SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

DECEMBER 9, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, Nardelli, Richter, Román, JJ.

3567 Shou Fong Tam also known as Shou Fong Chan,
Plaintiff-Respondent-Appellant,

-against-

Metropolitan Life Insurance Company,
Defendant-Appellant-Respondent.

Index 600085/07

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K&L Gates LLP, New York (Michael R. Gordon of counsel), for appellant-respondent.

Jaroslawicz & Jaros LLC, New York (David Jaroslawicz of counsel), for respondent-appellant.

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Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 16, 2009, which denied defendant's motion for summary judgment to dismiss the complaint and grant its counterclaim, and denied plaintiff's cross motion for summary judgment, unanimously modified, on the law, to dismiss plaintiff's General Business Law § 349 claim, and otherwise affirmed, without costs.

This appeal concerns plaintiff Shou Fong Tam's right to recover death benefits under three life insurance policies issued in 1988, 1991, and 1992 by defendant Metropolitan Life Insurance Company (MetLife). The policies insured the life of non-party

James Ngai. Tam worked for MetLife as a sales representative and account executive from the late 1980s until 2008. She apparently sold the policies to Ngai, who would later become her fiancé. Subsequent to their purchase, Ngai transferred ownership of all three policies to Tam.

Tam made premium payments for over a decade, until December 2003, when the policies lapsed for nonpayment. Coverage continued temporarily through a nonforfeiture clause, which allowed the owner a grace period in which to pay past due premiums and reinstate coverage. When Tam was notified her policies had lapsed, she elected to have the premiums paid by accrued dividends. However, as the policies had lapsed, their reinstatement required forms to be signed by Mr. Ngai, as insured. Tam never submitted these forms. She alleges that she was promised notification by regular mail in the event that her dividends were insufficient to keep premium payments current. MetLife counters that no such promise was made, and that it was standard practice to send email notification, which is what it did. By letter dated July 2004, MetLife notified Tam that her premiums were past due and that the policies' "non-forfeiture" periods had expired.

In December 2004, Tam requested that the reinstatement forms be waived. MetLife refused, and Tam asked her manager, a higher level MetLife employee, to intercede on her behalf. Through e-

mails and phone calls, he attempted to get MetLife to waive the reinstatement form requirement. Mr. Ngai died in March of 2005. In May 2005, Tam spoke with MetLife agents and stated that the policies lapsed due to MetLife's negligence. MetLife then waived the reinstatement requirements. Company employees aver that they only allowed reinstatement without Ngai's signature based upon Tam's misrepresentation that she was the agent, not the beneficiary of the policies. Once reinstated, Tam paid the balance on the premiums and the policies became active. Tam then submitted a claim for death benefits, which was rejected.

She then brought this action alleging breach of contract and violation of General Business Law § 349. In its answer, defendant counterclaimed for rescission of the three policies. Both plaintiff and defendant moved for summary judgment, which the court denied. Both parties appealed. We modify to dismiss plaintiff's General Business Law § 349 claim, and otherwise affirm.

The IAS court properly denied plaintiff's and defendant's motions for summary judgment on the cause of action for breach of contract. There are material issues of fact as to whether plaintiff was properly notified of the imminent lapse of the insurance policies she owned, thus precluding summary judgment to either party (*see Gilbert Frank Corp. v Federal Ins. Co.*, 70 NY2d 966 [1988]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

There are also issues of fact concerning whether plaintiff misrepresented her status as the owner of the policies when attempting to have them reinstated without proper documentation.

However, we grant defendant's motion to dismiss the claim for violation of General Business Law § 349. The elements of a claim under that section include consumer-oriented conduct that is materially deceptive and causes injury to the plaintiff (*see Oswego Laborers Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995]; *New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 320 [1995]). Here, plaintiff contends that MetLife violated General Business Law § 349 by withholding crucial information regarding the status of policyholders' premium payments, in furtherance of a broad scheme to unlawfully avoid paying benefits. While it is settled that disputes involving insurance transactions can fall within the ambit of General Business Law § 349 (*Riordan v Nationwide Mut Fire Ins. Co.*, 977 F2d 47, 52 [1992]), private contractual disputes upon matters not affecting the consuming public are not actionable under this section (see *Continental*, 87 NY at 321; *Security Mutual Life Insurance Company of N.Y. v DiPasquale*, 283 AD2d 182 [2001], *lv dismissed* 97 NY2d 653 [2001]).

Plaintiff alleges misconduct in the handling of her policy and MetLife's failure to pay death benefits. However, her dispute with her insurer and their course of dealings is unique.

There is nothing in the record to indicate that there are any other policyholders similarly situated. Accordingly, we dismiss plaintiff's General Business Law § 349 claim. These facts do not present the type of consumer-oriented misconduct the statute was enacted to prevent.

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3843 The People of the State of New York, Dkt. 62232C/07
Respondent,

-against-

Marcus Smith,
Defendant-Appellant.

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Robert S. Dean, Center for Appellate Litigation, New York (Abigail Everett of counsel), and Milbank, Tweed, Hadley & McCloy LLP, New York (Ryan O. West of counsel), for appellant.

Robert T. Johnson, District Attorney, Bronx (Maureen L. Grosdidier of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (Eileen Koretz, J.H.O. at nonjury trial; John P. Collins, J. at sentence), rendered September 24, 2009, convicting defendant of attempted assault in the in the third degree and harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The testimony of the victim as credited by the court disproved defendant's justification defense beyond a reasonable doubt.

Defendant's challenge to the duration of his order of protection is unpreserved (*see People v Nieves*, 2 NY3d 310 [2004]) and we decline to review it in the interest of justice.

Defendant should address his request for an amendment of the order to the court that issued it (*see id.* at 317-318).

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3846 Juan D. Reyes, M.D., Index 24634/03
Plaintiff-Respondent,

-against-

Rafael Sequeira, M.D., et al.,
Defendants-Appellants,

424 East 138th Street, LLC,
Defendant.

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Mark S. Friedlander, New York, for appellants.

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

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Order, Supreme Court, Bronx County (Geoffrey D. Wright, J.), entered on or about February 23, 2010, which denied defendants' motion to vacate an order, same court (Dianne T. Renwick, J.), entered on or about April 17, 2008, setting the valuation of the subject real property and to stay the scheduled closing on the property, unanimously affirmed, with costs.

Defendants failed to assert a New York basis for vacating the April 17, 2008 order, which valued the property based on an average of three court-ordered appraisals and directed a sale despite outstanding unresolved collateral issues. In issuing the valuation order, the court did not ultimately exceed the authority granted to it by the parties to value the properties pursuant to the appraisals. That the valuation was based on

three competing appraisals rather than two, does not violate the agreement because the plaintiff specifically agreed to defer valuation to the Court.

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3852 In re Natalie L.,

A Child Under the Age of
Eighteen Years, etc.,

Lisette A.,
Respondent-Respondent,

Sean T., et al.,
Respondents,

Administration for Children's Services,
Petitioner-Appellant.

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

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (James J. Beha II of counsel), for respondent.

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

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Order, Family Court, Bronx County (Karen I. Lupuloff, J.), entered on or about April 27, 2010, which granted respondent mother Lisette A.'s application for the return of her child, unanimously affirmed, without costs.

Petitioner agency failed to demonstrate that return of the child posed a threat to her life or health (Family Ct Act § 1028[a]; *see Nicholson v Scoppetta*, 3 NY3d 357 [2004]). Any imminent risk to the child was eliminated by Family Court's order which, among other things, directed an order of protection against respondent father Sean T., directed the mother and child

to reside in a domestic violence shelter, required weekly visits from petitioner, and required the mother to avail herself of various services. Additionally, the court's decision was in the child's best interest in considering the harm inflicted on the child from her continued removal.

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3853 In re Gaetano Salvadore, et al., Index 112380/09
Petitioners,

-against-

New York City Loft Board, et al.,
Respondents.

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Robert M. Petrucci, New York, for petitioners.

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

Belkin Burden Wenig & Goldman, LLP, New York (Robert A. Jacobs of counsel), for 37 West Realty Co., respondent.

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Determination of respondent New York City Loft Board, dated April 23, 2009, to the extent it denied petitioners' application for reconsideration of an order, dated September 18, 2008, which, after a fact-finding hearing, recalculated rent overcharge awards to petitioners whose units were found to be covered by the Loft Law and determined that a zoning change in 2005 did not result in coverage for Unit 10 (leased to petitioner Bonafede) under the 1982 Loft Law, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Michael D. Stallman, J.], entered December 10, 2009), dismissed, without costs.

The Loft Board rationally, and in accordance with its own precedent, calculated the amount of petitioners' overcharge claim

by subtracting the total amount of rent paid during the period under review from the aggregate amount of the maximum legal rent for the period. It did not purport to resolve the landlord's claims for unpaid rent, and it was not shown to have relied on any documents submitted after the record was closed.

The Loft Board also acted rationally, and consistently with the language and legislative history of the Loft Law (Multiple Dwelling Law [MDL] article 7-C), in rejecting petitioners' claim that a 2005 amendment to the New York City zoning laws rendered Unit 10 subject to the Loft Law as originally enacted in 1982 (L 1982, ch 349, § 1; MDL § 280 *et seq.*). Recognizing "the important impact that those in the creative arts have on the cultural and economic life of New York City and the need for the protection of loft space suitable for their working and living purposes," the 1982 Loft Law was intended to "take a 'snap shot' of those people eligible for protection" at the time (Mem of Legis Rep of City of NY, 1982 McKinney's Session Laws of NY, at 2484, quoted in *Wolinsky v Kee Yip Realty Corp.*, 2 NY3d 487, 492 [2004]). The Loft Law has been extended to other buildings through subsequent enactments opening limited window periods with specific eligibility requirements (MDL §§ 281[4] and [5]). The Loft Board rationally interpreted § 281(1) and (2) as extending coverage only to buildings and units that met all the criteria of those sections during the window period defined by the statute,

i.e., April 1, 1980 to December 1, 1981, and not extending coverage to buildings in areas subsequently rezoned to permit residential use, except those located in areas that were designated as "study areas" at the time of enactment (MDL § 281[2][i], [iii]; MDL § 281[1][i]-[iii]). The 2005 zoning change, which permits residential use in the area in which the subject building is located, may result in Unit 10's being covered under other rent regulation laws, and the unit may be covered under a more recent amendment to the Loft Law (MDL § 281[5]; *see generally Wolinsky*, 2 NY3d at 487). However, we conclude that the zoning change does not result in coverage under the Loft Law as of 1982.

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Catterson, Acosta, Manzanet-Daniels, JJ.

3854 Towne Partners, LLC, Index 100108/09
Plaintiff-Respondent,

-against-

RJZM, LLC doing business as
All-Med & Rehab of New York,
Defendant-Appellant.

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Stroock & Stroock & Lavan LLP, New York (Kevin L. Smith of counsel), for appellant.

Kucker & Bruh, LLP, New York (Abner T. Zelman of counsel), for respondent.

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Order, Supreme Court, New York County (Marcy S. Friedman, J.), entered April 27, 2010, which granted plaintiff's motion for summary judgment and denied defendant's motions for summary judgment and for leave to amend its answer, unanimously modified, on the facts and the law, to grant defendant's motion for summary judgment in part on the issue of use and occupancy, and for leave to amend its answer to include the proposed counterclaim, and otherwise affirmed, without costs.

The parties' lease and subsequent settlement agreement require defendant to make "use and occupancy" payments of 150% of the applicable monthly rental amount "for each month and each portion of any month during which [defendant] holds over in the premises." As defendant held over for a "portion" of the month of November 2008, it is liable for use and occupancy for only

that portion of the month where it was in possession of the premises (*501 East 87th St. Realty Co., LLC v. Ole Pa Enterprises, Inc.*, 304 AD2d 310, 311 [2003] ["(t)he court properly awarded use and occupancy for the entire holdover period, i.e., from the expiration of the last lease through the time the apartment was finally vacated"]).

