that which he ultimately obtained at HDNet is unavailing. "[T]he loss of an alternative contractual bargain [...] cannot serve as a basis for fraud or misrepresentation damages because the loss of the bargain was 'undeterminable and speculative.'" Lama, 88 N.Y.2d at 422, 646 N.Y.S.2d at 80, quoting Dress Shirt Sales v. Hotel Martinique Assoc., 12 N.Y.2d 339, 344, 239 N.Y.S.2d 660, 664, 190 N.E.2d 10, 13 (1963); see Geary v. Hunton & Williams, 257 A.D.2d 482, 684 N.Y.S.2d 207 (1st Dept. 1999).

Rather claims, based on his value and the value of similar professionals in the industry, that he would have been paid $4 million annually from 2005 through 2010. However, while claiming that he had an "agreement-in-principle" with CBS in the summer of 2004 to extend his contract, he alleges in the amended complaint that he had an unwritten "proposal" that "contemplated" a contract extension, and the terms of the proposal were compensation of $4 million for the first 19 months and $2 million

annually thereafter. Rather admits that, the broadcast and its aftermath aside, CBS was already contemplating that he would step down from the anchor position in 2006 and assume a reduced role.

As to lost opportunities in the trade, while Rather has shown his own track record of earnings and the earnings of other trade professionals, his future earnings are speculative, because there is no basis to conclude that his employment status would not have changed, regardless of CBS's actions, once he determined to make the broadcast. Rather never identified a single opportunity with specified terms that was actually available to him and which he declined to accept because of CBS' actions.

Even if Rather pled pecuniary loss sufficiently to satisfy the Lama standard, his claim would nonetheless fail. Although allegations that defendants made statements to the general public, for example, that they falsely blamed Rather for alleged errors in the broadcast, may constitute a defamation claim (see Morrison v. National Broadcasting Co., 19 N.Y.2d 453, 458-459, 280 N.Y.S.2d 641, 644, 227 N.E.2d 572, 574 (1967)), they are time-barred. Furthermore, Rather's claim of under-use merely recasts his breach of contract claim in terms of fraud. See Wegman v Dairylea Coop., 50 A.D.2d 108, 113, 376 N.Y.S.2d 728, 734-735 (1975), lv. dismissed, 38 N.Y.2d 918, 382 N.Y.S.2d 979, 346 N.E.2d 817 (1976), and CBS's alleged promise to extend

Rather's contract constitutes a non-actionable statement of future intent. See Laura Corio, M.D., PLLC v R. Lewin Interior Design, Inc., 49 A.D.3d 411, 412, 854 N.Y.S.2d 55, 56-57 (1st Dept. 2008).

Even if Rather had alleged "a breach of duty which is collateral or extraneous to the contract between the parties" Krantz v Chateau Stores of Canada, 256 A.D.2d 186, 187, 683 N.Y.S.2d 24, 25 (1st Dept. 1998) (internal quotation marks and citations omitted), he failed to adequately allege damages.

To the extent Rather claims that he should have been released from the agreement earlier to pursue other opportunities, this claim is duplicative of his breach of contract claim. See Non-Linear Trading Co. v. Braddis Assoc., 243 A.D.2d 107, 118, 675 N.Y.S.2d 5, 13 (1st Dept. 1998). Similarly, Rather's claim for breach of the implied covenant of good faith and fair dealing was properly dismissed by Supreme Court for being duplicative of his breach of contract claim. See Canstar v. Jones Constr. Co., 212 A.D.2d 452, 622 N.Y.S.2d 730 (1st Dept. 1995).

Finally, Supreme Court properly dismissed the claim of tortious interference with a contract as against CBS and Viacom. First, CBS asserts correctly that Viacom is not a proper party to this action. Documentary evidence demonstrates that on December

31, 2005, Viacom (old Viacom) split into two publicly traded companies named Viacom (new Viacom) and CBS Corporation, the latter retaining all of the liabilities concerning CBS's broadcasting business. Thus, the motion court correctly found that new Viacom carries no liability for old Viacom's acts in this suit. Second, as to the claim against CBS, the court correctly applied the economic interest doctrine to dismiss this claim against the corporate defendant. See White Plains Coat & Apron Co., Inc. v. Cintas Corp., 8 N.Y.3d 422, 835 N.Y.S.2d 530, 867 N.E.2d 381 (2007). Rather's bare allegations of malice do not suffice to bring the claim under an exception to the economic interest rule. See Ruha v. Guior, 277 A.D.2d 116, 717 N.Y.S.2d 35 (1st Dept. 2000). Since on appeal, Rather has not addressed his argument as to this cause of action to the individual defendants, we deem the argument abandoned. In any event, there is no particularized pleading of allegations that the acts committed by the individual corporate employees were either beyond the scope of their employment or motivated by their desire for personal gain. See Petkanas v. Kooyman, 303 A.D.2d 303, 305, 759 N.Y.S.2d 1, 2 (1st Dept. 2003).

