SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 14, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Sweeny, Freedman, Abdus-Salaam, JJ.

1859-
1860 Agim Preldakaj, et al., Index 7930/05
Plaintiffs-Respondents, 85921/07

-against-

Alps Realty of NY Corp.,
Defendant-Appellant,

Gjelosh Preldakaj,
Defendant.

[And a Third-Party Action]

Downing & Peck, P.C., New York (John M. Downing, Jr. of counsel), for appellant.

Timothy A. Green, White Plains, for respondents.

Orders, Supreme Court, Bronx County (Douglas E. McKeon, J.), entered October 24, 2008 and August 25, 2009, which, to the extent appealed from as limited by the briefs, denied defendant Alps Realty's motion to strike plaintiffs' note of issue and to declare certain hospital and Fire Department records admissible for all purposes at trial, denied Alps' motion to renew its prior motion, and granted plaintiffs' motion to redact the records, unanimously modified, on the law, to deny plaintiffs' motion, and otherwise affirmed, without costs.

The injured plaintiffs assert that they had merely stopped by an apartment to observe floor refinishing that was being performed by their cousin, who had been hired by defendant Alps, the corporation that owned the apartment and in which plaintiffs are shareholders and officers, when fumes from the polyurethane that the cousin was applying to the floor ignited, causing their injuries (*see* 47 AD3d 511 [2008]). However, hospital and Fire Department records indicate that plaintiffs admitted to ambulance attendants, hospital staff, and a Fire Department official that they were applying the polyurethane when the fire broke out.

The motion court, after correctly finding that the admissions were not germane to the diagnosis or treatment of plaintiffs' injuries and therefore were not admissible under the business records exception to the hearsay rule (*see Quispe v Lemle & Wolff, Inc.*, 266 AD2d 95 [1999]), ruled that the records were to be redacted to omit statements that plaintiffs were applying the polyurethane. In addition, apparently addressing the exception to the hearsay rule for admissions against interest in hospital records (*see Coker v Bakkal Foods, Inc.*, 52 AD3d 765 [2008], *lv denied* 11 NY3d 708 [2008]), the court ruled that the statements were unreliable, and therefore inadmissible, in view of uncontradicted evidence about the effects of the morphine that was administered to plaintiffs during treatment. This was error. The evidence concerning the effects of the morphine goes to the

weight to be accorded the admissions, not their admissibility (*see Gangi v Fradus*, 227 NY 452, 457 [1920]).

The statements that plaintiffs were applying the polyurethane may only be admitted if there is clear evidence connecting the party to the entry (i.e., testimony that the party made the statement) (*see Berrios v TEG Mgt. Corp.*, 35 AD3d 775 [2006]). If the statements are admitted at trial and it is determined that, contrary to plaintiffs' position, they were refinishing the floors when the fire broke out, then it will have been shown that plaintiffs' "role in the affairs of [Alps] involved ensuring the performance of the particular corporate duty whose breach [they] allege[] caused [their] injur[ies]," and they will be unable to prevail in this action (*see* 47 AD3d at 512).

To the extent not mooted by post-motion depositions, the motion court properly denied those branches of Alps' motions that sought vacatur of the note of issue and commissions for further depositions (*see Scocozza v Tolia*, 254 AD2d 475 [1998]).

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

ENTERED: JANUARY 14, 2010

Gonzalez, P.J., Buckley, Catterson, McGuire, Renwick, JJ.

469 Acadia-P/A 161st Street LLC, Index 102663/07
Plaintiff-Respondent-Appellant,

-against-

Proskauer Rose LLP, et al.,
Defendants-Appellants-Respondents,

Marisa D. Levinson,
Defendant.

[And Other Actions]

Cross appeals having been taken to this Court by the above-named appellants from an order of the Supreme Court, New York County (Richard B. Lowe, III, J.), entered on or about November 13, 2007,

And said appeals having been argued by counsel for the respective parties; and due deliberation having been had thereon, and upon the stipulation of the parties hereto dated January 4, 2010,

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

ENTERED: JANUARY 14, 2010

DEPUTY CLERK

Saxe, J.P., Friedman, Moskowitz, Freedman, JJ.

416 In re Brian Nesby, Index 400276/08
Petitioner,

-against-

David A. Hansell, as Commissioner of the New York State Office of Temporary and Disability Assistance, et al.,
Respondents.

John C. Gray, South Brooklyn Legal Services, Brooklyn (Catherine F. Bowman of counsel), for petitioner.

Andrew M. Cuomo, Attorney General, New York (Marion R. Buchbinder of counsel), for David A. Hansell, respondent.

Michael A. Cardozo, Corporation Counsel, New York (Ronald E. Sternberg of counsel), for municipal respondents.

Determination of the New York State Office of Temporary and Disability Assistance, dated January 15, 2008, which upheld the decision, rendered after a fair hearing, of the same agency, dated October 10, 2007, upholding the determination of the New York City Human Resources Administration that petitioner was not entitled to any refund from his initial Supplemental Security Income (SSI) payment, unanimously annulled, on the law, without costs, and the petition brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Leland DeGrasse, J.], entered April 18, 2008) granted to the extent of directing respondents to refund $5,681.20 to petitioner.

Petitioner challenges the amounts the state and local social

services agencies retained from his first retroactive federal SSI benefit payment to recoup payments he received in March, April and May of 2006 (during the pendency of his application for SSI benefits) as made under New York State's Safety Net Assistance (SNA) program (Social Services Law §§ 158[1],[2]; 211[5]; 18 NYCRR 370.2[b][5][ii]) and the federal interim assistance reimbursement program (42 USC § 1383[g]; *see* 18 NYCRR 370.2[b][5][i]; 353.2[a][5]). The decision after hearing by respondent Office of Temporary and Disability Assistance (affirmed on administrative appeal) that all the funds paid on petitioner's behalf during the three months in question were recoverable as interim assistance is not supported by substantial evidence. Petitioner contended that those payments were not recoverable by respondents to the extent they were financed by federal funds. The record evidence submitted by respondents, while showing payments on petitioner's behalf, failed to establish that the source of those payments was exclusively state and city funds, and also failed to explain the sudden dramatic increases in the amounts of benefits petitioner received during the period in issue. We note that the computer records that respondents placed in evidence at the hearing do not, on their face, identify the source of the funds paid to petitioner or describe the purpose of the payments. Moreover, respondents

failed to place in the administrative record any material establishing the extent to which the payments came from state and city funds.