Defendant is not liable for the attorneys' fees incurred by plaintiff. The settlement agreement specifically references only Article 20 of the lease, which provided for liquidated damages. There is no provision in the stipulation requiring a deviation from the American rule, and we decline to read one into the stipulation (*Hooper Associates, Ltd. v. AGS Computer, Inc.*, 74 NY2d 487 [1989]).

Defendant established the viability of its proposed counterclaim for the payment of utility charges incurred by defendant after it surrendered the premises (*see* CPLR 3025[b]). Accordingly, defendant is directed to serve an amended answer asserting the proposed counterclaim within 20 days after the entry of this order, after which the parties will have an

opportunity to conduct discovery on the issue.

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

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3856 The People of the State of New York, Ind. 4747/07
Respondent,

-against-

Andre Barnes,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Richard Nahas 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 (Maxwell Wiley, J.), rendered on or about April 1, 2009,

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: DECEMBER 9, 2010

CLERK

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

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3857 The People of the State of New York, Dkt. 31424C/06
Respondent,

-against-

Richard Rosa,
Defendant-Appellant.

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

Robert T. Johnson, District Attorney, Bronx (Kayonia L. Whetstone of counsel), for respondent.

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Judgment, Supreme Court, Bronx County (John W. Carter, J.), rendered June 18, 2007, convicting defendant, after a nonjury trial, of attempted assault in the third degree and harassment in the second degree, and sentencing him to a conditional discharge, unanimously affirmed.

The court properly exercised its discretion in denying defendant's request for a sanction resulting from the unavailability of the tape recording of the victim's 911 call. Defendant has not demonstrated that the Sprint report would have been inadequate to elicit the essential information contained in the tape recording (*see e.g. People v McDermott*, 279 AD2d 361 [2001], *lv denied* 96 NY2d 803 [2001]).

Defendant's remaining contentions are unavailing (*see People v Correa*, 15 NY3d 213 [2010]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3858 Sheila Leffler, et al., Index 6458/03
Plaintiffs-Appellants,

-against-

Michael Feld, M.D.,
Defendant-Respondent.

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Norman A. Olch, New York, for appellants.

Edward J. Guardaro, Jr., White Plains, for respondent.

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Judgment, Supreme Court, Bronx County (Patricia Ann Williams, J.), entered February 23, 2009, after a jury trial in a medical malpractice action, dismissing the complaint, unanimously affirmed, without costs.

No basis exists to disturb the verdict (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206-207 [2004]), "especially [as] resolution of the case turns on an evaluation of conflicting expert testimony" (*Fontana v Kurian*, 214 AD2d 832, 833 [1995], *lv denied* 86 NY2d 707 [1995]), and on issues of credibility. This includes what plaintiff told defendant about her symptoms. However, the jury specifically rejected the plaintiff's claim that Altace caused plaintiff's condition.

The court properly refused to permit plaintiff to call a previously undisclosed coworker as a rebuttal witness, as the witness could have been called on plaintiff's direct case (*cf. Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980]; *see Hutchinson v*

Shaheen, 55 AD2d 833, 834 [1976]). Moreover, since the rebuttal witness would not have testified to what plaintiff told defendant about her symptoms, no substantial right was prejudiced by the preclusion of the witness's testimony (*see Frias v Fanning*, 119 AD2d 796, 797 [1986]).

Finally, the testimony of plaintiff's handwriting expert was properly precluded because it "was of questionable probative value and likely to involve distracting collateral issues" (*Heraud v Weissman*, 276 AD2d 376, 377 [2000], *lv denied*, 96 NY2d 705 [2001]). The pre-deliberations substitution of an alternate juror for a juror who was late and could not be contacted was also a proper exercise of discretion (*see People v Jeanty*, 94 NY2d 507, 517 [2000]; *People v Ballard*, 51 AD3d 1034, 1035-1036 [2008], *lv denied* 11 NY3d 734 [2008]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3859 Felicita Sanchez, by her Guardian, Jose Rivera, Plaintiff-Respondent, Index 101869/08

-against-

Kateri Residence, et al., Defendants-Appellants,

John/Jane Doe 1-20, etc., et al., Defendants.

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

Parker Waichman Alonso LLP, Port Washington (Jay L.T. Breakstone of counsel), for respondent.

Order, Supreme Court, New York County (Alice Schlesinger, J.), entered April 16, 2010, which granted plaintiff's motion to compel production and denied defendants' cross motion for a protective order, unanimously affirmed, without costs.

Plaintiff seeks production of a "summary and analysis" document prepared during the course of defendants' investigation into plaintiff's injuries allegedly suffered while she was in defendants' care. Defendants object, claiming the protection of the quality assurance privilege (*see Matter of Subpoena Duces Tecum to Doe [Park Assoc.]*, 99 NY2d 434 [2003]). The document was properly ordered produced because the report, although utilized by the quality assurance committee, had not been prepared by or at the behest of the committee (*see Clement v*

Kateri Residence, 60 AD3d 527 [2009]).

The IAS court also properly ordered production of the incident reports prepared by defendants, documenting broken bones and facial bruising. Defendants failed to demonstrate that the court's limitation of such disclosure to those reports prepared within a two-year period was overly broad or unduly burdensome.

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

ENTERED: DECEMBER 9, 2010

CLERK

Gonzalez, P.J., Saxe, Catterson, Acosta, Manzanet-Daniels, JJ.

3860 Smart Workout, Inc., Index 101073/10
Petitioner,

-against-

Environmental Control Board
of the City of New York,
Respondent.

_____

Elaine Platt, New York, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Scott Shorr of counsel), for respondent.

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Three administrative determinations of respondent, dated October 29, 2009, imposing a total of $5,500 in fines for 74 violations of New York City Administrative Code § 10-119, unanimously confirmed, the petition denied, and this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered June 16, 2010), dismissed, without costs.

Petitioner failed to offer any admissible evidence to refute the testimony of respondent's agents that violations had been issued only for those handbills affixed to City property. Thus, the Board's determination was supported by substantial evidence and must be confirmed. (*see 300 Gramatan Ave. Assoc. v State Div. of Human Rights*, 45 NY2d 176 [1978]; *cf. Matter of Sulzer v Environmental Control Bd. of City of N.Y.*, 165 AD2d 270, 280 [1991]).

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

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

ENTERED: DECEMBER 9, 2010

CLERK

Nardelli, J.P., McGuire, Acosta, Freedman, Román, JJ.

2667 Christian Vasquez, Index 100081/04
Plaintiff-Respondent-Appellant, 590744/04

-against-

Urbahn Associates Inc.,
Defendant,

Great American Contracting Corp., et al.,
Defendants-Appellants-Respondents.

[And A Third-Party Action]

_____

Shaub, Ahmuty, Citrin & Spratt, LLP, Lake Success (Robert M. Ortiz of counsel), for appellants-respondents.

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

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Order, Supreme Court, New York County (Edward H. Lehner, J.), entered August 6, 2009, which granted the motion of defendants Great American Contracting Corp. and Home Again in Harlem LLC for summary judgment dismissing the complaint only insofar as it sought to dismiss the Labor Law § 241(6) cause of action, and granted plaintiff's cross motion for summary judgment on the issue of liability on his Labor Law § 240(1) claim, modified, on the law, the cross motion denied, the motion denied as to the Labor Law § 241(6) cause of action, and, upon a search of the record, plaintiff granted summary judgment on the issue of liability on his Labor Law § 241(6) cause of action insofar as it is premised upon a violation of Industrial Code (12 NYCRR) § 23-

3.3(c), and otherwise affirmed, without costs.

12 NYCRR 23-1.7(f) imposes a duty upon a defendant to provide a safe staircase, free of defects (*Murphy v American Airlines*, 277 AD2d 25, 26 [2000] [defendant granted seeking summary judgment on plaintiff's Labor Law § 241(6) claim based upon a violation of 12 NYCRR 23-1.7(f) when plaintiff was not injured as a result of a *defect* in the staircase or debris left thereon]; *see also McGarry v CVP 1 LLC*, 55 AD3d 441, 442 [2008]). The conflicting evidence as to whether the stairs were defective raises a question of fact with respect to whether 12 NYCRR 23-1.7(f) was violated by the defendants. Summary resolution of this issue is thus precluded.

However, it is clear, upon a search of the record, that defendants violated 12 NYCRR 23-3.3(c) and plaintiff is entitled to summary judgment to the extent that this section of the Industrial Code serves as a predicate for his Labor Law § 241(6) claim (*see Cardenas v One State St., LLC,* 68 AD3d 436, 438 [2009]; *Gawel v Consolidated Edison Co. of N.Y., Inc.*, 237 AD2d 138, 138 [1997]). 12 NYCRR 23-3.3(c) mandates "continuing inspections . . . by designated persons as the work progresses to detect any hazards to any person resulting from weakened or deteriorated floors or walls or from loosened material" and is explicitly aimed at preventing persons from working "where such hazards exist until protection has been provided by shoring,

bracing or other effective means." Defendants failed to demonstrate that the mandated inspections were conducted, since their evidence on this issue consisted solely of an affidavit by the general contractor's project manager, which was at odds with her deposition testimony. When the project manager was deposed, she recalled very little about the project or the accident, continually offering responses such as "I don't know," or "I don't recall." Specifically, she did not recall how often she visited the building, when or even whether she visited the building during the demolition phase, whether an engineering survey was performed before the demolition began, whether she ever met with any engineers in connection with the project, what type of flooring was in place, whether she observed any rotting floors or missing sections of flooring, whether there were any vertical columns supporting the building, whether she prepared any inspection reports regarding the building's interior, whether there was a safety plan or any meetings or discussions regarding safety, and whether regular inspections were conducted. Miraculously, in her affidavit, proffered in support of defendants' motion for summary judgment and prepared a year after her deposition, the project manager recalled conducting walk-through inspections of the building on a regular basis, such that she was now able to establish defendants' compliance with 12 NYCRR 23-3.3(c). Clearly, her affidavit was tailored to support

defendants' motion for summary judgment and to oppose plaintiff's cross motion seeking the same relief. Under these circumstances, the affidavit cannot be accorded any weight and fails to raise an issue of fact (*see Lupinsky v Windham Constr. Corp.*, 293 AD2d 317, 318 [2002]; *Joe v Orbit Indus.*, 269 AD2d 121, 122 [2000]; *Phillips v Bronx Lebanon Hosp.*, 268 AD2d 318, 320 [2000]). Since, as indicated above, plaintiff's evidence established that no such inspections were conducted, plaintiff is entitled to summary judgment on the issue of liability under Labor Law § 241(6) predicated upon a violation of 12 NYCRR 23-3.3(c).

As to the Labor Law § 200 and the common-law negligence causes of action, liability generally lies if a defendant created the dangerous condition alleged or had prior notice of the same (*Mitchell v New York Univ.*, 12 AD3d 200, 201 [2004]; *Paladino v Society of N.Y. Hosp.*, 307 AD2d 343, 345 [2003]). Since there exists an issue of fact as to whether these defendants had prior notice that the stairs were defective and thus a question as to whether it was foreseeable that they could fail or collapse, summary judgment in defendants' favor and with respect to plaintiff's common law negligence and Labor Law § 200 claim was properly denied.

Whether the collapse or failure of a permanent structure gives rise to liability under Labor Law § 240(1) turns on whether

"the risk of injury from an elevation-related hazard [is] foreseeable . . ." (*Jones v 414 Equities LLC*, 57 AD3d 65, 75 [2008]; *see also Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 [2008]). While plaintiff testified that the building in which he was injured was in a dilapidated condition before the commencement of the demolition work and that the stairs which collapsed, causing his accident, were "old" and "all like destroyed," Segundo Maldonado, president of the company which employed plaintiff, testified that the stairs were "solid" and "in good condition" prior to plaintiff's accident. Accordingly, a question of fact exists as to whether the collapse of the permanent stairs was foreseeable. This material issue of fact thus precludes summary judgment on plaintiff's claim pursuant to Labor Law § 240(1).

