SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

MARCH 25, 2010

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2431 The People of the State of New York, Respondent, Ind. 4583/07

-against-

Duwayne Chance,
Defendant-Appellant.

Richard M. Greenberg, Office of the Appellate Defender, New York (Joseph M. Nursey of counsel), and Fried, Frank, Harris, Shriver & Jacobson LLP, New York (Johnathan J. Smith of counsel, for appellant.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered August 7, 2008, convicting defendant, after a jury trial, of robbery in the third degree, grand larceny in the fourth degree and criminal possession of stolen property in the fourth degree, and sentencing him, as a second felony offender, to an aggregate term of 2½ to 5 years, unanimously affirmed.

The court correctly declined to impose any sanction for alleged noncompliance with the procedures for disposal of stolen property set forth in Penal Law § 450.10. The record supports the court's finding that the victim's wallet was never in police "custody" within the meaning of the statute when, in the victim's

presence, the police briefly possessed a wallet found at the scene of the crime for the purpose of confirming the victim's identity as the owner before returning it to her (*see People v Faucette*, 201 AD2d 252, 253 [1994]; *Matter of Morgenthau v Marks*, 177 AD2d 131, 133 [1992]). This is in keeping with the language of the statute, stating that it applies when "a request is made for the return of stolen property" (Penal Law § 450.10[1]). This contemplates a removal of the property from the scene of the crime for storage at the Property Clerk's office, or some other assertion of control over the property by the police. Nothing in the statute obligates the police to *take* custody of anything; instead, it governs the disposition of stolen property after the police have decided to voucher it, and after someone has asked for a property release. In any event, in light of the evidence presented and issues contested at trial, the return of the wallet to the victim did not cause sufficient prejudice to warrant any sanction.

Defendant's challenge to the sufficiency of the evidence supporting his robbery conviction is without merit. The evidence supports the inference that when defendant struggled with security guards, his intent was not only to escape or defend

himself, but also to retain possession of the stolen wallet (*see e.g. People v Gonzalez*, 60 AD3d 447, 448 [2009], *lv denied* 12 NY3d 915 [2009]).

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

ENTERED: MARCH 25, 2010

David Spolony

CLERK

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2432-
2433 Index 111744/08

Mark Lewis Brecker,
Plaintiff-Respondent,

-against-

295 Central Park West, Inc., et al.,
Defendants-Appellants.

Mitofsky Shapiro Neville & Hazen, LLP, New York (M. David Fonseca of counsel), for appellants.

Mark Lewis Brecker, New York, respondent pro se.

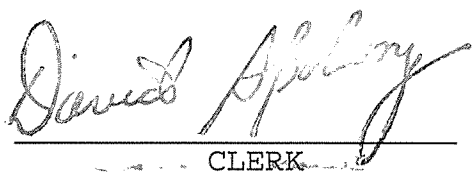
Order, Supreme Court, New York County (Carol R. Edmead, J.), entered February 5, 2009, which, to the extent appealed from, conditioned dismissal of this action on the parties being afforded full discovery in a pending Civil Court proceeding, and order, same court and Justice, entered September 16, 2009, which granted plaintiff's motion to reargue and restore this action to the calendar, unanimously reversed, on the law, without costs, plaintiff's motion denied, and the action dismissed unconditionally. The Clerk is directed to enter judgment accordingly.

When no other action or proceeding is pending in Civil Court, a tenant may commence an action in Supreme Court seeking a declaration of succession rights to a rent-regulated apartment and related injunctive relief (*see Shadick v 430 Realty Co.*, 250 AD2d 417 [1998]). However, Civil Court is the strongly preferred

forum for resolving such landlord-tenant disputes (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440 [2004]). Once a summary proceeding has been commenced in Civil Court where complete relief can be afforded to the tenant, there is no further basis for invoking the equitable jurisdiction of Supreme Court (*see Post v 120 E. End Ave. Corp.*, 62 NY2d 19, 28 [1984]; *Cox v J.D. Realty Assoc.*, 217 AD2d 179 [1995]). Absent a showing of special circumstances or novel issues requiring Supreme Court involvement, the court should not have conditioned dismissal on full discovery in Civil Court, and should simply have dismissed the equitable action under CPLR 3211(a)(4) (*see 44-46 W. 65th Apt. Corp.*, 3 AD3d 440, *supra*; *Cox*, 217 AD2d 179, *supra*). Discovery issues can be addressed by Civil Court using the procedures available in a summary proceeding pursuant to the Real Property Actions and Proceedings Law (*see id.* at 183-184). Plaintiff's request that this Court review outstanding discovery matters is beyond the scope of the appeals.