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

ENTERED: JANUARY 14, 2010

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

1080 Nautilus Insurance Company, Index 603742/07
Plaintiff-Appellant,

-against-

Matthew David Events, Ltd.,
Defendant,

Timothy Shea,
Defendant-Respondent.

Wade Clark Mulcahy, New York (Robert J. Cosgrove and Menachem Mendel Simon of counsel), for appellant.

Ferro, Kuba, Mangano, Sklyar, P.C., Hauppauge (George J. Parisi of counsel), for respondent.

Order, Supreme Court, New York County (Michael D. Stallman, J.), entered January 12, 2009, which, to the extent appealed from as limited by the briefs, denied plaintiff's motion for summary judgment, and upon a search of the record, granted defendants summary dismissal of the third cause of action of the complaint, reversed, on the law, without costs, the motion for summary judgment granted, and it is declared that Nautilus Insurance Company has no obligation to defend or indemnify Matthew David Events, Ltd. and Timothy Shea in the underlying action. The Clerk is directed to enter judgment accordingly.

In the underlying action, Timothy Shea, defendant herein, seeks monetary damages for alleged personal injuries sustained while working at a corporate party held on Randall's Island and sponsored by Bloomberg, LLC and Bloomberg, Inc. (Bloomberg).

Bloomberg had entered into an agreement with defendant Matthew Davis Events (MDE) for MDE to plan, design and manage the event for Bloomberg.

MDE also entered into an agreement with United Stage Service, Inc. (Stage) to perform work, labor and services for the Bloomberg event at Randall's Island. Shea, then an employee of Stage, worked as a stagehand at the event. He alleges that he was injured as a result of an on-the-job accident when he fell off a utility vehicle in which he had been riding.

On the date of the accident, June 27, 2004, MDE was insured by plaintiff Nautilus Insurance Company under a commercial liability policy. Almost three years after the accident, on June 25, 2007, Shea commenced a personal injury action against Bloomberg and MDE, among others. The next day, on June 26, 2007, MDE sent notice about the accident to Nautilus. Immediately, Nautilus disclaimed coverage on the grounds that MDE failed to provide timely notice of the claim and that Shea's injury was excluded under the terms of the policy.

Upon denying coverage, Nautilus commenced this action against MDE, among others, seeking a declaration that no coverage was owed to MDE for the claims asserted in the *Shea* action. The first and second causes of action of the complaint allege that pursuant to the terms of the policy, Nautilus was not required to defend or indemnify MDE because of its failure to provide timely

notice of the occurrence or suit. The third cause of action alleges that the policy did not apply to liability as a result of bodily injury to an employee of the insured arising out of and in the course of employment or performing duties related to the conduct of MDE's business. Specifically, the complaint alleges that at the time of the accident, Shea was working for Stage, a company performing duties relating to MDE's work. Because Shea was performing duties related to MDE's work at the time of the accident, and was thus an "employee" of MDE, as the word was defined by the policy, the policy did not provide defense or indemnity coverage to MDE in the underlying action and Nautilus was entitled to a declaration that no coverage was owed to MDE for any claims asserted by Shea.

On May 16, 2008, Nautilus moved for summary judgment and for a declaration that it was under no obligation to defend or indemnify MDE and/or Shea in the underlying action, and to dismiss all counterclaims against it. In opposition, MDE averred, inter alia, that the language of the employee exclusion was ambiguous since it was not clear whether or not employees of a contractor were included. MDE also argued that the motion was premature since discovery had not yet commenced and it was necessary to determine the relationship between MDE and Stage. Nautilus replied that the language of the employee exclusion was clear, and since Shea was an "employee" of MDE at

the time of the accident, recovery under the policy was precluded.

The motion court denied Nautilus's motion for summary judgment holding that the employee exclusion was inapplicable. The court then, upon a search of the record, dismissed the third cause of action of the complaint. The court stated that exclusions from coverage in an insurance policy must be specific and clear in order to be enforced, and ambiguities were construed against the insurer. In this case, the court found that it was not clear whether Shea, as Stage's employee, would be a person "contracted for" by MDE and excluded from coverage. Inasmuch as the policy did not define the phrase "contracted for," the court concluded that it was susceptible to more than one meaning. The court noted that, for instance, the phrase could be narrowly defined to include only a temporary worker whom MDE contracted from a temporary employment agency. We reverse.

"'[C]ourts bear the responsibility of determining the rights or obligations of parties under insurance contracts based on the specific language of the policies'" *(Sanabria v American Home Assur. Co.*, 68 NY2d 866, 868 [1986], quoting *State of New York v Home Indem. Co.*, 66 NY2d 669, 671 [1985]), whose unambiguous provisions must be given "their plain and ordinary meaning" *(United States Fid. & Guar. Co. v Annunziata*, 67 NY2d 229, 232 [1986] [internal quotations marks and citations

omitted]; *see Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 471-473 [2007]; *Catucci v Greenwich Ins. Co.*, 37 AD3d 513, 514 [2007]). "An exclusion from coverage 'must be specific and clear in order to be enforced' (*Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 311 [1984]), and an ambiguity in an exclusionary clause must be construed most strongly against the insurer" (*Guachichulca v Laszlo N. Tauber & Assoc., LLC*, 37 AD3d 760, 761 [2007]; *see Ace Wire & Cable Co. v Aetna Cas. & Sur. Co.*, 60 NY2d 390, 398 [1983]; *Ruge v Utica First Ins. Co.*, 32 AD3d 424, 426 [2006], *lv denied* 7 NY3d 716 [2006]). However, the plain meaning of the policy's language may not be disregarded to find an ambiguity where none exists (*see Bassuk Bros. v Utica First Ins. Co.*, 1 AD3d 470, 471 [2003], *lv dismissed* 3 NY3d 696 [2004]; *Garson Mgt. Co. v Travelers Indem. Co. of Ill.*, 300 AD2d 538, 539 [2002], *lv denied* 100 NY2d 503 [2003]).

In this case, Nautilus met its burden of demonstrating that the exclusion provision relied upon by the court to dismiss the third cause of action clearly applies to the underlying action. The policy contained an "Employee Exclusion," which excluded from coverage bodily injury to an "employee" of the insured "arising out of and in the course of: (a) [e]mployment by the insured; or (b) [p]erforming duties related to the conduct of the insured's business." The employee exclusion is very broad. The exclusion defined "employee" as including but not limited to, any person or

persons "hired by, loaned to, leased to, contracted for, or volunteering services to the insured, whether or not paid by the insured." Moreover, the exclusion was applicable whether the insured was liable as an employer or in any other capacity and applied to any obligation to share damages with or repay someone else who must pay damages because of the injury.