The dissent takes the untenable position that in denying plaintiff's cross motion for summary judgment on his claim pursuant to Labor Law § 240(1), we continue to require a statutorily unsupported foreseeability element. Not only is the dissent's position unsupported by this court's well reasoned precedent (*see Jones v 414 Equities LLC*, 57 AD3d 75 [2008], *supra*; *Espinosa v Azure Holdings II, LP*, 58 AD3d 287, 291 [2008], *supra*), but by precedent in the Second Department (*Shipkoski v Watch Case Factory Assoc.*, 292 AD2d 587, 589 [2002]), and the

Court of Appeals (*Gordon v Eastern Ry. Supply*, 82 NY2d 555, 562 [1993] ["(t)o establish a prima facie case (of a violation of Labor Law § 240[1]) plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that *the risk of some injury from defendants' conduct was foreseeable*" (emphasis added]). While it is true that Labor Law § 240(1), fails to mention any foreseeability requirement as a predicate to its violation, a foreseeability requirement must necessarily be imputed as to every claim pursuant thereto, when as here, the claim is premised on a collapsing permanent structure. Labor Law § 240(1) applies when there is an inherent risk in the task being performed "because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]). Thus, "[t]he contemplated hazards are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted or secured" (*id.* at 514). Since permanent structures, such as the stairs here, are normally not expected to collapse or

fail, work being performed thereon, much like work performed at ground level and not involving the hoisting or securing of materials, does not usually expose a worker to a gravity-related hazard. Accordingly, only if a defendant has reason to foresee that the permanent structure is likely to collapse, does it then have to comply with the mandates of Labor Law § 240(1) by providing the safety devices enumerated therein. To hold otherwise, as proposed by the dissent, nonsensically imposes liability upon a defendant when the work being performed does not expose a worker, at the outset, to a gravity related hazard; the hallmark of liability under Labor Law § 240(1).

Zimmer v Chemung County Performing Arts (65 NY2d 513 [1985) does not alter our holding because it fails to address the pertinent issue. Of course it is true, as the court held in *Zimmer*, that when safety devices are required pursuant to Labor Law § 240(1), circumstantial reasonableness plays no role in the analysis related to the failure to provide such devices (*id.* at 523). However, the issue here is not whether defendants acted reasonably in failing to provide safety devices when the circumstances so warranted, but rather whether it was foreseeable that the work being performed exposed plaintiff to a gravity-related hazard such that safety devices should have been provided in the first place.

The dissent's second position, while sound public policy, is both legally and factually untenable. While as a policy matter, a defendant who takes a head-in-the-sand approach should not be rewarded for such gross neglect, we find no support for the dissent's imputation of foreseeability *solely* because a defendant takes no steps which would enable him or her to foresee that an accident is likely. Foreseeability is "[t]he risk reasonably to be perceived . . .; it is risk to another or to others within the range of apprehension" (*Palsgraf v Long Is. R.R. Co.* 248 NY 339, 344 [1928]). Assuming, arguendo, that the defendants here took no steps to ascertain the condition of the building wherein plaintiff worked, we nonetheless disagree that this, by itself, leads to a finding of foreseeability as a matter of law since in such case, albeit through their own neglect, and barring other avenues of notice, defendants would have had no reason to perceive or apprehend prior to the accident that the stairs were in a condition such that they were likely to collapse. A review of the record further weakens the dissent's position, since while defendants may not have undertaken inspections to the extent urged by the dissent, or to the extent necessary to satisfy the "continuing inspections" requirement promulgated by 12 NYCRR 23-3.3(c), defendants did in fact inspect the premises prior to plaintiff's accident, including the stairs and beams supporting them, thereafter concluding that they were sound. Based on this

record, whether this accident was foreseeable so as to require defendants to provide the safety devices mandated by Labor Law § 240(1) is a question of fact. We have considered the parties' remaining arguments for affirmative relief and find them unavailing.

All concur except Acosta and Freedman, JJ. who dissent in part in a memorandum by Acosta, J. as follows:

ACOSTA, J. (dissenting in part)

Because I believe that the majority is reading into Labor Law § 240(1) an element that is found nowhere in the statute, I respectfully dissent, and would grant plaintiff's cross motion for summary judgment on the issue of liability under Labor Law § 240(1). The majority's position is that a plaintiff bears the burden of demonstrating that a particular injury was foreseeable. In so ruling, the majority misreads the Court of Appeals holding in *Gordon v Eastern Ry. Supply* (82 NY2d 555 [1993]). In *Gordon*, the Court of Appeals explicitly held that a "plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate that the risk of some injury from *defendant's conduct* was foreseeable" (*id.* at 562) (emphasis added). Thus, the statute imposes no requirement that a particular accident be foreseeable, as urged by the majority. It is enough that given the inherently dangerous conditions of work sites, it is foreseeable that an owner or contractor's failure to provide safety devices to workers, as here, may create an injury.

Significantly, the plaintiff in *Gordon* was not injured as a result of hitting the ground when he fell off his ladder, but rather because he lost control of a sandblaster which, due to a defective trigger, continuously sprayed plaintiff with sand. According to the defendant in *Gordon*, the injury was

unforeseeable. Although the plaintiff was provided with a ladder, the Court held that defendants could not avoid liability under Labor Law § 240(1) since the core objective of the statute was not met - namely, preventing plaintiff from falling. Since defendants in *Gordon* failed to provide the proper safety devices to the plaintiff, it was of no moment that the *exact* injury suffered by plaintiff was not foreseeable. The injury, the Court held, "was a foreseeable result of [performing covered activity] from an elevated position" (*id.* at 562).[1] The breach of the statute by defendants was sufficient to find liability. Under the majority's rationale, plaintiff's § 240(1) claim in *Gordon* would have been dismissed.

The plain language of Labor Law § 240(1) mandates that in the demolition of a "*structure,*" contractors and owners "*shall* furnish" safety devices to workers (emphasis added). Nowhere is there a requirement that owners and contractors have to supply safety devices only when they divine there is a foreseeable risk of injury in a particular task because of the employee's relative elevation. Nor, as the majority urges, is there a distinction in the statute between a permanent structure and a temporary

[1]The Court noted that "[a]n independent intervening act may constitute a superceding cause, and be sufficient to relieve a defendant of liability, if it is of such an extraordinary nature or so attenuated from the defendants' conduct that responsibility for the injury should not reasonably be attributed to them" (*id.* at 562). But, that is not the case here.

structure.

The majority heavily relies on *Jones v 414 Equities LLC* (57 AD3d 65 [2008]) wherein this Court held that a plaintiff who was engaged in a protected activity (demolition work) at the time of his accident was not entitled to judgment as a matter of law where he failed to demonstrate that the collapse of the floor on which he was standing was foreseeable. I concurred with the majority opinion in *Jones*. However, upon a closer examination of the statute and in the absence of any Court of Appeals case directly on point, I now believe that a better approach would be to not read into the statute a foreseeability requirement, lest we encourage contractors, as here, to take a head-in-the-sand approach to their statutory obligations.

Moreover, given the dangerous conditions of construction and demolition sites, imposing a foreseeability requirement may result in unnecessary and preventable injuries to workers. Placing on plaintiffs the burden to demonstrate a particular accident was foreseeable disturbs the balance struck by the legislature between employee safety and employer cost in promulgating this absolute liability statute. It is hardly within the ambit of this Court's majority to change this very important legislative choice.

Indeed, reading such a requirement into the statute goes directly against the legislative intent. For instance, the

sponsors of the 1969 amendments to the Labor Law made it absolutely clear that "[t]he Labor Law was enacted for the *sole* purpose of protecting workmen" (Mem. of Sen. Calandra and Assemblyman Amann, 1969 N Y Legis Ann, 1969 at 407 [emphasis added]). The Court of Appeals has recognized this legislative intent of placing ultimate responsibility for safety on owners and general contractors, rather than workers who "are scarcely in a position to protect themselves from accident" (*Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 520 [1985] [internal citations omitted]).

The Court of Appeals has also held that "this statute is one for the protection of workmen from injury and undoubtedly is to be construed as *liberally* as may be for the accomplishment of the purpose for which it was thus framed" (*id.* at 521) [emphasis added]). Reading into the statute a foreseeability requirement would, therefore, not only limit the scope of the statute and go against Court of Appeals guidance on the issue, but also fly in the face of the statute's legislative intent, which primarily is to ensure the safety of workers, not to limit contractor liability to accidents that are foreseeable.[2]

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[2] This risk is evidenced in another case relied on by the majority, *Espinosa v Azure Holding II, LP* (58 AD3d 287 [2008]). There, a construction worker on a rehabilitation project sustained injuries when the sidewalk he was standing on collapsed into the cellar vault below. This Court held that summary judgment on Labor Law § 240(1) was not warranted inasmuch as there was an issue as to whether the collapse was foreseeable.

In any event, were foreseeability a required element, I would nevertheless find that plaintiff has demonstrated that he is entitled to summary judgment on his Labor Law § 240(1) claim. This case is clearly distinguishable from *Jones v 414 Equities LLC* (57 AD3d 65 [2008], *supra*), on which the majority relies. In *Jones*, the building's permanent wooden floors were not to be removed during the renovation of the building. In the present case the flooring of the entire building was to be removed as part of the renovation. Jackhammers were employed, and renovation necessitated making holes in the side walls to loosen and remove beams, which clearly compromised the integrity of the floors.

Moreover, unlike the building in *Jones*, the building here had a hole in the roof, thus exposing the floors to the elements. The building had been abandoned by the City since 1974, until it was purchased by the owner from the City in 2003 in "as is" condition for $1. Thus, the building sat for three decades with no maintenance whatsoever. There is no indication that this was the case in *Jones*. Given all these factors, I believe it is glaringly evident that the type of accident that occurred was indeed foreseeable.

Most troubling to me, however, is the fact that the general

The injury, I believe, may have been prevented were the statute strictly adhered to.

contractor and the owner took a head-in-the-sand approach to their safety obligations, and now cavalierly claim that the accident was not foreseeable. There is no indication whatsoever that the general contractor or owner took any reasonable step to ensure the safety of their workers.

For instance, the principal of the entity hired by the general contractor to perform the demolition and debris removal work testified that there was no engineering survey performed by a qualified structural engineer before the work began. This survey is essential to determine the stability of the interior and the risk of an unplanned collapse. He further testified that he never saw any inspection reports from any inspections of the flooring, that there was no safety officer, and he was not aware of any safety meetings having been held with employees. Significantly, he testified that the structural integrity of the floors was checked by merely walking on them.

Plaintiff's expert affidavit, on the other hand, made clear that proper inspection and safety procedures for a construction project of this magnitude were not in place, and that, to the extent that any inspections were performed at all, they were not done by a professional structural engineer qualified to evaluate the changing structural conditions of the building. It is thus clear that defendants did not even take minimal precautions at the work site. I do not believe that defendants' failure to

ensure their workers' safety should now allow them to claim the accident was not foreseeable. This Court should be cautious in making Labor Law § 240(1) claims contingent on foreseeability lest employers ignore the safety of their workers behind the shield of foreseeability. Preventive measures in line with the spirit of Labor Law § 240(1) will undoubtedly prevent certain injuries, and employers would be wise to protect their workers rather than expend resources on unnecessary litigation.