Accordingly, the judgment of the Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 14, 2008, dismissing the complaint as against the individual defendants,

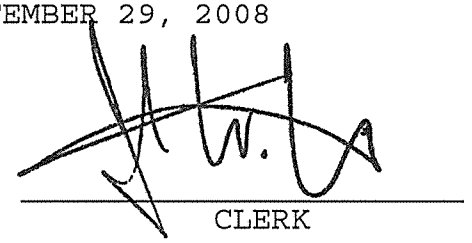
and bringing up for review an order, same court and J.H.O., entered April 11, 2008, which, inter alia, granted defendants' motion to dismiss the complaint to the extent of dismissing the causes of action for fraud, breach of the implied covenant of fair dealing, and tortious interference with prospective business relations, and denied the motion to the extent it sought to dismiss the causes of action for breach of contract and breach of fiduciary duty, should be modified, on the law, to grant the motion to dismiss the causes of action for breach of contract and breach of fiduciary duty, and otherwise affirmed, with costs. Judgment, same court and J.H.O., entered September 30, 2008, dismissing the amended complaint as against Viacom, Inc. and dismissing the causes of action for fraud and tortious interference with contract as against CBS Corporation, and bringing up for review an order, same court and J.H.O., entered September 23, 2008, which granted CBS and Viacom's motion to the extent it sought to dismiss the causes of action for fraud and tortious interference with contract and denied the motion to the extent it sought to dismiss the cause of action for breach of fiduciary duty, should be modified, on the law, to dismiss the remaining causes of action against CBS, and otherwise affirmed, with costs. Plaintiff's appeals from the aforesaid orders should

be dismissed, without costs, as subsumed in the appeals from the respective judgments. The Clerk is directed to enter judgment in favor of defendant CBS dismissing the amended complaint as against it.

All concur.

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

ENTERED: SEPTEMBER 29, 2008



CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John T. Buckley
Leland G. DeGrasse
Helen E. Freedman, JJ.

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x

J. Virgil Waggoner, et al.,
Plaintiffs-Appellants,

-against-

Kenneth A. Caruso et al.,
Defendants-Respondents.

x

Plaintiffs appeal from an order of the Supreme Court, New York County (Bernard J. Fried, J.), entered September 11, 2008, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211.

W. Asa Hutchinson, Rogers, AR, of the Bar of the State of Arkansas, admitted pro hac vice, Helms & Greene, LLC, New York (James J. Mahon of counsel), and Christopher S. Rooney, New York, for appellants.

Paterson Belknap Webb & Tyler LLP, New York (Frederick B. Warder III and Rosanne E. Felicello of counsel), for Kenneth A. Caruso, respondent.

Bracewell & Giuliani LLP, New York (Daniel S. Connolly and Michael Kuhn of counsel), for Bracewell & Giuliani LLP, respondent.

Chadbourne & Parke LLP, New York (Thomas J. Hall and Eric Przybylko of counsel), for Chadbourne & Parke LLP, respondent.

Pillsbury Winthrop Shaw Pittman LLP, New York (David G. Keyko, E. Leo Milonas and Ryan G. Kriger of counsel), for Pillsbury Winthrop Shaw Pittman LLP, respondent.

DeGRASSE, J.

The issues on this appeal involve the facial sufficiency of a legal malpractice complaint as well as the applicability of the continuous representation doctrine. The following allegations are set forth in the amended verified complaint. Beginning in 1996, plaintiff Waggoner was lured by Lisa Duperier, an acquaintance, into investing $10 million in a supposed high-yield investment program (HYIP). Duperier persuaded Waggoner to utilize the services of Donal Kelleher, a financial advisor. In 1997, Waggoner, with Kelleher as a trustee, placed $10 million into an escrow account pending the location of an HYIP. In May and June 1998, Kelleher and Duperier began discussing the investment with representatives of British Trade and Commerce Bank (BTCB), an HYIP administrator. In order to effectuate the investment, Waggoner organized plaintiff J.V.W. Investment at the suggestion of Charles L. Brazie, BTCB's Vice President of Managed Accounts. Accordingly, in June 1998, JVW and BTCB entered into a cooperative venture agreement by which BTCB was to administer the investment program into which Waggoner was to place his money. On BTCB's instructions, Kelleher deposited Waggoner's $10 million into a purported BTCB sub-account maintained by Suisse Security Bank and Trust (SSBT) at Citibank. A certificate of deposit (CD)

was supposedly issued upon the investment of the $10 million into the HYIP. However, the account was a freestanding SSBT account rather than a BTCB sub-account. Waggoner's money was immediately stolen upon deposit at Citibank. BTCB laundered a portion of the funds through its account at First Equity Corporation of Florida (FECF) among others.