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

ENTERED: MARCH 25, 2010



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Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2435 Briyanna Poyer, etc., et al., Index 8441/06
Plaintiffs-Respondents,

-against-

Florence O. Nnebe, M.D., et al.,
Defendants-Appellants.

Amabile & Erman, P.C., Staten Island (Edward F. Humphries of counsel), for appellants.

Jay K. Margolis, New City, for respondents.

Order, Supreme Court, Bronx County (Alison Y. Tuitt, J.), entered on or about May 19, 2009, insofar as it denied defendants motion for summary judgment dismissing the complaint based on plaintiff's failure to comply with a compliance conference order, unanimously affirmed, without costs.

Plaintiffs failed to serve bills of particulars on certain defendants within the time set forth in a compliance conference order. The order provided that failure to comply would result in the preclusion of the offending party or waiver of EBT, unless otherwise ordered by the court. Here, the court properly exercised its discretion in determining that preclusion was unwarranted (*see Rankin v Miller*, 252 AD2d 863 [1998]). Defendants failed to demonstrate any harm resulting from the failure to respond to all of their demands for bills of

particulars (*see Northway Eng'g v Felix Indus.*, 77 NY2d 332, 336 [1991]), and they also appear to have been deficient in complying with the scheduling order.

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

ENTERED: MARCH 25, 2010

CLERK

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2437 The People of the State of New York, Ind. 4125/08
Respondent,

-against-

Emanuel Hancock,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Alice Wiseman of counsel), for respondent.

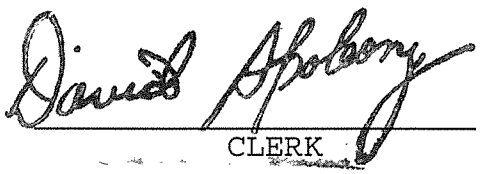
Judgment, Supreme Court, New York County (Laura Ward, J. at suppression hearing; Edward J. McLaughlin, J. at jury trial and sentence), rendered on or about March 10, 2009, convicting defendant of criminal possession of a forged instrument in the second degree, and sentencing him to a term of 1 to 3 years, unanimously reversed, on the law, defendant's motion to suppress physical evidence granted, and the indictment dismissed.

At the suppression proceedings, the only theory relied upon by the People in their argument, and by the court in its decision, was that a forged driver's license recovered from defendant's car after his arrest was admissible under the inevitable discovery doctrine. As the People concede, defendant is entitled to suppression because the inevitable discovery exception does not apply where "the evidence sought to be

suppressed is the very evidence obtained in the illegal search" (*People v Stith*, 69 NY2d 313, 318 [1987]).

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

ENTERED: MARCH 25, 2010



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Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2438 Tamir Sapir, Index 601146/07
Plaintiff-Appellant,

-against-

Gregory Hovas, et al.,
Defendants-Respondents.

Scarinci Hollenbeck, New York (Mitchell L. Pascual of counsel), for appellant.

Scarola Ellis LLP, New York (Richard J.J. Scarola of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered July 23, 2009, which granted defendants' motion for summary judgment dismissing the complaint and declaring their entitlement to a $1.3 million down payment held in escrow, unanimously affirmed, with costs.

The dispute involves a contract for the purchase of a substantial piece of property on Acapulco Bay, known as Villa Arabesque. When the transaction did not close, the buyer brought this action for return of his deposit.

The Letter of Deposit, whereby plaintiff agreed to purchase the property, portions of which were held in trust under Mexican law, was a valid and enforceable document. The relevant trust documents gave defendants the authority to direct the transfer of the property of which they were the beneficial owners. The agreement, signed by all parties, constituted "a legal and

binding obligation . . . enforceable . . . in accordance with its terms."

The agreement established a purchase price, and made remedies available to the parties in the event of a dispute. Plaintiff's failure to tender performance or give defendants a reasonable time to cure an alleged defect was an anticipatory breach warranting a declaration of default against him, and retention of the deposit as liquidated damages (*see Water St. Dev. Corp. v City of New York*, 220 AD2d 289, 291 [1995], *lv denied* 88 NY2d 809 [1996]).

Under the plain language of the contract, the failure of the parties to agree upon a list of furnishings to be sold with the house did not render the contract unenforceable. Contrary to plaintiff's contention, the agreement did not omit material terms; his novel argument that a further written contract was required cannot be considered for the first time on appeal (*see Omansky v Whitacre*, 55 AD3d 373 [2008]).

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

ENTERED: MARCH 25, 2010

David Apolony

CLERK

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2439 Elizabeth Garza, et al., Index 101238/06
Plaintiffs-Respondents,

-against-

508 West 112th Street, Inc., et al.,
Defendants-Appellants.

Belkin Burden Wenig & Goldman, LLP, New York (Magda L. Cruz of counsel), for appellants.

David E. Frazer, New York, for respondents.