The majority's position that an owner or contractor can completely ignore any safety hazards in a work site completely obfuscates the purpose of the "extreme protection" afforded by the statute, and defies logic. If the majority's reasoning is accepted, no matter how obvious a condition may be, if an owner or contractor simply asserts that it did not know of the condition because it took no preventive measure whatsoever, it will be insulated from liability. Such reasoning turns the Labor Law completely on its head.

The majority cites to the universally recognized *Palsgraf* case to define foreseeability as "[t]he risk reasonably to be *perceived . . . ;* it is risk to another or to others within the range of *apprehension"* (*Palsgraf v Long Is. R.R. Co.*, 248 NY 339, 344 [1928] [emphasis added]). Yet, in the same breath the majority urges that through "neglect" a defendant will have no obligation to perceive a dangerous situation. I do not believe

Judge Cardozo meant to define reasonableness as looking the other way. The majority's conclusion here is that whether this accident was foreseeable is a question of fact. However, this question would have to be resolved by determining whether defendants knew or should have known of a dangerous condition had they taken *reasonable* steps. Unfortunately, based on the majority's logic, whether defendants should have known of the perilous condition is irrelevant, inasmuch as the majority makes clear that "albeit through their own neglect, defendants would have had no reason to perceive or apprehend that prior to the accident the stairs were in a condition such that they were likely to collapse."

Furthermore, such a position is completely at odds with Court of Appeals precedent. In *Zimmer v Chemung County Performing Arts* (65 NY2d 513 [1985], *supra*), the Court of Appeals explicitly recognized that Labor Law § 240(1) has an unvarying standard and "[t]he question of circumstantial reasonableness is therefore irrelevant under subdivision 1 of Section 240" (*id.* at 523 [internal citations omitted]). *Zimmer* is perfectly in line with *Gordon v Eastern Ry. Supply* (82 NY2d 555 [1993], *supra*), to which the majority cites for the proposition that "[t]o establish a prima facie case plaintiff need not demonstrate that the precise manner in which the accident happened or the injuries occurred was foreseeable; it is sufficient that he demonstrate

that the risk of some injury from defendants' *conduct* was foreseeable" (id. at 562 [emphasis added]). Here the actionable *conduct* of defendants was failing to provide plaintiff with appropriate safety devices (*see Zimmer*, 65 NY2d at 522 ["a violation of section 240[1] . . . creates absolute liability. The failure to provide such safety devices is such a violation"]). Plaintiff has undeniably made out his prima facie case in that he was working in a construction site and was injured as a result of an elevation related risk. Defendants, in my view, have utterly failed to demonstrate that plaintiff was afforded appropriate safety devices. It is simply incongruent for the majority to cite to *Gordon* to support its holding that defendants here are not liable under Labor Law § 240(1). In *Gordon*, the plaintiff was at least provided a ladder, which, albeit, proved inadequate.

The majority also astonishingly holds that inasmuch as permanent structures are not "normally" expected to collapse, defendants are not required to comply with the strict requirements of the statute. This position is a slippery slope that defeats the clear legislative intent to protect workers. Moreover, the grafting of a foreseeability element into section 240(1) permits these blanket statements that a permanent structure of defendant's own choosing is not normally expected to collapse or fail even when, as here, it does. Given the

majority's holding, it is difficult to fathom the need for Labor Law § 240(1) since the elevated risk element of the statute is eliminated simply by defendant's claim that although plaintiff's injury was the result of gravity, the occurrence was not "normal" and therefore the defendant had no duty to protect its workers. Accidents are occurrences that by definition happen outside the "norm."

Permanent structures, like temporary structures, are bound to collapse depending on *the nature of the work* being done on the structure. Thus, as here, if the permanent structure has been abandoned for three decades, and exposed to the elements, and the supporting beams of the floors were loosened, the requirement of proper safety devices is based not on some intangible element of foreseeability, but rather on the nature of the work (i.e. elevation-related construction).

As a final matter, the majority's flawed logic is further highlighted when in addressing plaintiff's Labor Law § 241(6) claim, it chooses to discredit the project manager's affidavit as tailored to support defendant's summary judgment motion and to

oppose plaintiff's cross motion. However, to buttress its position that there is a question of fact as to foreseeability, the majority incredibly asserts that the project manager's later claim that the premises were inspected should be considered.

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

ENTERED: DECEMBER 9, 2010

CLERK

Andrias, J.P., Saxe, Sweeny, Nardelli, Catterson, JJ.

3046 In re Len Flores, Index 112583/09
Petitioner-Appellant,

-against-

New York University,
Respondent-Respondent.

Lynn, Gartner & Dunne, LLP, Mineola (Kenneth L. Gartner of counsel), for appellant.

Bonnie Brier, New York (Nancy Kilson of counsel), for respondent.

Order and judgment (one paper), Supreme Court, New York County (Eileen A. Rakower, J.), entered February 22, 2010, which granted respondent University's motion to dismiss an article 78 proceeding to annul its determination expelling petitioner from its dental college for cheating, and dismissed the petition, unanimously affirmed, without costs.

The documentary evidence submitted with the petition demonstrates that, contrary to petitioner's allegations, the finding that petitioner had cheated in violation of the college's ethics code was based not just on hearsay (*but see Matter of Ebert v Yeshiva Univ.*, 28 AD3d 315, 316 [2006]), but also on petitioner's admission that he glanced at another student's test paper. Petitioner's denial that he made such admission at any of the unrecorded interviews and hearings conducted pursuant to the college's disciplinary procedures raises an issue of credibility that is immaterial in an article 78 proceeding that, like this,

does not involve a determination made as a result of a hearing mandated by law, and in any event is largely unreviewable (*see Matter of Berenhaus v Ward*, 70 NY2d 436, 443-444 [1987]). The penalty of expulsion without possibility of reinstatement does not shock our sense of fairness (*see generally Matter of Pell v Board of* Educ., 34 NY2d 222, 233 [1974]; *cf. Matter of Carr v St. John's Univ.*, 17 AD2d 632, 634 [1962], *affd* 12 NY2d 802 [1962]). We have considered petitioner's other arguments and find them unavailing.

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

ENTERED: DECEMBER 9, 2010

CLERK

Friedman, J.P., Sweeny, Catterson, Renwick, Román, JJ.

3603 Leigh Short, Index 105678/05
Plaintiff-Appellant,

-against-

Deutsche Bank Securities, Inc.,
Defendant-Respondent.

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Liddle & Robinson, LLP, New York (David M. Marek of counsel), for appellant.

Sidley Austin Brown & Wood, LLP, New York (Laura H. Allen of counsel), for respondent.

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Order, Supreme Court, New York County (Debra A. James, J.), entered June 24, 2009, which, to the extent appealed from as limited by the briefs, granted defendant's motion for summary judgment dismissing the causes of action alleging employment discrimination under Executive Law § 296 (the State Human Rights Law) and Administrative Code of City of NY § 8-107(1)(a) (the City Human Rights Law), unanimously affirmed, without costs.

Plaintiff, an Australian citizen, was employed by Deutsche Bank as a salesperson working on Asian and Australian accounts from March 2001 until she resigned on May 5, 2004, when her visa expired. At the end of 2001, she received a guaranteed bonus; the next year she was one of the top performers on the desk and received the highest bonus awarded. Plaintiff alleges that starting in late 2003, the manager of the Australasian desk, Raymond Kim, tried to push her out by not talking to her,

criticizing her unfairly, reassigning her Asian accounts (which accounted for a large portion of her revenue) to men, and, ultimately, giving her a bonus lower than the amount she received the previous year and about 30% less than the bonuses he gave his two favorite male employees, one of whom had only worked there for six months.

After resigning, plaintiff filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that Kim created a "misogynistic culture" in which men entertained clients at strip clubs and that all four female salespeople who were in the department when she arrived had left by 2004. Kim was terminated by defendant after receiving a written warning for making an inappropriate advance to a female employee and after an internal investigation found that he had improperly charged such outings to the company. The EEOC found reasonable cause to believe that defendant had discriminated against plaintiff and a class of similarly situated females on its Asian and Australian Sales desks on the basis of sex, and that evidence indicated "discrimination regarding compensation as well as the terms, conditions or privileges of their employment." The EEOC finding provides some evidence of discrimination (*Philbrook v Ansonia Bd. of Educ.*, 757 F2d 476, 481 [2d Cir 1985], *affd* 479 US 60 [1986]). However, such a finding is by no means dispositive (*id.*).

To establish a constructive discharge, plaintiff was

required to produce evidence that her employer "deliberately created working conditions so intolerable, difficult or unpleasant that a reasonable person would have felt compelled to resign" (*Mascola v City Univ. of N.Y.*, 14 AD3d 409, 410 [2005], citing *Stetson v NYNEX Serv. Co.*, 995 F2d 355, 361 [2d Cir 1993]). Even when the evidence is viewed in a light most favorable to her, plaintiff's complaints about work assignments and bonus compensation do not demonstrate an intolerable work environment that would lead a reasonable person to feel compelled to resign. Moreover, defendant showed that plaintiff had long planned to stop working in 2004 to travel and pursue other interests and that she acted in accordance with that plan by taking steps to leave New York before defendant had even completed its investigation into her charges. She rejected out of hand defendant's offers of employment in positions that would not report directly to Kim.

As for plaintiff's claim of unequal treatment with respect to the terms and conditions of employment based on gender, defendant does not dispute that the reassignment of some or all of plaintiff's Asian accounts and the decrease in her bonus compensation were adverse employment actions but contends that plaintiff did not make a prima facie showing that the actions occurred under circumstances giving rise to an inference of discrimination, and that, in any event, the actions were taken

for legitimate, nondiscriminatory reasons (*see Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 305 [2004]). The threshold for a prima facie showing is low (*see id.*). Viewed as a whole, the record evinces circumstances from which a factfinder could infer discrimination (*see generally Chambers v TRM Copy Ctrs. Corp.*, 43 F3d 29, 37 [2d Cir 1994]). Among other things, there was evidence that salespeople on the desk perceived Kim as favoring male salespersons, expected women to be "subservient," had a "chauvinistic" attitude toward women, and particularly disliked plaintiff, whom he perceived as disrespectful to him.

However, with respect to the reassignment of Asian accounts, defendant submitted evidence that the decision to have plaintiff focus on Australian product was initiated not by Kim, but by the new head of Australian product, and that the decision was made for legitimate, nondiscriminatory reasons related to staffing and the desire to rebuild the Australian desk. Accordingly, defendant successfully rebutted plaintiff's prima facie showing of discrimination (*Ferrante v American Lung Assn.*, 90 NY2d 623, 629 [1997]; *Mary's Honor Ctr. v Hicks*, 509 US 502, 507 [1997]). Plaintiff did not submit evidence sufficient to raise an issue of fact whether those explanations were pretextual (*id.*).

With respect to the award of bonuses, defendant relies largely on the fact that plaintiff received top bonuses her first two years and that, in 2003, another top female salesperson,

Elaine Yu, received the second highest bonus and plaintiff received the third highest. Since prior equal treatment of an employee undermines an inference of subsequent discrimination (*see Chin v ABN-Amro N. Am. Inc.*, 463 F Supp 2d 294, 303-304 [ED NY 2006]), plaintiff fails to establish a prima facie case of gender discrimination. Assuming arguendo, that plaintiff had in fact established a prima facie case of discrimination based on the way bonuses were allocated in 2003, defendant nevertheless successfully rebuts such claim inasmuch as Kim explained that the reason for the diminution of plaintiff's bonus was that she had not improved her results to the same degree as had others and had shown poor teamwork. Plaintiff presents insufficient evidence to raise an issue of fact as to whether the reasons proffered by defendant justifying the allocation of bonuses was pretextual.