On October 7, 1998, Waggoner retained defendant Caruso, and the defendant Pillsbury firm's predecessor (Caruso's then law firm), Shaw Pittman Potts & Trowbridge, to trace SSBT's assets and recover any amounts due and owing to J.V.W. Shortly thereafter, Caruso allegedly ignored information from Kelleher as to the location of attachable assets of SSBT and BTCB. On August 16, 1999, Correspondent Services Corporation, a clearing broker, commenced an interpleader action in the United States District Court for the Southern District of New York with respect to competing claims to the aforementioned CD. Plaintiffs herein, Kelleher and FECF (the holder of the CD) were named as defendants. Through Caruso, their attorney, plaintiffs filed a cross claim against SSBT and attached its property to the extent of $3 million. Caruso requested that Waggoner sign an affidavit stating that he had recovered approximately $7.7 million of the $10 million. Waggoner signed the affidavit although he now

asserts that the $7.7 million was not recovered. The $3 million attachment represents the unrecovered $2.3 million plus interest. The subject CD expired and its funds were moved to another CD. Accordingly, the district court dismissed the interpleader action for lack of subject matter jurisdiction inasmuch as the CD had no value (*see Correspondent Servs. Corp. v J.V.W. Inv. Ltd.*, 2004 US Dist LEXIS 19341, 2004 WL 2181087 [SDNY], *affd sub nom. Correspondent Servs. Corp. v First Equities Corp. of Fla.*, 442 F3d 767 [2d Cir 2006], *cert denied sub nom. Waggoner v Suisse Sec. Bank & Trust, Ltd.*, 549 US 1209 [2007]). The district court also ordered Waggoner to pay SSBT's attorneys' fees pursuant to CPLR 6212(e) upon making a finding that Waggoner had wrongfully attached SSBT's property.

In February 2001, the U.S. Senate Committee on Investigations issued the "Minority Staff of the Permanent Subcommittee on Investigations Report on Correspondent Banking: a Gateway for Money Laundering," detailing a number of financial frauds involving BTCB, including the transfer of plaintiffs' funds from the escrow account to a Swiss account. The report implicates Brazie in the investment scheme. In November 2001, Rodolfo Requena, BTCB's chairman and the president of BTC Financial Services, the parent company of FECF, pleaded guilty to

federal money laundering charges in the United States District Court for the Southern District of Florida. Plaintiffs allege that Caruso agreed to represent Requena but never disclosed that discussion to them. According to the complaint, Caruso, the Pillsbury firm and defendant Chadbourne & Parke did not advise Waggoner of any wrongdoing on the part of BTCB despite these damaging revelations. In February 2001, BTCB's license was revoked and it entered liquidation. SSBT's license was revoked the following month.

In November 2001, Caruso and his practice group left Pillsbury and began practicing at Chadbourne. In January 2002, Chadbourne replaced Pillsbury as plaintiffs' counsel in the federal action. Caruso left Chadbourne and joined defendant Bracewell & Giuliani as a partner in May 2005. Bracewell, in turn, replaced Chadbourne in the federal litigation, and continued to represent plaintiffs until discharged in May 2006. This action against Caruso, Bracewell, Chadbourne and Pillsbury was commenced in July 2007. The claims set forth in the amended complaint sound in legal malpractice, breach of fiduciary duty, fraud and conspiracy to commit fraud. Plaintiffs based their malpractice claim upon defendants' alleged failure to "timely and properly investigate and institute. . . recovery actions against SSBT and/or BTCB" before 2001 when these

institutions entered liquidation.

A cause of action for legal malpractice cannot be stated in the absence of an attorney-client relationship (*Baystone Equities, Inc. v Handel-Harbour*, 27 AD3d 231 [2006]). Accordingly, the legal malpractice claims against Chadbourne and Bracewell are not viable inasmuch as they were not plaintiffs' attorneys when the recovery and attachment remedies were purportedly available. Moreover, the legal malpractice cause of action was properly dismissed as to all defendants because plaintiffs have not demonstrated that they would have prevailed in any underlying proceeding but for defendants' alleged negligence (*Davis v Klein*, 88 NY2d 1008 [1996]).