Judgment, Supreme Court, New York County (Judith J. Gische, J.), entered March 6, 2009, after a nonjury trial, declaring that the subject roof terrace was part of plaintiffs' rent-stabilized tenancy, unanimously affirmed, with costs.

"In a nonjury trial, 'the decision of the fact-finding court should not be disturbed upon appeal unless it is obvious that the court's conclusions could not be reached under any fair interpretation of the evidence, especially when the findings of fact rest in large measure on considerations relating to the credibility of witnesses'" *Watts v State of New York*, 25 AD3d 324, 324 [2006], quoting *Thoreson v Penthouse Intl.*, 179 AD2d 29, 31 [1992], *affd* 80 NY2d 490 [1992]).

Here, based upon the language of the two leases, the trial testimony, the physical layout, and the parties' long-term conduct, the court properly determined that the "roof terrace" was part of the demised premises which use was not *de minimus*

(*see Conforti v Goradia*, 234 AD2d 237 [1996]). The 1982 lease expressly referred to a "roof terrace" and both the 1982 and 1989 leases described the demised premises to include "a terrace, if any." Further, plaintiffs had used the roof exclusively with the consent of the landlord since 1982 and accessed the space through two full-sized doors from their apartment, with no other public access to the space except for a fire door for which only the owner and plaintiffs had keys.

We have considered defendants remaining arguments and find them unavailing.

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

ENTERED: MARCH 25, 2010

CLERK

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2441 The People of the State of New York, Ind. 6055/07
Respondent,

-against-

Domingo Quiroz-Santos,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman 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 (Bruce Allen, J.), rendered on or about December 3, 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: MARCH 25, 2010

CLERK

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

Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2442-
2442A Index 602459/06

Boris Komarov, et al.,
Plaintiffs-Respondents,

-against-

L&L International Import/Export, Inc., et al.,
Defendants,

Russian Black Pearl, Inc., et al.,
Defendants-Appellants.

Greenfield Stein & Senior, LLP, New York (Paul T. Shoemaker of counsel), for appellants.

Turret & Associates, P.C., Melville (Ira A. Turret of counsel), for respondents.

Judgment, Supreme Court, New York County (Eileen Bransten, J.), entered September 15, 2009, awarding plaintiffs damages in the principal amount of $607,000, plus interest, costs and disbursements, and bringing up for review an order, same court and Justice, entered September 15, 2009, which, insofar as challenged, denied defendants-appellants' motion for summary judgment dismissing the complaint and granted plaintiffs' cross motion for summary judgment against appellants, unanimously affirmed, with costs. Appeal from the above order unanimously dismissed, without costs, as subsumed in the appeal from the above judgment.

Plaintiffs demonstrated prima facie entitlement to summary judgment by submitting documents showing that appellants had at

various times acknowledged an existing debt to plaintiff and containing nothing inconsistent with an intention to pay it (*see Banco do Brasil v State of Antigua & Barbuda*, 268 AD2d 75, 77 [2000]). In addition to acknowledging that money had been lent, these documents variously purport to update running balances as partial payments were made and to provide new consideration to defendants by reducing the interest rate or delaying interest payments. Some of the documents were signed by appellant Leybson alone; others are on the letterhead of her company and co-appellant, defendant Russian Black Pearl, Inc.; others, including one on the letterhead of Russian Black Pearl, were signed by her since-deceased husband alone, who was the principal of defendant L&L International Import/Export, Inc., a company that was in same caviar and fish import business as appellants; and others were signed by both Leybson and her husband. Beyond the signatures at the bottom and titles at the top (e.g. "Payment Reconciliation Statement On the debt obligations of Lia and Leo Leybzon to Boris Komarov"), the tenor of these documents, especially their use of the pronoun "we," is, at the least, consistent with plaintiffs' claim that the parties intended the debt to be a joint obligation of Leybson, her husband, and their respective companies.

In opposition, appellants submitted no documents tending to show that they did not acknowledge the debt. Instead, Leybson asserted that she acted only as a scrivener for her husband and

signed the documents at his behest even though she was unaware of and never asked him about their meaning, and that she and her company had no involvement with the alleged debt. The motion court correctly found these assertions to be insufficient to raise an issue of fact in the face of plaintiffs' documentary evidence (*see Raj Jewelers v Dialuck Corp.*, 300 AD2d 124, 126 [2002]).

The amount owing was properly determined on the basis of documentary evidence showing that the balance had been reduced to $607,000, and an adverse interest that there no subsequent payments were made, based on appellants' failure to produce documents as ordered by the court and Leybson's admission that she had destroyed L&L's records after commencement of the action (*see id.*; *Gryphon Dom. VI, LLC v APP Intl. Fin. Co., B.V.*, 18 AD3d 286, 287 [2005]; *Denoyelles v Gallagher*, 40 AD3d 1027 [2007]).