For the foregoing reasons, summary judgment was properly granted in defendant's favor with respect to plaintiff's claim under the New York City Human Rights Law. A claim under that statute lies when it is "proven by a preponderance of the evidence that she [the plaintiff] has been treated less well than other employees because of her gender" (*Williams v New York City Hous. Auth.*, 61 AD3d 62, 78 [2009], *lv denied* 13 NY3d 702 [2009]). While such a determination is ordinarily one for the trier of fact (i*d.*), here it is clear that the disparate treatment alleged was attributable to legitimate business and

nondiscriminatory reasons rather than plaintiff's gender.

Plaintiff failed to present evidence of a hostile work environment under the City Human Rights Law. The various complaints about Kim's conduct in the workplace were nothing more than non-actionable petty slights and minor inconveniences (*see Williams*, 61 AD3d at 79-80), which in any event may be viewed by a reasonable employee as a function of Kim's management style, unrelated to gender discrimination.

Plaintiff did not present evidence of widespread acts of intentional discrimination against individuals, as is required to bring a "pattern and practice" discrimination claim (*Robinson v Metro-North Commuter R.R. Co.*, 267 F3d 147, 158 [2nd Cir 2001], *cert denied* 535 US 951 [2002]). Thus, it is unnecessary to reach the issue whether an individual plaintiff can assert such a claim.

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

ENTERED: DECEMBER 9, 2010

CLERK

Andrias, J.P., Catterson, Moskowitz, Manzanet-Daniels, Román, JJ.

3689 In re Brett R.,
Petitioner-Appellant,

-against-

Marla E.-R.,
Respondent-Respondent.

_____

Steven N. Feinman, White Plains, for appellant.

Beldock Levine & Hoffman LLP, New York (Jonathan K. Pollack of counsel), for respondent.

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Order, Family Court, New York County (Gloria Sosa-Lintner, J.), entered on or about November 18, 2009, which dismissed this proceeding for custody of petitioner's daughter, unanimously affirmed, without costs.

There is no evidence in this record that respondent wrongfully removed the subject child from New York State. Since the child resided outside the state for more than six months prior to the commencement of this proceeding, petitioner has failed to establish that New York is the child's home state (*see* Domestic Relations Law § 75-a[7]), thus depriving the Family Court of jurisdiction to hear this matter (§ 76[1][a]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ

3827 Thaddeus Daniels, Index 117973/09
Plaintiff-Appellant,

-against-

Commerzbank, et al.,
Defendants-Respondents,

Dresdner Kleinwort,
Defendant.

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Law Firm of Eric Andrew Suffin, New York (Eric A. Suffin of counsel), for appellant.

Epstein Becker Green, P.C., New York (Lauren A. Malanga of counsel), for respondents.

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Order, Supreme Court, New York County (Louis B. York, J.), entered May 7, 2010, which, in an action alleging employment discrimination, granted defendants' motion to dismiss the action on the ground that there was a prior agreement to arbitrate all claims, unanimously affirmed, with costs.

The motion court properly found that the subject arbitration agreement was clear on its face and was a typical agreement routinely entered into by parties who wish to arbitrate. Although plaintiff does not recall signing the agreement, he does not dispute his signature and he offers nothing to overcome the presumption that he knew its contents and assented to them (*see Metzger v Aetna Ins. Co.*, 227 NY 411, 416 [1920]; *see also Ciago v Ameriquest Mtge. Co.*, 295 F Supp 2d 324, 329 [SD NY 2003]). Furthermore, the record is devoid of an indication that the

agreement was "so grossly unreasonable or unconscionable in the light of the mores and business practices of the time and place as to be unenforceable according to its literal terms" (*Gillman v Chase Manhattan Bank*, 73 NY2d 1, 10 [1988] [internal quotation marks and citation omitted]; *compare Brennan v Bally Total Fitness*, 198 F Supp 2d 377 [SD NY 2002]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3828 In re Alyssa Genevieve C.,
also known as Alyssa C-McG.,

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

Laura Marie McG., etc.,
Respondent-Appellant,

New York Foundling Hospital,
Petitioner-Respondent,

Commissioner of Social Services of
the City of New York,
Respondent.

_____

Jay A. Maller, New York, for appellant.

Law Office of Quinlan and Fields, Hawthorne (Daniel Gartenstein of counsel), for The New York Foundling Hospital, respondent.

Lawyers for Children, Inc., New York (Elizabeth S. Hyon of counsel), Law Guardian.

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Order, Family Court, New York County (Susan K. Knipps, J.), entered on or about June 12, 2009, which, insofar as appealed from, terminated respondent mother's parental rights to the subject child upon a finding of mental illness, and committed custody and guardianship of the child to petitioner agency and the Commissioner of Social Services for the purpose of adoption, unanimously affirmed, without costs.

Clear and convincing evidence supports the finding that by reason of her mental illness, the mother is presently and for the foreseeable future unable to provide proper and adequate care for

her daughter, who has special needs (*see Matter of Ashanti A.*, 56 AD3d 373 [2008]; Social Services Law § 384-b[4][c]; [6][a]). The record demonstrates that the mother has a long history of mental illness, which was diagnosed as schizoaffective disorder, bipolar type, and borderline personality disorder, and that the child was diagnosed with autism, spinal dysplasia, and a serious developmental disorder. The court-appointed psychologist who interviewed the mother and reviewed her records, opined that the child would be at risk of being neglected if placed in the mother's care because of the child's special needs and the mother's occasional symptomatic displays of paranoia and combativeness. Furthermore, the mother testified that she required support and did not believe that she could address the child's needs on her own.

Although, according to her doctor, the mother's mental condition has improved through great effort and commitment to treatment, she remains symptomatic, and the court's conclusion that the mother's strong motivation to care for the child would likely prove insufficient to overcome the challenge of raising a child with extraordinary special needs is reasonable. The fact that at some time in the future the mother might be able to parent the child does not warrant denial of termination

(see Matter of Dominique R., 38 AD3d 211 [2007], *lv denied* 8 NY3d 816 [2007]).

We have considered the mother's remaining contentions, including that the court did not accord proper weight to her doctor's testimony, and find them unavailing.

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3833 Kevin Bartee, Index 111571/08
Plaintiff-Respondent,

-against-

D & S Fire Protection Corp.,
Defendant-Appellant,

Turner Construction Company, et al.,
Defendants.

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Smith Mazure Director Wilkins Young & Yagerman, P.C., New York (Stacy I. Malinow of counsel), for appellant.

Sackstein, Sackstein & Lee, LLP, Garden City (Laurence D. Rogers of counsel), for respondent.

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Order, Supreme Court, New York County (Milton A. Tingling, J.), entered March 5, 2010, which, in an action for personal injuries sustained by a worker at a school construction site when he fell into a hole created by the removal of a grating, inter alia, denied, without prejudice to renew after further disclosure, defendant-appellant sprinkler system contractor's (appellant) motion for summary judgment dismissing the complaint and all cross claims as against it, unanimously affirmed, without costs.

Appellant's summary judgment motion was premature. The affidavit of its president stating that it did not remove the grating or have any responsibility for it was not based on personal knowledge, and was otherwise conclusory and therefore

insufficient to satisfy appellant's prima facie burden on the motion (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Gonzalez v Vincent James Mgt. Co.*, 306 AD2d 226 [2003]). Nor was this deficiency cured by appellant's contract with the school district and "contractor's daily reports" stating that appellant's workers had accessed a "pump-room," a "valve-room," and the basement on days before the accident, and that a worker had finished "exterior WMAG" and "firecaulked floor penetrations" on the day of the accident. In any event, we would reach the same result even if the foregoing were sufficient to show, prima facie, appellant's lack of involvement in the removal of the grating, since plaintiff provided an acceptable excuse for not showing any countervailing facts, namely, lack of opportunity to depose any of the parties as to their involvement in the removal of the grating, especially appellant's employee who was at the site on the day of the accident (*see Gonzalez*, 306 AD2d 226, *supra*; *see also Terranova v Emil*, 20 NY2d 493, 497 [1967]). Contrary to appellant's contention that plaintiff's request for additional disclosure is based on mere hope or conjecture that such will reveal favorable evidence, plaintiff's photos of the hole and appellant's daily reports show that facts essential to

defeat the summary judgment motion may exist but cannot yet be stated (CPLR 3212[f]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3836 The People of the State of New York, Ind. 6097/07
Respondent,

-against-

Lonnie Payne,
Defendant-Appellant.

_____

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

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

_____

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Richard Carruthers, J.), rendered on or about December 17, 2008,

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: DECEMBER 9, 2010

CLERK

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

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3837 Maura Rubencamp, Index 101832/07
Plaintiff-Appellant,

-against-

Arrow Exterminating Co., Inc., et al.,
Defendants-Respondents.

_____

Freed & Lerner, New York (Martin A. Lerner of counsel), for appellant.

Mintzer Sarowitz Zeris Ledva & Meyers, LLP, New York (Kevin L. Kelly of counsel), for respondents.

_____

Order, Supreme Court, New York County (Paul Wooten, J.), entered August 11, 2009, which, in this action seeking damages as a result of injuries purportedly sustained in a motor vehicle accident, granted defendants' motion for summary judgment dismissing the complaint on the ground of lack of serious injury pursuant to Insurance Law § 5102(d), unanimously affirmed, without costs.

Defendants satisfied their initial burden of establishing, prima facie, the absence of any triable questions of fact so as to entitle them to judgment as a matter of law (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). In support of their motion they submitted the affirmed reports of an orthopedic surgeon, a neurologist and a dentist, supported by specific tests that had been performed upon plaintiff, establishing that the subject accident did not cause her to suffer a serious injury in

the form of a permanent consequential limitation of a body organ or a significant limitation of use of a body function or system (*see Zhijian Yang v Alston*, 73 AD3d 562, 563 [2010]; *Santiago v Bhuiyan*, 71 AD3d 485 [2010]). In opposition thereto, plaintiff did not present any objective assessment of her condition, based upon sworn and/or certified records, that was contemporaneous with the accident (*see Pou v E&S Wholesale Meats, Inc.*, 68 AD3d 446, 447 [2009]; *Lopez v Abdul-Wahab*, 67 AD3d 598, 599 [2009]). While evidence, otherwise excludable at trial, may be considered for the purpose of denying a motion for summary judgment, such proof cannot be the sole basis for the court's determination (*see Clemmer v Drah Cab Corp.*, 74 AD3d 660, 661 [2010]). The affirmed report of August 4, 2008 by plaintiff's treating chiropractor, the only admissible medical evidence that was presented in opposition to defendants' motion, failed to raise a triable question of fact since it reviewed his findings from an examination performed in July 2008, which was 2½ years after the accident (see *Vargas v Ahmed*, 41 AD3d 328, 319 [2007]).

In any event, to the extent that the MRIs done upon plaintiff in March 2006 revealed that she had some herniated discs, it is well settled that the mere existence of "bulging or herniated discs are not, in and of themselves, evidence of serious injury without competent objective evidence of the limitations and duration of the disc injury" (*DeJesus v Paulino*,

61 AD3d 605, 608 [2009]). Moreover, plaintiff's alleged limitations were set forth in an unsworn report adopted by plaintiff's treating chiropractor in his own unsworn report, and, consequently, the motion court appropriately rejected the subject test results.

Insofar as concerned the 90/180-day category of serious injury, "the reference to plaintiffs' proof and deposition testimony sufficiently refuted the 90/180 day allegation of serious injury" (*id.* at 607).

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3838 The People of the State of New York, Ind. 4080/06
Respondent,

-against-

Philip McKelvey,
Defendant-Appellant.

_____

Cardozo Appeals Clinic, New York (Stanley Neustadter of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Sean T. Masson of counsel), for respondent.