We agree with Nautilus that giving the words "contract for" their plain and ordinary meaning, MDE's retention of a subcontractor to perform work for the Bloomberg event at Randalls' Island constituted services for the insured and thus falls within the scope of the employee injury exclusion. Indeed, the "contract for" language of the Employee Exclusion clearly contemplates that a contractor could be retained by a party other than the insured on the insured's behalf, and that an injury to that contractor or its employee would fall within the scope of the exclusion (*see U.S. Underwriters Ins. Co. v Beckford*, 1998 WL 23754, 1998 US Dist LEXIS 574 [ED NY 1998]). The argument that this language may be interpreted to apply only to persons who contract directly to work for MDE renders the explanatory language that the term "employees" includes those providing "services to the insured, whether or not paid by the insured" a nullity. It is a well settled principle of contract law that a court should not adopt a construction of a contract "which will operate to leave a provision of a contract . . . without force

and effect. An interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms or accords them an unreasonable interpretation" *(Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 196 [1995] [internal quotation marks and citations omitted]; *see also Consolidated Edison Co. of NY, Inc. v United Coastal Ins. Co.*, 216 AD2d 137 [1995], *lv denied* 87 NY2d 808 [1996]).

All concur except Mazzarelli, J.P. and Richter, J. who dissent in part in a memorandum by Mazzarelli, J.P. as follows:

MAZZARELLI, J.P. (dissenting in part)

Plaintiff issued a commercial general liability insurance policy to defendant Matthew David Events (the insured), a planner for events held on Randall's Island. Defendant Shea, an employee of a subcontractor hired by the insured, was allegedly injured while working as a stagehand at an event hosted by Bloomberg, LLC and Bloomberg, Inc. Shea then commenced a personal injury action against the insured and others. The insured demanded that plaintiff provide it with a defense and, if necessary, indemnification.

Plaintiff commenced this action seeking a declaration that the incident was not covered by the policy. Plaintiff's position was premised on an endorsement to the policy entitled "Employee Exclusion." The endorsement expressly excluded from coverage claims for bodily injury to "[a]n 'employee' of the insured arising out of and in the course of: (a) Employment by the insured; or (b) Performing duties related to the conduct of the insured's business." The term "employee" was expressly defined to "include . . . any person or persons hired by, loaned to, leased to, contracted for, or volunteering services to the insured, whether or not paid by the insured." The phrase "contracted for" was not further defined.

It is well settled that "'[t]o negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is

stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case" (*Westview Assoc. v Guaranty Natl. Ins. Co.*, 95 NY2d 334, 340 [2000], quoting *Continental Cas. Co. v Rapid-American Corp.* (80 NY2d 640, 652 [1993]). Moreover, "[i]f the language of the policy is doubtful or uncertain in its meaning, any ambiguity must be resolved in favor of the insured and against the insurer" (*Westview Assoc.*, 95 NY2d at 340).

The exclusion invoked by plaintiff is ambiguous because it is eminently reasonable to interpret the definition in the endorsement of the term "employee" as extending only to those who are engaged directly by the insured. Such an interpretation is based on the policy definition which describes "employee[s]" as persons having been "hired *by*," "loaned *to*,", "leased *to*," and "volunteering services *to*" the insured. The emphasized prepositions strongly suggest the necessity for privity between the insured and the person being employed by it if a claim is to be excluded.

Plaintiff does not argue that Shea was "hired by," "loaned to," "leased to," or "volunteering services to" the insured. Rather, it argues that Shea fits the one other class of "employee" delineated in the definition, one "contracted for" the insured. Plaintiff contends that this element of the definition expands the universe of "employee[s]" covered by the endorsement

to any person who does work that benefits the insured. However, in deciding whether an agreement is ambiguous, "'[p]articular words should be considered, not as if isolated from the context, but in the light of the obligation as a whole and the intention of the parties as manifested thereby'" (*Kass v Kass*, 91 NY2d 554, 566 [1998], quoting *Atwater & Co. v Panama R.R. Co.*, 246 NY 519, 524 [1927]). Again, the overall context of the definition of "employee" suggests that the parties intended that only those engaged directly by the insured would be covered by the exclusion. Indeed, this is consistent with the notion that at least one of the purposes of hiring a subcontractor is to insulate oneself from liability. The interpretation urged by plaintiff would defeat this purpose by depriving the insured of coverage for injuries to employees of subcontractors.

In addition, the phrase "a person . . . contracted for . . . the insured" is ambiguous on its face. Indeed, a reasonable person, if he or she could make any sense of the phrase at all, would be confused as to who had contracted with whom. Even if some sensible meaning could be ascribed to the phrase, reasonable people could differ about what it means. One person could, like plaintiff, interpret it as referring to a person who, like Shea, works for a company with which the insured enters into a contract. However, another person could, as Supreme Court did, interpret the phrase as referring to a person furnished directly

to the insured pursuant to a contract entered into between the insured and third-party, such as a temporary employment agency. Because the term is reasonably susceptible of more than one interpretation, it is ambiguous (*see Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]).

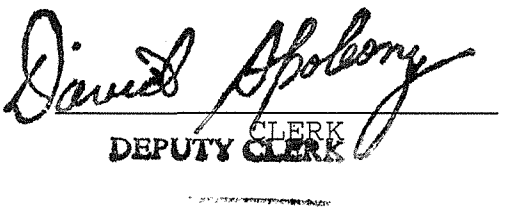
The majority states that to accept the insured's interpretation of the endorsement would render a nullity the provision that a person can be considered an "employee" "whether or not paid by the insured." However, that is not necessarily so. It is not unreasonable to believe that such a modifier was added simply to confirm that a person directly engaged by the insured can be an "employee" whether or not he or she is compensated. It does not necessarily apply, as the majority interprets it, to situations where an "employee" is paid by a third party.

Because the definition of "employee" contained in the endorsement is inherently ambiguous, Supreme Court properly denied summary judgment to plaintiff. However, plaintiff's interpretation is not so unreasonable that a declaration is warranted that the insured is entitled to coverage (*see Sekulow v Nationwide Mut. Ins. Co.*, 193 AD2d 395 [1993]). Because an issue of fact exists, Supreme Court overreached in searching the record and dismissing the third cause of action. Instead, I would

reinstate plaintiff's third cause of action so that a trier of fact can determine whether the endorsement at issue here bars the insured's claim.