Plaintiffs based their claim for breach of fiduciary duty upon defendants' nondisclosure of their employment of Duperier and Brazie as consultants, an alleged personal relationship between the two, and Caruso's alleged agreement to represent Requena. Plaintiffs assert that these undisclosed conflicts of interest prevented defendants from pursuing any claims against BTCB, which would have represented plaintiffs' best interests. As such, the claim for breach of fiduciary duty was properly dismissed because it is redundant of the legal malpractice cause of action (*see Sage Realty Corp. v Proskauer Rose L.L.P.*, 251 AD2d 35, 38-39 [1998]).

Plaintiffs based their fraud claim on Caruso's request that Waggoner sign the affidavit stating that $7.7 million of his funds had been recovered, his failure to cooperate with the Senate subcommittee's investigation, defendants' failure to disclose that plaintiffs' $10 million investment was stolen or the fraudulent nature of the HYIPs, their employment of Duperier and Brazie and their failure to disclose their own malpractice. The circumstances of a fraud claim must be stated in detail (CPLR 3016[b]). In order to state such a cause of action, a plaintiff must allege misrepresentation or concealment of a material fact, falsity, scienter by the wrongdoer, justifiable reliance on the deception, and resulting injury (*Zanett Lombardier, Ltd. v Maslow*, 29 AD3d 495 [2006]). Here, the fraud claim is not pleaded with the required detail because plaintiffs have failed to allege how they changed their position or otherwise relied upon any purported misrepresentations or omissions to their detriment. The required detail is also lacking with respect to causation because the complaint does not set forth how defendants' conduct caused plaintiffs to lose their $10 million. In addition, the claim of conspiracy to commit fraud is not viable because the State of New York does not recognize an independent cause of action in tort for conspiracy (*Salerno v Pandick, Inc.*, 144 AD2d 307, 308 [1988], *citing Alexander &*

*Alexander v Fritzen*, 68 NY2d 968, 969 [1986]).

Although we affirm Supreme Court's order, we do not do so on the ground that plaintiffs' legal malpractice claim against Pillsbury is time-barred. A legal malpractice action must be commenced within three years of accrual (CPLR 214[6], 203[a]). Accrual occurs when the malpractice is committed (*Shumsky v Eisenstein*, 96 NY2d 164, 166 [2001]). In this case, plaintiffs' malpractice claim against Pillsbury accrued nearly six years before this action was commenced. Under the doctrine of continuous representation, however, the statute of limitations is tolled while representation on the same matter in which the malpractice is alleged is ongoing (*see Glamm v Allen*, 57 NY2d 87 [1982]). The doctrine is rooted in recognition that a client cannot be expected to jeopardize a pending case or relationship with an attorney during the period that the attorney continues to handle the case (*see id.* at 94). In rendering its decision, Supreme Court ruled that the statute of limitations was not tolled as to Pillsbury because it ceased representing plaintiff in January 2002 when Caruso left the firm and took plaintiffs' case with him. In *HNH Intl., Ltd. v Pryor Cashman Sherman & Flynn LLP* (63 AD3d 534 [2009]), this Court has since held that the statute was tolled as to a malpractice claim against a law firm because the attorneys who handled the case continued to

represent the plaintiffs in the same matter, albeit at different law firms. Guided by this precedent, we now hold that the statute of limitations was tolled by the doctrine of continuous representation during the time that Caruso represented plaintiffs in the underlying matter while he was a partner at Chadbourne and Bracewell.

Sound policy considerations also support the tolling of the statute of limitations with respect to the legal malpractice claim against Pillsbury. Any suit brought by plaintiffs against Pillsbury would have been based upon Caruso's acts of malpractice. Caruso would have thereby been exposed to Pillsbury's potential claims for contribution or indemnification. As noted by the Court of Appeals in *Glamm*, a person cannot be expected to jeopardize a relationship with the attorney handling his or her case during the period that the attorney continues to represent him (57 NY2d at 94). An attorney-client relationship would certainly be jeopardized by a client's allegation that his or her attorney committed malpractice while representing the client. *Beal Bank, SSB v Arter & Hadden, LLP* (42 Cal 4th 503, 167 P3d 666 [2007]), a case defendants cite, is distinguishable because it involves the interpretation of a California statute that codifies the continuous representation doctrine. New York does not have a similar statute.

Accordingly, the order of Supreme Court, New York County (Bernard J. Fried, J.), entered September 11, 2008, which granted defendants' motion to dismiss the complaint pursuant to CPLR 3211, should be affirmed, with costs.

All concur.

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

ENTERED: SEPTEMBER 29, 2009