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Judgment, Supreme Court, New York County (Edward J. McLaughlin, J.), rendered December 13, 2007, as amended January 10, 2008, convicting defendant, after a jury trial, of rape in the first degree (two counts), attempted rape in the first degree, criminal sexual act in the first degree (four counts) and sexual abuse in the first degree (three counts), and sentencing him, as a persistent violent felony offender, to an aggregate term of 75 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations as to each of the three incidents. Each of the three victims provided credible testimony that established the element of force beyond a reasonable doubt.

We perceive no basis for reducing the sentence. Defendant's

contention that the sentence should be vacated on the ground that the court's comments at sentencing constituted a "bilious phillipic" is unpreserved (*see People v Harrison*, 82 NY2d 693 [1993]), and we decline to review it in the interest of justice. As an alternative holding, we find no ground for any remedy regarding the sentence.

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3839-
3839A Index 602568/08

Dorothy Singer, et al.,
Plaintiffs-Respondents,

-against-

Robert Seavey, et al.,
Defendants-Appellants,

John L. Edmonds,
Defendant-Respondent.

_____

Gibson, Dunn & Crutcher LLP, New York (Marshall R. King of counsel), for appellants.

Hogan Lovells, US LLP, New York (Sabrina H. Cochet of counsel), for Dorothy Singer, Norma Brandes, Mars Associates, Inc., Normel Construction Corp., Gary A. Singer, Brad C. Singer, Steven G. Singer, Wendy Brandes, Frieda Tydings, Adine D. Brandes, George Kleinman, GBK Associates Inc., Elise Weingarten, Loren Kleinman and Gayle Reisman, respondents.

M. Douglas Haywoode, Brooklyn, for John Edmonds, respondent.

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Appeal from order, Supreme Court, New York County (Paul G. Feinman, J.), entered June 16, 2009, which, to the extent appealed from, denied the motion by defendants Robert Seavey and BNA Realty Company to dismiss the cause of action for breach of fiduciary duty as against them, unanimously dismissed, without costs, as academic. Order, same court and Justice, entered January 13, 2010, which denied defendants' motion to compel arbitration, unanimously reversed, on the law, without costs, the motion granted, and all proceedings stayed pending arbitration.

Defendants did not waive their right to arbitrate by moving

to dismiss the complaint and appealing from the partial denial of the motion (*see Flynn v Labor Ready*, 6 AD3d 492 [2004]). Nor, since defendants made their demand for arbitration before serving their answer, did they waive the right by asserting the cross claim (*see City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49, 55 [1969]).

In light of this determination, we dismiss the appeal from the first order as academic.

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

ENTERED: DECEMBER 9, 2010

CLERK

Mazzarelli, J.P., Friedman, McGuire, Renwick, Richter, JJ.

3840 Jennifer Walker, Index 113810/05
Plaintiff-Appellant,

-against-

Insignia Douglas Elliman LLC doing
business as Prudential Douglas Elliman,
Defendant-Respondent,

Ira Berman,
Defendant.

_____

Eric W. Berry, New York, for appellant.

Malapero & Prisco, LLP, New York (Andrew L. Klauber of counsel), for respondent.

_____

Order, Supreme Court, New York County (Michael Stallman, J.), entered May 11, 2009, which granted defendant Insignia Douglas Elliman LLC's (Insignia) motion for summary judgment dismissing the complaint as against it, unanimously affirmed, with costs.

Plaintiff alleged that the real estate broker, employed by Insignia, representing her in connection with the purchase of a building failed to disclose that the building was designated as Class B Single Room Occupancy (SRO) under Multiple Dwelling Law § 4(9). A real estate broker's fiduciary duties include an obligation to keep her principal informed of all material facts within the broker's knowledge regarding the relevant transaction (*Dubbs v Stribling & Assoc.*, 274 AD2d 32, 35 [2000], *affd* 96 NY2d

337 [2001]). Here, plaintiff failed to rebut Insignia's showing that the broker did not know the building was designated as a SRO dwelling. At most, plaintiff showed only that the broker conveyed material information obtained from the listing agent (see *Killough v Shiels*, 45 AD3d 1159, 1161 [2007]).

Moreover, a building's legal designation is "settled by the certificate of occupancy" *(23 Realty Assoc. v Teigman,* 213 AD2d 306, 307 [1995]), as well as applicable DHCR regulations (*id.*). Here, plaintiff retained counsel to conduct due diligence prior to closing, and during that process learned that the subject building had not been issued a certificate of occupancy, yet nonetheless elected to proceed to closing without ascertaining the legal ramifications. We note also that plaintiff purchased the building "as is" and, before executing the contract to purchase, was undeniably informed that the building was designated a Class B Dwelling under the Multiple Dwelling Law, and was provided ample opportunity to inspect the building and speak with its prior owner and the listing agent. Under these circumstances, we agree with the motion court that plaintiff could have readily ascertained the building's SRO status prior to closing by making relevant inquiries and exercising ordinary intelligence, and her undisputed failure to exercise adequate due diligence prior to closing supports summary dismissal of her claim (see *Killough*, 45 AD3d at 1161). To the extent plaintiff

claims that the seller's broker was obligated to provide legal advice, we disagree (*see id.*; *Donnelly v Margolis*, 265 AD2d 523, 523-524 [1999]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Tom, J.P., Andrias, Saxe, Freedman, Manzanet-Daniels, JJ.

3899-
3899A Rafael Rodriguez, etc., Index 116200/05
Plaintiff-Respondent, 116201/05

-against-

Dennis Estevez, et al.,
Defendants-Appellants.
- - - - - - -
Arthur J. Kremer,
Non-Party Receiver.

[And Another Action]

_____

Demetrios Adamis, P.C., Purchase (Demetrios Adamis of counsel), for appellants.

White, Cirrito & Nally, LLP, Hempstead (Michael L. Cirrito of counsel), for respondent.

Berkman, Henoch, Peterson, Peddy & Fenchel P.C., Garden City (Joseph E. Macy of counsel), for receiver.

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Second amended order, Supreme Court, New York County (Lewis Bart Stone, J.), entered April 23, 2010, to the extent it directed that the judgment in plaintiff's favor be satisfied from the proceeds of the sale of the subject property without any deductions or withholding for any prospective tax liability of defendant EB 110 Realty Corp., unanimously affirmed, without costs. Appeal from so much of the order as determined that the receiver was appointed pursuant to CPLR article 52 and considered the receiver's April 13, 2010 letter a motion, unanimously dismissed, without costs.

The stipulation, so-ordered by the court, by which the parties settled the shareholder derivative action, provided that defendant Estevez would pay plaintiff for the latter's shares of stock by a date certain and entitled plaintiff, in the event of a default, to apply for a judgment to be entered against defendants and for the appointment of a receiver to sell the property to satisfy the judgment. The parties waived their rights to any further litigation, including the right to appeal, except as to the issue of the payment of capital gains tax due as a result of the sale of the property. Accordingly, defendants' appeal is limited to that issue. Were we to consider defendants' other arguments, we would reject them. Although the stipulation permits the court to appoint a receiver pursuant to the Business Corporation Law, the receiver was properly appointed pursuant to the CPLR following defendants' default and the entry of judgment (*compare* Business Corporation Law § 1202[a] *with* CPLR 5228). The record supports the court's treatment of the receiver's April 13, 2010 letter as a motion, and defendants were afforded more than the time provided for in CPLR 2214(b) to prepare for the hearing thereon.

The court properly ordered that payment be made to plaintiff without withholding for prospective capital gains tax. The stipulation of settlement gave the court absolute authority to determine the method by which any corporate capital gains tax

would be paid, and, as a judgment creditor, plaintiff is entitled to payment of the judgment without reference to any taxes not yet assessed (*see e.g. Roberson v Roberson*, 45 AD3d 1494 [2007]; *Department of Hous. Preserv. & Dev. of City of N.Y. v Ferranti*, 212 AD2d 438 [1995]).

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

ENTERED: DECEMBER 9, 2010

CLERK

Tom, J.P., Andrias, Nardelli, Renwick, Román, JJ.

2429 Ronald Bruce Posner, Index 103496/09
Plaintiff-Respondent,

-against-

Russell T. Lewis, et al.,
Defendants-Appellants.

_____

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

Krauss PLLC, White Plains (Geri S. Krauss of counsel), for respondent.

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Order, Supreme Court, New York County (Marylin G. Diamond, J.), entered November 30, 2009, affirmed, without costs.

Opinion by Andrias, J. All concur except Tom, J.P. and Román, J. who dissent in an Opinion by Tom, J.P.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

Peter Tom, J.P.
Richard T. Andrias
Eugene Nardelli
Dianne T. Renwick
Nelson S. Román, JJ.

2429
Index 103496/09

_____x

Ronald Bruce Posner,
Plaintiff-Respondent,

-against-

Russell T. Lewis, et al.,
Defendants-Appellants.

_____x

Defendants appeal from an order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered November 30, 2009, which denied their motion to dismiss the complaint.

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

Krauss PLLC, White Plains (Geri S. Krauss of counsel), and Jonathan P. Arfa, P.C., White Plains (Jonathan P. Arfa of counsel), for respondent.

ANDRIAS, J.

Plaintiff alleges that defendants engaged in a malicious course of conduct that resulted in the denial of his application for tenure, solely as retribution for plaintiff's refusal to accede to their demands that he relinquish all of his parental rights to his newly born daughter, and not as a genuine effort to promote any public policy concern.

Accepting these allegations as true, and according them the benefit of every favorable inference, as we must do on a motion to dismiss pursuant to CLRR 3211(a)(7) (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), both the majority and dissent agree that plaintiff states causes of action to recover damages under the theories of prima facie tort and tortious interference with prospective contractual relations. Nevertheless, the dissent would dismiss the complaint under *Brandt v Winchell*, (3 NY2d 628 [1958]) on the ground that defendants' communications with school officials disclosing plaintiff’s affair with a coworker, who was also the mother of a child in his class, and alleging that plaintiff helped the coworker get work, were protected by the absolute privilege attending the disclosure of matters of public interest, regardless of defendants' allegedly vindictive motive. This rigid and unjustifiably narrow reading of *Brandt* fails to

give weight to the countervailing public interest in deterring the use of coercive means to compel a parent to relinquish his or her parental rights, without consideration of the best interests of the child. Accordingly, the absolute privilege of *Brandt* should not attach to defendants' communications simply because of defendants' (hollow, in our view) claims of public interest.

As stated in the complaint, plaintiff was a nontenured teacher at Siwanoy Elementary School, in the Pelham Union Free School District in Westchester (District), where he received "superior" and "outstanding" evaluations by his principal. In March 2008, after his wife Erin, a tenured teacher, accused him of misconduct, his father-in-law, defendant Russell T. Lewis (Russell), formerly president and CEO of the New York Times Company, and his brother-in-law, defendant David Lewis (David), a Proskauer Rose attorney, told plaintiff to pack his things and leave the marital residence, which Russell owned. When plaintiff returned with his brother Daniel later that day, Russell "warned" Daniel that if plaintiff "did not go quietly," Russell would "make trouble" for plaintiff. Russell also "explicitly threatened to go to the Pelham Board of Education and impact [plaintiff's] tenure."

On March 31, 2008, plaintiff was served with papers commencing a divorce proceeding. Although Erin was represented by matrimonial counsel, David entered into a written "retainer agreement" with her in April 2008 under which he agreed to act, pro bono, as her general attorney, "includ[ing], but not [] limited to, advising [Erin] with respect to general legal issues regarding [her] divorce."

On April 10, 2008, plaintiff's principal attended a session of the District's Board of Education (Board) at which time plaintiff was approved for tenure, to be formally acted upon at the June 2, 2008 meeting of the Board. The principal advised plaintiff of the grant of tenure by an e-mail that day. By separate e-mail, he also conveyed the tenure decision to other staff members.