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

ENTERED: JANUARY 14, 2010



Mazzarelli, J.P., Catterson, Moskowitz, Richter, Manzanet-Daniels, JJ.

1891 Benjamin Kohn, et al., Index 150018/06
Plaintiffs-Appellants,

-against-

City of New York, et al.,
Defendants-Respondents,

Dandy Dan, Inc., et al.,
Defendants.

Arnold E. DiJoseph III, New York, for appellants.

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

Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 30, 2008, which granted defendants City and Petrocelli's motion for summary judgment dismissing the complaint, unanimously modified, on the law, the complaint reinstated as to defendant City, and otherwise affirmed, without costs.

Plaintiffs were passengers in a taxi that collided with another taxi at the intersection of Lexington Avenue and East 23rd Street in Manhattan, at a time when the traffic signals were not functioning at that spot. Pursuant to a contract with the City, Petrocelli was required to respond within two hours of receipt of notice of an outage. The accident occurred before the time Petrocelli was required to arrive.

A municipality has a duty to maintain its streets in a

reasonably safe condition. In order to prevail, plaintiff must show that the City permitted a dangerous or potentially hazardous condition to exist and cause injury (*cf. Thompson v City of New York*, 78 NY2d 682 [1991]). Plaintiffs presented sufficient evidence to raise a triable issue of fact as to whether the City promptly acted to repair the traffic signal or whether the City deployed a traffic officer to the scene in a timely fashion. Furthermore, there is a question of fact on whether either event was a significant factor in causing the accident.

As to Petrocelli, plaintiffs conceded before the motion court that the City should bear the entire responsibility for the injuries; they only opposed the grant of summary judgment as to the City. However, before this Court, they seek to hold Petrocelli liable because it allegedly failed to respond to an extremely dangerous condition at a busy intersection. Thus, we decline to consider this argument, improperly raised for the first time on appeal.

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

ENTERED: JANUARY 14, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1981 Asim Cekic, et al., Index 110704/06
Plaintiffs-Appellants,

-against-

Carlos E. Zapata,
Defendant-Respondent.

Ginsberg & Broome, P.C., New York (Robert M. Ginsberg of counsel), for appellants.

Votto & Cassata, LLP, Staten Island (Christopher J. Albee of counsel), for respondent.

Order, Supreme Court, New York County (Paul Wooten, J.), entered April 23, 2009, which, insofar as appealed from, as limited by the briefs, granted defendant's motion for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Defendant met his initial burden by submitting the affirmed report of experts who examined plaintiffs and concluded, based upon objective tests conducted, that neither had suffered a permanent consequential limitation or a significant limitation of his/her lumbar or cervical spine as a result of the subject September 25, 2005 motor vehicle accident.

Although plaintiff Asim Cekic came forward with objective medical evidence of a limitation, such evidence is unavailing due to a failure to distinguish between injuries from the subject

accident and those from two prior accidents (*see Pommells v Perez*, 4 NY3d 566, 572 [2005]). Moreover, Asim Cekic's doctor's conclusory statement in January 2009 that his neck and back injuries were related to the subject accident is contradicted by the findings in the doctor's March 12, 2004 report which found a permanent partial disability resulting from a prior accident on August 12, 2003 (*see Depena v Sylla*, 63 AD3d 504 [2009]; *lv denied* 13 NY3d 706 [2009]; *Thompson v Abbasi*, 15 AD3d 95, 99 [2005]).

Plaintiff Almera Cekic's doctor presented evidence of a limited range of motion, but no evidence of any treatment after one year. Plaintiff Almera Cekic testified that she had stopped seeing the doctor - giving a myriad of reasons - approximately one year prior to being deposed in this action, i.e., two years prior to her August 2008 re-examination. Such a cessation in treatment, without a consistent explanation, severs the causal connection between her injuries and the accident three years earlier (*Pommells* at 580; *Gonzalez v A.V. Managing, Inc.*, 37 AD3d 175 [2007]).

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

ENTERED: JANUARY 14, 2010

DEPUTY CLERK

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1982 Sears Tooth, Index 116019/07
Plaintiff-Respondent,

-against-

Antony Georgiou,
Defendant-Appellant.

Moskowitz, Book & Walsh, LLP, New York (M. Todd Parker of counsel), for appellant.

Wilson Elser Moskowitz Edelman & Dicker LLP, White Plains (Richard L. Reiter of counsel), for respondent.

Order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered April 15, 2009, which granted plaintiff's motion to voluntarily discontinue its action and to dismiss defendant's counterclaims on the ground of forum non conveniens, unanimously affirmed, without costs.

In this dispute arising out of plaintiff's representation of defendant in a divorce proceeding in London, England, the motion court properly determined that the courts of England are the appropriate forum for hearing plaintiff's fee claims and defendant's legal malpractice counterclaims (*see Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 479 [1984], *cert denied* 469 US 1108 [1985]). Of the competing factors to be considered in determining whether to retain jurisdiction of the litigation, only defendant's primary residence in New York militates in his favor, since the transaction out of which the claims in the

complaint and counterclaim arose occurred in London; English substantive and procedural law applies to the claims; defendant is the only witness located in New York rather than in England; the English courts, as defendant concedes, are an adequate forum for the litigation; the maintenance of the action would be a burden on the New York courts; and England has a substantial interest in adjudicating an action involving the regulation of its legal profession. Contrary to defendant's argument, the fact that plaintiff selected the forum does not preclude the dismissal of the counterclaims, since plaintiff seeks to discontinue the entire action (*cf. Kissimmee Mem. Hosp. v Wilson*, 188 AD2d 802, 803 [1992] [denying plaintiff's motion to dismiss, on ground of forum non conveniens, defendants' medical malpractice counterclaims, which were "inexorably intertwined" with plaintiff's claim for recovery for health care professional services provided]). Moreover, since the litigation is only in the pleading stages, defendant's interposition of counterclaims is insufficient to preclude a voluntary discontinuance so that the action may be litigated in England (*see Ruderman v Brunn*, 65 AD2d 771 [1978]).

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

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

ENTERED: JANUARY 14, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1986 The People of the State of New York, Ind. 5873/07
Respondent,

-against-

Kenneth Brown,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Bonnie G. Wittner, J.), rendered August 19, 2008, convicting defendant, upon his plea of guilty, of burglary in the second degree, and sentencing him, as a second violent felony offender, to a term of 5 years, unanimously affirmed.