Meanwhile, on April 3, 2008, Russell had told plaintiff that he wanted a "clean break" between plaintiff and Erin. It later became clear that Russell's idea of a clean break included plaintiff's relinquishing all of his parental rights with regard to his and Erin's daughter, Sydney, born March 24, 2008, and agreeing never to see her again. When plaintiff rejected Russell's offer of a significant cash payment to do so, Russell and David, as retribution, engaged in a series of acts in

furtherance of their threat to block plaintiff from obtaining tenure and to seek the revocation of his teaching license.

Towards this end, without plaintiff's knowledge or consent, defendants had Kroll Associates examine the computers in the marital residence to find plaintiff's personal and professional e-mails so that defendants could present them to the District to influence the tenure decision and to demand revocation of plaintiff's teaching license. They also retained detectives to conduct surveillance.

On April 14, 2008, in a letter to the Office of School Personal Review and Accountability of the New York State Education Department (OSPRA) that allegedly had been initiated, reviewed and approved by Russell, David accused plaintiff of "Immoral and Fraudulent Misconduct" "requiring disciplinary action . . . including [] the revocation of his teaching license." David, who had no connection to the District, stated that the letter was "being submitted solely on my own initiative in my individual and personal capacity as a private citizen." He did not disclose his relationship to plaintiff, that plaintiff and Erin were involved in divorce proceedings, or that Erin had retained him.

After OSPRA advised the District of the complaint, David, allegedly at Russell's urging, made several calls to the District and its superintendent "demanding to know what was going on in the investigation and what disciplinary actions were being taken."

On or about April 28, 2008, having been called in to meet with his principal and the District assistant superintendent, plaintiff was apprised of the complaint and advised that the District was required to conduct an investigation. Plaintiff told them of "the events that had transpired in his personal life," and the principal and the assistant superintendent replied that his private life was not their concern and that if a computer check came up clean they did not believe there would be any impact on his tenure. The Board was scheduled to meet the following night, April 29, 2008.

On April 29, 2008, plaintiff was told the computer check had come up clean. However, prior to the Board meeting, David, allegedly at Russell's urging, sent a letter dated April 29, 2008 to the District superintendent and all the members of the Board, including e-mail attachments and the Kroll report. David, who again failed to disclose his relationship to Erin, asserted that plaintiff and "his co-worker" had lied to the District

superintendent and demanded that "the strongest of disciplinary measures" be taken, emphasizing plaintiff's nontenured status. While demanding that the Kroll report not be released to plaintiff, David consented to its use in any litigation involving the District.

On or about May 1, 2008, plaintiff was told that the District superintendent and assistant superintendent and his principal were satisfied with his answers, that they believed he had been honest with them and that there was no impediment to his gaining tenure. He was also told that it was the Board that made the final decision, that 99% of the time it followed their recommendation, and that the Board would take a formal vote on June 2, 2008.

On or about May 6, 2008, the Board met in executive session and discussed plaintiff's tenure. On or about May 7, plaintiff was told by the superintendent and his principal that he no longer had the votes for tenure, and was given the opportunity to resign before the scheduled June 2 vote. The pressure exerted by Russell and David was allegedly the sole reason why tenure was not to be granted.

Plaintiff tendered his resignation, which was accepted by the Board by resolution at the June 2, 2008 meeting. Still,

David continued to call the superintendent demanding information about the investigation. On or about June 10, 2008, David made a Freedom of Information Act request for all documents that related to plaintiff, and the District responded by providing a copy of the resolution accepting plaintiff's resignation. According to the complaint, "[a]s a result of Defendants' wrongful and malicious actions, Plaintiff Posner was and continues to be unable to secure another tenure track teaching position in a public school district in Westchester County."

To state a claim for prima facie tort, plaintiff must plead "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]; *see also Learning Annex Holdings, LLC v Gittelman*, 48 AD3d 211 [2008]). "[T]here is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act or, in [other words], unless defendant acts from disinterested malevolence" *(Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [internal quotation marks and citations omitted]).

To state a legally cognizable claim for tortious interference with prospective contract rights, the plaintiff must allege with specific factual support that the defendant directly interfered with a third party and that the defendant acted wrongfully, by the use of dishonest, unfair, or improper means, or was motivated solely by a desire to harm the plaintiff (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-192 [2004]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 189-190 [1980]; *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300 [1999]).

These elements are undisputedly satisfied by the factual allegations set forth above and by plaintiff's allegations that:

- "[t]he sole motivation for Defendants' conduct was their admitted and avowed intent and desire to inflict maximum injury upon Plaintiff because of his refusal to accede to the demands of Defendant Russell Lewis that Plaintiff relinquish all of his parental rights to Plaintiff's newly born daughter, Sydney . . .";

- "Each of these acts were motivated solely by malice and were done with the sole purpose and intention to punish and injure Plaintiff";

- defendants acted "solely out of malice and in order to punish and injure Plaintiff Posner for his refusal to accede to Defendant Russell's demand that Plaintiff relinquish all of Plaintiff's parental rights to Sydney";

- David's April 14, 2008 letter "evidences that Defendant David's motive was not a genuine effort to promote any public policy concern or provide information to the District for it to act on as and if it saw fit, but

rather was motivate solely by malice and calculated and designed to injure Plaintiff";

- David's April 29, 2008 letter "further evidences that Defendant David's motive was not a genuine effort to promote any public policy concern or to provide information to the District for it to act on as and if it saw fit, but rather was motivated solely by malice and calculated and designed to injure Plaintiff;" and

- "As a results of Defendant's acts, Plaintiff Posner has suffered special damages, including the loss his teaching position at the District and the income derived . . . therefrom, the loss of tenure at the District and the security and income to be derived therefrom, and a diminution in job prospects and future earnings in his chosen profession of teaching."

Contrary to the dissent's opinion, *Brandt v Winchell* (3 NY2d 628 [1958], *supra*) does not mandate dismissal of the complaint. In *Brandt*, which has not been cited by a New York State appellate court for more than twenty years, the plaintiff sued columnist Walter Winchell and philanthropist Elmer Bobst, alleging prima facie tort, for maliciously instigating public officials to investigate the Cancer Welfare Fund, Inc. so that it could not compete with their Damon Runyon Memorial Fund for Cancer Research, Inc. The Court of Appeals dismissed the complaint, finding, among other things, that Winchell's lawful act of bringing charges against plaintiff before public officials did not become unlawful just because it was motivated by malevolent intent, since the best interests of the public were served by

exposing plaintiff's offenses. However, in reaching this determination, the Court of Appeals cautioned that a balancing test must be applied:

> "There are situations where for one of several reasons a court is constrained to ignore the wrongful motive of the actor. For example, a court may be prompted to disregard the actor's motive by reason of the paramount consideration of the public welfare. *Accordingly, it may fairly be said that whenever the gist of an alleged cause of action (as here) is that an otherwise lawful act has become unlawful because the actor's motives were malevolent, the court is called upon to analyze and weigh the conflicting interests of the parties and of the public in order to determine which shall prevail"* (3 NY2d at 634-635 [emphasis added]).

Applying *Brandt's* balancing test and weighing the conflicting interests of the parties and the public, we find that the circumstances before us do not warrant that defendants' communications be protected by an absolute privilege. Although there is certainly a strong public interest in preserving the integrity of our school systems, there is an equally strong public interest in deterring the use of coercion to compel a parent to relinquish his or her parental rights, without consideration of the best interests of the child (*see generally Eschbach v Eschbach*, 56 NY2d 167 [1982]). In *Eschbach,* the Court of Appeals made clear that it is the policy of this state that in making custody determinations the paramount concern is the "best

interest of the child, and what will best promote its welfare and happiness" (56 NY2d at 171, quoting Domestic Relations Law § 70), including the effect an award of custody to one parent might have on the child's relationship with the other parent and which parent is the more likely to assure meaningful contact between the child and the noncustodial parent. Here, without any regard for the best interests of the child, both now and in the future, defendants allegedly sought retribution against plaintiff for refusing to give up his parental rights and terminate all contact with his daughter, which may in fact be detrimental to the child (*Beth R. v Donna M.*, 19 Misc. 3d 724, 735 [2008] ["The abrupt exclusion of a parental figure may be damaging to the emotional well-being of that child"]).

Further distinguishing *Brandt* is the allegedly unlawful and independently tortious means used by defendants to accomplish their goals, which may serve as a basis for plaintiff's tortious interference with prospective contract rights claim. As detailed above, plaintiff alleges that "[u]pon his refusal to accede to Defendant Russell's demands and accept Defendant Russell's offer of a financial buy-out of Plaintiff's parental rights," defendants, "upon information and belief, conspired and acted, both individually and together, to carry through on [] Russell's

threats to interfere with the granting of tenure to [] Posner by the District," which they accomplished by exposing plaintiff's affair with the parent of one his students, who was also a substitute teacher. An effort by defendants to coerce plaintiff into forfeiting his parental rights, if true, may very well fall within the ambit of Penal Law § 135.60(5), which provides:

> "A person is guilty of coercion in the second degree when he or she compels or induces a person to engage in conduct which the latter has a legal right to abstain from engaging in, or to abstain from engaging in conduct in which he or she has a legal right to engage, . . . by means of instilling in him or her a fear that, if the demand is not complied with, the actor or another will:
> . . .
> "5. Expose a secret or publicize an asserted fact, whether true or false, tending to subject some person to hatred, contempt or ridicule."

Plaintiff further alleges that defendants employed other wrongful means in engaging in their malicious course of conduct. These include: (1) the April 14, 2008 letter states that it was submitted solely in David's "individual and personal capacity as a private citizen" but omits his relationship to plaintiff, the divorce action or his retention by his sister; (2) while David holds himself out as an expert in legal ethics, he "failed to follow the basic, published guidelines and rules for filing a complaint against a teacher" and did so "deliberately with the belief that circumventing the guidelines would expedite the

process and increase the possibility of inflicting the maximum amount of injury on Plaintiff Posner"; and (3) in his April 29, 2009 letter, David similarly concealed his true motive. Moreover, as even the dissent concedes, "the complaint arguably alleges independently tortious conduct as a result of the unauthorized invasion of a personal computer hard drive, even if that computer was located in a home owned by a defendant (Russell)."

Whatever we think of plaintiff's conduct, "adultery would not *ipso facto* warrant [the] loss of custody" (*Martin v Martin*, 74 AD2d 419, 428 [1980]). Thus, in the circumstances alleged in the complaint, to allow defendants to hide beyond the "absolute privilege" of *Brandt* at this stage of the proceeding would circumvent the very balancing test that is mandated by *Brandt*.

Nor does the *Noerr-Pennington* doctrine (*see Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.,* 365 US 127 [1961]; *United Mine Workers of Am. v Pennington*, 381 US 657 [1965]) mandate dismissal at this procedural stage. Pursuant to this doctrine, "citizens who petition the government for governmental action favorable to them cannot be prosecuted under the antitrust laws" (*Alfred Weissman Real Estate v Big V Supermarkets*, 268 AD2d 101, 106-107 [2000]). Plaintiff contends that defendants sought action by the Board that, while

detrimental to plaintiff, was not favorable to defendants, who had no personal interest in the outcome of the tenure determination since they did not reside in the District and did not have any children there. Thus, as the motion court found, it is far from clear that the *Noerr-Pennington* doctrine applies here, where "the motivation for such communications was vindictive and arose from personal animus unrelated to any apparent actual concern about the operation of government."

Accordingly, the order of the Supreme Court, New York County (Marylin G. Diamond, J.), entered November 30, 2009, which denied defendants' motion to dismiss the complaint, should be affirmed, without costs.

All concur except Tom, J.P., and Román, J.
who dissent in an Opinion by Tom, J.P.:

TOM, J.P. (dissenting)

The complaint alleges that, in the attempt to pressure plaintiff to surrender his parental rights to his daughter, defendants maliciously communicated information to the Pelham school board with the result that plaintiff was denied a tenured teaching position and has since been unable to secure such position in any Westchester County school district. I would find that the action taken by the school board was the consequence of wrongful conduct by plaintiff that was inimical to the public and that defendants' exposure of such misconduct was privileged because it advanced the public interest.