Although defendant has appealed from his judgment of conviction, the only issue he raises relates to the court's denial of his postjudgment CPL 420.40 motion that sought a financial hardship hearing to defer or vacate the mandatory surcharges and fees that had been imposed at the time of sentence. Although an appeal from a judgment of conviction brings up for review the imposition of fees and surcharges (*People v Hernandez*, 93 NY2d 261, 268 [1999]), defendant does not challenge the sentencing court's imposition of these assessments. The order denying the motion was not part of the judgment and is

otherwise not a legislatively authorized basis for a criminal appeal (*see* CPL 450.10; *People v Stevens*, 91 NY2d 270, 277 [1998]). An order denying a defendant's postconviction application for relief from an aspect of the judgment cannot be viewed as part of the preexisting judgment. Since defendant has not raised any reviewable issue, we affirm (*see People v Callahan*, 80 NY2d 273, 285 [1992]).

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

ENTERED: JANUARY 14, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1988 Rafael Frias, Index 6722/07
Plaintiff-Respondent,

-against-

Claudette James, et al.,
Defendants-Appellants.

Kaplan & McCarthy, Yonkers (Jeffrey A. Domoto of counsel), for appellants.

Daniel J. Hansen, New York, for respondent.

Order, Supreme Court, Bronx County (Dominic R. Massaro, J.), entered July 7, 2009, which, in an action for personal injuries arising out of a motor vehicle accident, denied defendants' motion for summary judgment dismissing the complaint, unanimously modified, on the law, to dismiss plaintiff's 90/180-day claim of serious injury, and otherwise affirmed, without costs.

Defendants failed to establish their prima facie entitlement to judgment as a matter of law with respect to plaintiff's claims under the "permanent consequential limitation of use of a body organ or member" and "significant limitation of use of a body function or system" categories of serious injury under Insurance Law § 5102(d). In support of their motion, defendants submitted evidence that plaintiff was suffering from restrictions of motion in his lumbar spine, and the opinion of defendants' examining neurologist that such restrictions were attributed to degenerative causes. That opinion, however, was conclusory as it

was advanced without any elaboration and without any reference to degeneration in the MRI reports reviewed (*see Pommells v Perez*, 4 NY3d 566, 577-578 [2005]; *June v Akhtar*, 62 AD3d 427, 428 [2009]). In view of the foregoing, it is not necessary to consider whether plaintiff's opposition with respect to those claims was sufficient to raise a triable issue of fact (*see Glynn v Hopkins*, 55 AD3d 498 [2008]).

However, plaintiff's claim of serious injury under the 90/180-day category should have been dismissed. Plaintiff's bill of particulars that was submitted with defendant's motion failed to demonstrate that substantially all his usual activities were curtailed during the requisite time period (*see Licari v Elliott*, 57 NY2d 230, 238-239 [1982]; *Uddin v Cooper*, 32 AD3d 270, 271-272 [2006], *lv denied* 8 NY3d 808 [2007]), and plaintiff has failed to address this issue on appeal.

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

ENTERED: JANUARY 14, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1989 425 Park Avenue Company, Index 601934/07
Plaintiff-Respondent,

-against-

425 Park Avenue Ground Lessee L.P.,
Defendant-Appellant,

St. Paul Fire and Marine Insurance Company, et al.,
Defendants.

Reed Smith, LLP, New York (Gil Feder of counsel), for appellant.

Proskauer Rose LLP, New York (Steven E. Obus of counsel), for respondent.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered June 24, 2009, which, to the extent appealed from, granted plaintiff's motion for summary judgment on its second cause of action to the extent of requiring defendant 425 Park Avenue Ground Lessee to pay costs associated with the installation of telecommunications wiring upgrades in the subject premises, and denied said defendant's cross motion for partial summary judgment, unanimously affirmed, with costs.

The parties' lease obligated plaintiff tenant to restore or replace any part of the demised premises damaged or destroyed by fire "as nearly as possible to its value, condition and character immediately prior to such damage or destruction." Defendant landlord's withholding of its consent to the proposed restoration plans was unreasonable. We reject defendant's argument that it

reasonably withheld its consent based on safety concerns regarding plaintiff's plan for the restoration. The plan was approved by the New York City Department of Buildings' Electrical Advisory Board, the agency charged with oversight of electrical installations, and there is no evidence to indicate that the approval was irrational or unreasonable (*see Matter of New York Botanical Garden v Board of Stds. & Appeals of City of N.Y.*, 91 NY2d 413, 418-419 [1998]).

We also reject defendant's argument that the general lease provision obligating plaintiff to keep and maintain the premises "in first class order, repair and condition" requires plaintiff to upgrade the electrical system as part of the restoration it undertook pursuant to the specific lease provision governing the scope of its obligation to repair fire damage (*Greenwich Ins. Co. v Volunteers of Am.-Greater N.Y., Inc.*, 62 AD3d 557 [2009]; *Bank of Tokyo-Mitsubishi Ltd., N.Y. Branch v Kvaerner a.s.*, 243 AD2d 1, 8 [1998]).

Although the lease provides that defendant will not be required to pay for any work associated with plaintiff's obligation to repair fire damage and restore the premises, installation of the telecommunications wiring and conduit demanded by defendant exceeded the scope of plaintiff's contractual duty. Moreover, the parties stipulated that while plaintiff would proceed with restorative work that included

installation of the telecommunications upgrades demanded by defendant, the issue of whether defendant would be liable for all or part of the costs associated with the upgrades would be determined in this action. In any event, having breached the lease by unreasonably withholding its consent, defendant is liable on this independent ground for the costs associated with the upgrade.

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

ENTERED: JANUARY 14, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1990 The People of the State of New York, Respondent, Ind. 2478/06

-against-

John Cuoco,
Defendant-Appellant.

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

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered October 11, 2007, convicting defendant, upon his plea of guilty, of attempted robbery in the third degree, and sentencing him, as a second felony offender, to a term of 1½ to 3 years, unanimously affirmed.

Defendant argues that the court should have granted his motion to dismiss the indictment, made on the ground that an offensive remark made by a grand juror at the close of defendant's grand jury testimony incurably tainted the proceeding. However, by pleading guilty, defendant forfeited that claim (*see People v Hansen*, 95 NY2d 227 [2000]). As in *Hansen*, "[d]efendant in essence seeks a review of the fact-finding process engaged in by the grand jurors" (*id.* at 232). The prosecutor instructed the grand juror in question not to vote and directed the other grand jurors to disregard the

remark. Under these circumstances, defendant's claim does not implicate the integrity of the grand jury proceedings (*see* CPL 210.35 [5]; *People v Darby*, 75 NY2d 449, 455 [1990]).

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

ENTERED: JANUARY 14, 2010

Andrias, J.P., McGuire, Moskowitz, Freedman, Román, JJ.

1994 Frank Mondello, Index 12430/06
Plaintiff-Respondent,

-against-

Patricia Mondello,
Defendant-Appellant.

DLA Piper LLP (US), New York (Sonal Patel of counsel), for appellant.

Frank J. Mondello, respondent pro se.

Order, Supreme Court, Bronx County (Julia I. Rodriguez, J.), entered on or about May 26, 2009, which, in this matrimonial action, denied in part defendant's motion to enforce stipulations dated October 31, 2007 and March 18, 2008, unanimously affirmed, without costs.

The parties' October 2007 stipulation required plaintiff to perform certain repairs to the marital residence and provided that other repairs would be performed by a third party; defendant was responsible for obtaining estimates for the latter repairs. Plaintiff stated, without contradiction, that he had performed all the repairs required by the stipulation and that he was unaware if defendant had obtained estimates for the third-party repairs. Defendant's claims in her reply brief that various items remain in disrepair have no record support.

The March 2008 stipulation states, "The Parties, as soon as possible, shall take all necessary actions to distribute the

following accounts on an equal basis to each Party, as of the next monthly statement: i. Ameriprise Brokerage Account; ii. All stocks, including Exxon, GE and Merck." Defendant claims that she should get half the dollar amount of these accounts as of April 1, 2008, as opposed to half of the number of shares on the dates of distribution. Even putting aside that there is no evidence that the next monthly statements were dated April 1, 2008, the parties' stipulation merely states that the accounts shall be distributed on an equal basis. Unlike the stipulation in *Reiff v Reiff* (40 AD3d 346, 346 [2007]), it does not say that the assets "would be divided equally in *value*." Furthermore, defendant did not, "as soon as possible, . . . take all necessary actions to distribute the . . . accounts," as there is no indication that she responded to plaintiff's lawyer's July 2, 2008 letter to her lawyer, asking when she would be available to execute necessary documents.

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

ENTERED: JANUARY 14, 2010

David Apolony
DEPUTY CLERK

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
John W. Sweeny, Jr.
Rolando T. Acosta
Rosalyn H. Richter, JJ.

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Index 105733/07

x

Daniel N. Arbeeny,
Plaintiff-Appellant,

-against-

Kennedy Executive Search, Inc., et al.,
Defendants-Respondents,

Kennedy Associates, et al.,
Defendants.

x

Plaintiff appeals from an order of the Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2008, which granted the motion of defendants Kennedy Executive Search, Inc., and Jack Kandy to dismiss the complaint.

Nathaniel B. Smith, New York, for appellant.

DLA Piper LLP (US), New York (Cary B. Samowitz of counsel), for respondents.

ACOSTA, J.

On or about January 5, 2006, plaintiff and defendant Kennedy Executive Search (KES), an executive recruitment firm, entered into an agreement whereby KES employed plaintiff as a Senior Executive Search Consultant. The agreement, drafted by KES's lawyers and governed by New York law, states that employment may be terminated by plaintiff or KES at any time, with or without cause or prior notice.

The agreement set plaintiff's salary at $125,000 per year and provided that "[s]uch salary shall be reviewed by Management from time to time, and any adjustment to such Salary shall be in the sole discretion of Management." In addition to salary, section 5.1 of the agreement provided that plaintiff was eligible "to earn commission compensation in respect of placements *arranged* by Employee on behalf of KES" as set out in Article 5 (emphasis added). Section 5.2 of the agreement set forth a formula by which commissions were to be calculated.[1] Sections

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[1]Section 5.2 provides, in relevant part, that

> the commission amount will be a percentage of the Net Fee Income to KES (which is defined as the total fee received by KES from the client, less any sales tax, in respect of placement(s) of candidate(s) arranged by Employee), after achieving the annual threshold amount determined in accordance with subparagraph 5.7 below. Such commission compensation shall be Thirty Percent . . . of up to Five Hundred Thousand . . . Dollars in Net Fee Income to KES,

5.3 and 5.7 provided that the commission amount would be paid to plaintiff in the calendar month following the month in which payment in full of the Net Fee Income was received by KES from the client, provided KES had recovered plaintiff's salary and other costs. Section 5.6(a), the portion at issue in this case, provides that "[n]o commission shall be due" in the event plaintiff "is not in the employ of KES at the date the commission payment would otherwise be made."

KES unilaterally reduced plaintiff's salary to $100,000 a year in October 2006, and terminated him on March 28, 2007 because he refused to accept KES's demand that he accept a reduction in his commissions.[2] According to KES, it received a fee in March for a placement plaintiff had handled. Pursuant to section 5.3, payment to plaintiff would have been due in April if plaintiff were still employed. To avoid unnecessary disputes, however, KES paid plaintiff $35,000 "without prejudice."[3] KES

> Forty Percent . . . of the Net Fee Income to KES of between Five Hundred Thousand Dollars . . . and One Million Dollars . . . . ., and Fifty Percent . . . of the Net Fee Income to KES exceeding One Million Dollars.

[2]According to KES, plaintiff left voluntarily.

[3]Pursuant to section 13.4,

> [t]his Agreement may be amended, modified, superseded, [or] canceled . . . and the terms . . . hereof may be waived, only by a written instrument executed by both of the parties

received other fees originated by plaintiff after March 2007, but no further commissions were paid to plaintiff.

In April 2007, plaintiff brought the instant action against KES, Kennedy Associates, Jason Kennedy, Jack Kandy (the president of KES), and Joel Kandy. He alleged that he was owed $12,500 in unpaid salary for six months, $223,970 in unpaid commissions, and another unspecified amount for placements that he was working on when he was terminated. The complaint asserted claims for breach of contract, unpaid salary and commissions pursuant to Labor Law §§ 191 and 198, quantum meruit/unjust enrichment, and violation of Business Corporation Law § 630.