As recounted in the complaint, plaintiff married Erin Lewis Posner, the daughter of defendant Russell T. Lewis, on July 23, 2005, and the couple took up residence in Armonk, New York, in a house owned by Russell. After receiving his Master's degree in early childhood education, plaintiff was employed as a nontenured teacher by the Pelham Union Free School District in Westchester County. Erin is also a school teacher, employed by the Chappaqua school district, and was granted tenure in May 2007. Plaintiff received high evaluations for his work with the Pelham school district and became eligible for tenure in June 2008.

Erin gave birth to a baby girl on March 24, 2008 and returned home with her daughter, Sydney, two days later. On

March 28, plaintiff arrived home to find his father-in-law at the house. Based on information of plaintiff's alleged misconduct that he had received from his daughter, Russell told plaintiff to pack his things and leave, which plaintiff did. When plaintiff, accompanied by his brother, Daniel, returned to the house later in the day to pick up a few more belongings, Russell told Daniel that if plaintiff "did not go quietly" he, Russell, would "make trouble," explicitly threatening to contact the Pelham Board of Education and "impact" plaintiff's tenure. Plaintiff was served with divorce papers on March 31, 2008.

In early April 2008, Russell arranged a meeting, at which he informed plaintiff that he wanted a "clean break" between plaintiff and his daughter. It subsequently became clear that Russell intended that plaintiff would relinquish all parental rights to Sydney and agree never to see his child again. To that end, Russell promised plaintiff a substantial cash payment to secure his compliance. Plaintiff refused.

It is alleged on information and belief that plaintiff was approved for tenure at an executive session of the Pelham School District Board of Education on April 10, 2008, subject to formal action at a meeting of the board to be held on June 2. Plaintiff received a congratulatory e-mail from the elementary school principal shortly thereafter. It is further alleged that

defendants retained the firm of Knoll Associates to examine the hard drives of plaintiff's personal computers to recover his personal and professional e-mails and that they retained other persons or businesses to conduct surveillance of plaintiff and report on his activities. In addition, although Erin was represented by well-reputed matrimonial counsel, her brother, defendant David Lewis, entered into a retainer agreement dated April 11, 2008 to act on Erin's behalf "with respect to vendors and other third-parties . . . All of this communication will be subject to the Attorney-client privilege and work product doctrine to the maximum extent allowed by law."

The complaint alleges that defendants then conspired to prevent plaintiff from being granted tenure by the Pelham school district. David sent a letter dated April 14, 2008 to the New York State Education Department Office of School Personnel Review and Accountability (OSPRA) complaining of plaintiff's "immoral behavior," specifically, "carrying on a long-term immoral adulterous relationship with the parent of a child in Mr. Posner's class. Compounding matters, this parent is also a substitute teacher (recently for Mr. Posner's class) . . . " The letter included the text of personal e-mails between plaintiff and the substitute teacher recovered from plaintiff's computer. The letter also stated that plaintiff lied on his resume in

violation of the National Education Association code by omitting a pre-teaching employment position that was abruptly terminated. David represented that he was writing "as a private citizen pursuant to The Regulations of the Commissioner of Education Part 83, Section 83.1 (c)" (8 NYCRR 83.1[c]), which provides that "[i]nformation in the possession of any person indicating that an individual holding a teaching certificate . . . has committed an act which raises a reasonable question as to the individual's moral character, may be referred to the professional conduct officer of the department." David alleged that plaintiff's "misconduct involves a clear nexus between the immoral behavior of this teacher and his fitness to teach." David argued that plaintiff's promotion of his paramour as a substitute teacher "had the effect of ingratiating [her] to Mr. Posner at the financial and educational expense of the Pelham Union Free School District," and "compromised [plaintiff's] objectivity in the classroom." David later provided the report from Kroll Ontrack, described as a subsidiary of Kroll Associates and "a worldwide leader in the area of computer forensic investigations," to both OSPRA and the superintendent of the school district. This correspondence, like his former letter, demanded disciplinary action. It is also asserted on information and belief that David, with the consent and inducement of Russell, made a series

of telephone calls to officials in the school district, including its superintendent, demanding to know the status of the investigation into his complaint and what disciplinary action was being taken.

About May 1, 2008, plaintiff met with the principal of his school and the district superintendent and assistant superintendent. On May 6, the school board met in executive session. The following day, plaintiff was informed that he no longer had enough support to obtain tenure and was given the opportunity to resign before the board's scheduled vote on June 2. As a result, plaintiff tendered his resignation. David made a Freedom of Information Act request for documents relating to plaintiff and obtained a copy of the June 2, 2008 resolution of the school board accepting plaintiff's resignation.

The complaint alleges that, solely as a result of the pressure brought to bear by defendants, plaintiff was denied the tenured teaching position that the board had approved at the executive session on April 10, 2008 and that, as a consequence, he continues to be unable to obtain a tenured teaching position with a public school district in Westchester County. The complaint seeks $3.5 million in compensatory and $10 million in punitive damages for tortious interference with a prospective contractual relation, asserting that defendants acted with malice

and without excuse or justification, proximately causing the school district to deny plaintiff tenure and resulting in the termination of his employment.

The complaint seeks the same damages for prima facie tort, alleging that defendants were solely motivated by a malicious intent to injure plaintiff, without excuse or justification. The loss of his job, loss of tenure and diminution in job prospects and future earnings are listed as special damages. However, plaintiff does not claim that the information defendants communicated to the Board was false.

Defendants interposed this pre-answer motion to dismiss the complaint for failure to state a cause of action (CPLR 3211[a][7]), contending that their letters and other communications to the school officials were privileged as matters of public concern. Supreme Court denied the motion, holding that defendants failed to establish, as a matter of law, that the information they reported was in the public interest so as to qualify for absolute privilege under *Brandt v Winchell* (3 NY2d 628 [1958]). The court further rejected defendants' contention that the communications were protected by the First Amendment under the *Noerr-Pennington* doctrine absent a clear showing that they were of bona fide governmental interest (*see Eastern R.R. Presidents Conference v Noerr Motor Freight, Inc.*, 365 US 127

[1961]; *United Mine Workers of Am. v Pennington*, 381 US 657 [1965]). The court noted that David was not a resident of the school district, concluding that "the motivation for such communications was vindictive and arose from personal animus unrelated to any apparent actual concern about the operation of government." Finally, although the complaint fails to allege that Russell undertook any actionable conduct, the court found his alleged threat to make trouble and his asserted complicity with David sufficient to sustain the complaint as against him.

While the causes of action are adequately pleaded, the complaint is barred by absolute privilege. As a nontenured teacher lacking enforceable contractual rights, plaintiff is obliged to make out a prima facie case of tortious interference with prospective contractual relations. This cause of action requires more culpable conduct than tortious interference with contract, such as criminal or independently tortious acts, or action taken for the sole purpose of inflicting intentional harm (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-192 [2004]; *Perry v Collegis, Inc.*, 55 AD3d 459 [2008]). The complaint plainly alleges conduct undertaken for the sole purpose of inflicting injury, and the cause of action is adequately pleaded on this basis alone. Further, the complaint arguably alleges independently tortious conduct as a result of the unauthorized

invasion of a personal computer hard drive, even if that computer was located in a home owned by a defendant (Russell).

With respect to prima facie tort, the complaint sufficiently pleads malice or "disinterested malevolence" (*see* L*earning Annex Holdings, LLC v Gittelman*, 48 AD3d 211 [2008][*internal quotation marks & citations omitted*]; *Golub v Esquire Publ.*, 124 AD2d 528, 529 [1986], *lv denied* 69 NY2d 606 [1987]). Although claims of malice are repeated in conclusory fashion in the complaint, the cause of action does not fail for insufficiency because the entire tenor of the complaint is that defendants were vengeful over the injury to Erin caused by plaintiff's affair, which supplies the requisite supporting factual allegations (*cf. WFB Telecom. v NYNEX Corp.*, 188 AD2d 257, 258-259 [1992], *lv denied* 81 NY2d 709 [1993]; *Turner Constr. Co. v Seaboard Sur. Co.*, 98 AD2d 88, 91-92 [1983]).

However, the communications with school officials are protected by absolute privilege under *Brandt v Winchell* (3 NY2d 628 [1958], *supra*). There, the plaintiff, who ran a charitable fund, brought an action for prima facie tort, alleging that the defendants, who were principals in a competing charitable fund, sought to put an end to his fund and its charitable endeavors by making false and wanton accusations against him to law enforcement officials, thereby prompting baseless and harassing

investigations. Despite their allegedly reprehensible motives, the Court of Appeals held that the defendants were immune from suit, noting that prima facie tort is an innovation that makes actionable what is otherwise a lawful act when undertaken solely out of malice and ill will to injure another. Enunciating a policy decision, the Court weighed the conflicting interests of the parties and the public, choosing to ignore the wrongful motive and "vindictive spirit" of the actors and their "malicious instigation of official action" in favor of the paramount consideration of the public welfare. The Court reasoned:

> "The best interests of the public are advanced by the exposure of those guilty of offenses against the public and by the unfettered dissemination of the truth about such wrongdoers. Such a person is entitled to *immunity* from civil suit at the hands of the one exposed, for the truth is not to be shackled by fear of a civil action for damages" (3 NY2d at 635 [emphasis added]).

Unlike defamation, where absolute privilege in judicial proceedings depends on “the personal position or status of the [actor] and is limited to [his] official participation in the processes of government” (*Park Knoll Assoc. v Schmidt*, 59 NY2d 205, 209 [1983]), *Brandt* treats the privilege as *absolute* (conferring "immunity"), irrespective of the status of the actor. Contrary to plaintiff's contention, subsequent cases do not limit the privilege to judicial and quasi-judicial proceedings. The

privilege exists to promote public welfare, not public officials, and has been extended where required to insulate against "the harassment and financial hazards that may accompany suits for damages by victims of even malicious libels or slanders" (*Stukuls v State of New York*, 42 NY2d 272, 278 [1977]). The privilege continues to be extended to "circumstances where allegations of possible wrongdoing are acted upon by government agencies" (*ATI, Inc. v Ruder & Finn*, 42 NY2d 454, 460 [1977]). Nor is discovery required to assess whether the information communicated by defendants was pertinent to the school board's determination, as Supreme Court reasoned. Whether information is pertinent presents a question of law, "properly determinable on a motion to dismiss addressed to the pleadings and documentary evidence alone" (*Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 173 [2007]). Significantly, the test of pertinence is "extremely liberal" (*id.*).

The information conveyed by defendants herein was a matter affecting the public interest. It is beyond cavil that a plaintiff's adulterous relationship with the parent of a child in his class raises a reasonable question as to his moral character and warrants referral to the Education Department under the Regulations of the Commissioner of Education (8 NYCRR) § 83.1(c). This conduct may have a negative impact on students by leading to

favoritism or by affecting their moral perceptions. Plaintiff's influencing school officials to hire his paramour as a substitute teacher may adversely affect the students if she is not as qualified as others. The use of school computer equipment for the lovers' private e-mails affects the public fisc. Plaintiff's conscious omission from his resume of a prior employment from which he was abruptly terminated may have affected his hiring and reflects adversely on his honesty in general. Nor does the regulation in any way restrict the source of such information to persons residing within the affected school district. Finally, the action resulting in injury to plaintiff was the result of the school board's decision to deny him tenure, the propriety of which has not been challenged in the appropriate proceeding pursuant to CPLR article 78 and is not before us.

Accordingly, the order should be reversed, and the motion granted.

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

ENTERED: DECEMBER 9, 2010

CLERK