In September 2007, defendants KES and Jack Kandy, the only defendants to have been served, moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7). In granting the motion, the court noted that "the employment agreement expressly deprives plaintiff of post-termination commissions," and there was "no allegation that [KES] failed to pay to [plaintiff] commissions

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> hereto, or in the case of a waiver, by the party waiving compliance. . . The failure of either party at any time or times to require performance of any provision hereof shall in no manner affect the right at a later time to enforce the same. No waiver by either party of the breach of any term . . . contained in this Agreement, whether by conduct or otherwise, . . . shall be deemed to be . . . a further or continuing waiver of any such breach.

for placements he finalized and for which fees were received prior to his termination."

With respect to the Labor Law claims, the court found that "[d]espite the fact that [plaintiff]'s title was 'senior executive search consultant,' [he] qualifies as an 'employee' under the Labor Law." Nevertheless, it dismissed the Labor Law claims because "[t]he statutory remedies against an employer for the wilful failure to timely pay earned wages and commissions are unavailable where . . . there is no enforceable contractual right to those wages or commissions." The court dismissed the quantum meruit claim because of "the existence of [an] enforceable contract covering the disputed issue of the plaintiff's compensation." It dismissed the complaint against the other defendants as well, noting that they had not been served and were "sued only as alter egos of" KES.

Plaintiff's claim for $12,500 in unpaid salary for the reduction in pay from $125,000 to $100,000 is unavailing inasmuch as the agreement clearly stated that "any adjustment to such Salary shall be in the sole discretion of Management."

Plaintiff, however, has sufficiently stated a breach of contract claim for unpaid earned commissions that he "arranged" prior to his termination. Although generally an at-will employee is not entitled to post-termination commissions, the parties are

certainly free to provide otherwise in a written agreement. For example, in *Yudell v Israel & Assoc.* (248 AD2d 189 [1998]), the employee earned commissions based on a percentage of all fees actually received that were "originated by" her. She brought an action to recover commissions for her role in securing two placements that were completed post-termination. The employer contended that as a matter of law, the employee could not recover commissions for placements that were finalized after she left. In denying summary judgment, this Court held that the words "placements . . . originated by you" did not alone specify when or how the placement must be completed in order to entitle the employee to a commission. Had the employer meant to foreclose the possibility of the employee earning a post-termination commission on a placement unquestionably originated by her, it could have said so explicitly, such as "placements . . . originated *and completed* by you" or "placements . . . originated by you *which occur during your employment here*" (*id.* at 190 emphasis added).

In *Yudell*, we distinguished *McEntee v Van Cleef & Arpels* (166 AD2d 359, 360 [1990]), where the employee was not entitled to post-termination commissions because he had "failed to allege the existence of any contract entitling him to such unearned commissions nor the precise terms thereof." Accordingly, we

rejected McEntee's "open-ended claim to commissions on unspecified future placements, where there was no contract setting forth either how such commissions would be calculated or what the limits of [the employer]'s purported obligation would be" (*Yudell* at 167). Likewise, in *Mackie v La Salle Indus.* (92 AD2d 821 [1983], *appeal dismissed* 60 NY2d 612 [1983]), we held that a salesperson was not entitled to commissions, on an account that she did not service for over a year, simply because she had originally obtained it. We noted in *Yudell* (at 190) that "[o]ther cases in which an at-will salesman has been denied commissions from post-termination sales similarly involve a plaintiff's indefinite and unlimited claim to commissions from all future transactions between its former employer and certain customers, simply because plaintiff was the one who initially secured these customers." The employee in *Yudell,* by contrast, sought commissions from two specific placements allegedly originated by her and could "point to a contract provision that establishes this calculation method and that supports the inference that her termination was not meant to extinguish her rights with respect to those placements. She [did] not claim the right to prospective commissions for the indefinite future simply because she allegedly originated defendant's relationship with those clients" (*id.* at 190-191).

Once the commission is earned, it cannot be forfeited (*see Davidson v Regan Fund Mgt. Ltd.*, 13 AD3d 117 [2004];[4] *Yudell*, 248 AD2d 189, *supra*). There is a long-standing policy against the forfeiture of earned wages, and this applies to earned, uncollected commissions as well (*Weiner v Diebold Group*, Inc., 166, 166-167[1991]).

Here, as in *Yudell*, plaintiff seeks commissions for placements "arranged" by him during his tenure at KES. Had KES "meant to foreclose the possibility that plaintiff might earn a post-termination commission on a placement" *arranged* by plaintiff, it "could have said so explicitly" (248 AD2d at 189-190). Under the doctrine of contra proferentem, an employment agreement should be construed against the drafter (*id.* at 189). Instead, section 5.1 states simply that plaintiff was entitled to commissions *arranged* by him. Sections 5.2, 5.3 and 5.7 merely provide the formula for determining the amount of the commission and the date when it vests,[5] as well as the month when payment

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[4]Although *Pachter v Bernard Hodes Group, Inc.* (10 NY3d 609, 615-616 [2008]) abrogated that portion of the decision in *Davidson* where we had held that the cause of action under Labor Law § 198(1-a) was properly dismissed on a finding of employment in an executive capacity, the remainder of *Davidson* remains good law.

[5]*Pachter* (10 NY3d at 617), does not dictate a different result. There, the employee's commission consisted of a percentage of the amount billed minus particular charges that

was to be made. It does not, however, otherwise modify the term *arranged* set forth in section 5.1. Being employed, after plaintiff fully performed by arranging a placement, has no

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were reduced by certain business costs, such as finance charges for late payments, losses attributable to errors in placing advertisements, uncollectible debts, and travel and entertainment expenses, as well as a portion of an assistant's salary. Labor Law §193, however, prohibits an employer from making deductions from wages, which includes commissions, unless permitted by law or authorized by the employee for "insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee." Since the deductions for business costs noted above were not within the category of permissible deductions delineated in section 193, their legality depended on when a commission was "earned" and became a "wage." "If the adjustments were made before the commissions were earned, section 193 did not prohibit them; but if the charges were subtracted after [the] commissions were earned, [the employer] engaged in impermissible practices under the statute" (10 NY3d at 167).

The Court noted that even though commissions under common law were earned when a broker produced a person ready and willing to enter into a contract on his employer's terms, the parties to a transaction were still free to depart from the common law by entering into a different arrangement, adding whatever conditions they might wish (*Feinberg Bros. Agency v Berted Realty Co.*, 70 NY2d 828, 830 [1987]), including the computation of downward adjustments from gross sales, billings or receivables, in which event the commission would not be deemed earned or vested until computation of the agreed-upon formula (*Patcher,* 10 NY3d at 617-618). As applied to the present case, plaintiff's commissions were "earned" or "vested" after the various deductions provided for in sections 5.2, 5.3 and 5.7 were made. Otherwise, KES would have been in violation of Labor Law §193. It does not follow from this holding, however, that a commission must be earned or vested pre-termination for plaintiff to receive it, where the agreement provides that plaintiff is entitled to the commission once it vests if he "arranged" the placement.

bearing on the various calculations specified in sections 5.2 and 5.7.

Section 5.6, which states that "[n]o commission shall be *due*" in the event plaintiff "is not in the employ of KES at the date the commission payment would otherwise be made," is thus enforceable only to the extent it seeks to foreclose the right to prospective commissions for the indefinite future, such as sought by the plaintiffs in *McEntee* and *Mackie*. Indeed, the provision does not explicitly express an intent that earned commissions will be retroactively lost upon termination. Rather, the employment agreement provides for an increase in the commission percentage based on annual revenue targets. It also provided that the first year's commissions, i.e. 2006, were based specifically on that year's numbers, and subsequent commissions would be based on the "Employee's salary for the then current calendar year" (Section 5.7). Finally, the agreement provides, in section 5.2, that in calculating commissions based on revenues, "there will be no carry-over to the next calendar year or look-back to the preceding year in determining commissions earned." These references support an interpretation that section 5.6 was intended not to cut off retroactive commissions earned during a calendar year, but rather to prevent prospective commissions in later years. Enforcing it in the manner argued by

defendants would deprive plaintiff of earned commissions, and thus would be inconsistent with section 5.1 of the agreement as well as the public policy against forfeiting commissions.

Aside from the wording of the contract, inasmuch as an employee is entitled to the fruits of his or her labor, the at-will doctrine should not preclude plaintiff from raising a breach of contract claim for earned commissions. The implied covenant of good faith does not give rise to a contract action for the wrongful discharge of an at-will employee (*Murphy v American Home Prods. Corp., Inc.*, 58 NY2d 293, 304-305 [1983]). While an at-will employee cannot recover for termination per se, an employee's "contract for payment of commissions creates rights distinct from the employment relation, and . . . obligations derived from the covenant of good faith implicit in the commission contract may survive the termination of the employment relationship. A covenant of good faith should not be implied as a modification of an employer's right to terminate an at-will employee because even a whimsical termination does not deprive the employee of benefits expected in return for the employee's performance. This is so because performance and the distribution of benefits occur simultaneously, and neither party is left high and dry by the termination. Where, however, a covenant of good faith is necessary to enable one party to receive the benefits

promised for performance, it is implied by the law as necessary to effectuate the intent of the parties" (*Wakefield v Northern Telecom, Inc.*, 769 F2d 109, 112 [1985]; *see also Sibbald v Bethlehem Iron Co.*, 83 NY 378, 383-384 [1885]).

Although an at-will employee such as plaintiff would not be able to sue for wrongful termination of the contract, he should nonetheless be able to state a claim that the employer's termination action was specifically designed to cut off commissions that were coming due to the employee. A contract "cannot be read to enable the defendant to terminate an employee for the purpose of avoiding the payment of commissions which are otherwise owed. Such an interpretation would make the performance by one party the cause of the other party's non-performance" (*Wakefield*, 769 F2d at 112). *Berzin v W.P. Carey & Co.* (293 AD2d 320 [2002]) does not dictate a different result. In that case we rejected the employee's claim that employer's "sole motivation in terminating him was to prevent the vesting of additional stock options and other compensation benefits, and that his termination therefore violated the covenant of good faith and fair dealing implied in every contract" (at 321]). Stock options, however, are different from earned commissions in that the latter cannot be forfeited (*Weiner*, 173 AD2d at 167-168). In *Knudsen v Quebecor Printing*,

(792 F Supp 234, 239 [SD NY 1992]), the court distinguished *Gallagher v Lambert* (74 NY2d 562 [1989]), which involved a buy-back provision for employee stock, noting that *Knudsen (and Wakefield*, 769 F2d 109), involved

> sales commissions due and owing to employees. A sales commission provision provides for an employer to pay its employees commissions earned through the employees' own efforts. In contrast, a stock buy-back provision affords employees a form of compensation that is related merely to the employees' length of tenure rather than to the extent of their efforts. The Second Circuit's finding of an implied covenant of good faith and fair dealing, while compelling in the sales commissions context, is less so in the stock buy-back context because buy-back provisions do not relate as directly to the efforts of employees as do sales commission provisions.[6]

The motion court also erred in dismissing plaintiff's Labor Law claims. Although it found that plaintiff was an employee and

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[6]Defendants argue that *Wakefield*, decided by the Second Circuit, has not been followed by several district courts (*see Baguer v Spanish Broadcasting Sys., 2007 US Dist LEXIS 70793, *26-28*, 2007 WL 2780390, *9-11 [SD NY]; *Plantier v Cordiant*, 1998 US Dist LEXIS 15037, *8-9, 1998 WL 661474, *3 [SD NY 1998]; *Collins & Aikman Floor Coverings Corp. v Froehlich*, 736 F Supp 480, 486 [SD NY 1990], but neither the Second Circuit nor the New York State Court of Appeals has rejected it. In fact, *Knudsen*, cited it with approval (792 F Supp at 239):

> It is important to note at the outset that the majority in *Gallagher* did not even consider *Wakefield*. Furthermore, given the *Gallagher* dissent's reliance on *Wakefield*, the majority had a clear invitation to signal either its acceptance or its rejection of *Wakefield* but it declined to do so. Therefore, if *Gallagher* is distinguishable from *Wakefield*, there is no reason to read into the majority's decision any assessment of *Wakefield*.

qualified for the protection of the Labor Law, it incorrectly held that there was no enforceable contractual right to those commissions.

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

Accordingly, the order, Supreme Court, New York County (Eileen Bransten, J.), entered April 29, 2008, which granted the motion of defendants KES and Jack Kandy to dismiss the complaint, should be modified to the extent of vacating that portion of the judgment dismissing the breach of contract and Labor Law §§ 191 and 198 claims, and otherwise affirmed, without costs.

M-2057&
M-2231 - *Arbeeny v Kennedy Executive Search, Inc., et al.*

Motion seeking leave to supplement the record granted and cross motion to strike references to matters outside the record from plaintiff's reply brief denied.

All concur.

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

ENTERED: JANUARY 14, 2010

DEPUTY CLERK