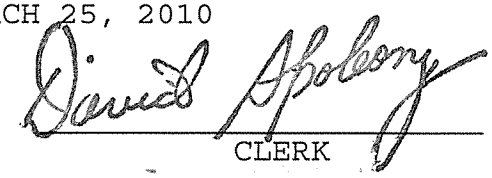
We have considered appellants' other contentions and find them unavailing.

M-914 - Komarov v L&L International Import/Export, Inc.

Motion to vacate stay denied as academic.

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

ENTERED: MARCH 25, 2010



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Gonzalez, P.J., Moskowitz, Freedman, Román, JJ.

2443 Timothy Keefe, Index 109484/09
Plaintiff-Appellant,

-against-

New York Law School,
Defendant-Respondent.

Timothy Keefe, appellant pro se.

Nixon Peabody LLP, Jericho (Daniel A. Rizzi of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered November 25, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

Plaintiff, a transfer student at defendant law school, commenced this action alleging, inter alia, that defendant breached an implied contract of good faith and fair dealing with him as a result of a grade he received in his Legal Writing II course. Claiming that he was unfairly disadvantaged because he did not take Legal Writing I at the law school, plaintiff seeks to require the law school to change its grading system from letter grades to pass/fail.

"The rights and obligations of the parties, as contained in the university's bulletins, bec[o]me a part of the parties' contract" (*Prusack v State of New York*, 117 AD2d 729, 730 [1986]). However, only specific promises set forth in a school's bulletins, circulars and handbooks, which are material to the

student's relationship with the school, can establish the existence of an implied contract (*see Lloyd v Alpha Phi Alpha Fraternity*, 1999 WL 47153, *9-10, 1999 US Dist LEXIS 906, *25-28 [ND NY 1999]; *see also Abraham v New York Univ. Coll. of Dentistry*, 190 AD2d 567 [1993]). Absent the existence of a contract, a claim alleging breach of the implied covenant of good faith and fair dealing is legally unavailing (*see Schorr v Guardian Life Ins. Co. of Am.*, 44 AD3d 319 [2007]). Furthermore, "although . . . the determinations of educational institutions as to the academic performance of their students are not completely beyond the scope of judicial review, that review is limited to the question of whether the challenged determination was arbitrary and capricious, irrational, made in bad faith or contrary to Constitution or statute" (*Matter of Susan M. v New York Law School*, 76 NY2d 241, 246 [1990] [internal citations omitted]).

The court properly dismissed the complaint as there is no indication that defendant ever promised that it would utilize a pass/fail grading system. In fact, the remedy plaintiff seeks is contradicted by the documentary evidence, as defendant communicated through its student handbook that it utilizes a letter grading system under which all students are evaluated. Accordingly, plaintiff's breach of implied contract claim fails, as does his claim for breach of the implied covenant of good

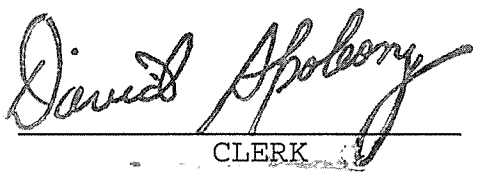
faith and fair dealing.

Plaintiff contends that he was unfairly disadvantaged and that his grade was arbitrary and capricious, as all assignments given in Legal Writing II were based on the law and the facts from assignments given in Legal Writing I. This argument is belied by the record, which includes an email from defendant's Office of Academic Affairs informing plaintiff that his Legal Writing section had been changed, and that he should contact the Administrative Assistant of Legal Writing, who would provide him with the materials needed to bring him "up to speed" for the spring term. There is no evidence that plaintiff availed himself of this opportunity.

The motion court did not abuse its discretion in declining to enter an unsigned, unverified copy of a transcript of a recorded discussion between plaintiff and his professor (*see e.g. Myers v Polytechnic Preparatory Country Day School*, 50 AD3d 868, 869 [2008]).

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

ENTERED: MARCH 25, 2010



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Gonzalez, P.J., Moskowitz, Freedman, Richter, Román, JJ.

2444-
2445 Joan Banach, Index 600918/09
Plaintiff-Respondent,

-against-

The Dedalus Foundation, Inc.,
Defendant-Appellant.

Pryor Cashman LLP, New York (Perry M. Amsellem of counsel), for appellant.

Emery Celli Brinckerhoff & Abady LLP, New York (Sarah Netburn of counsel), for respondent.

Appeals from order, Supreme Court, New York County (Doris Ling-Cohan, J.), entered October 28, 2009, which vacated a stay of disclosure and directed immediate discovery, and order, same court and Justice, entered November 24, 2009, wherein the Justice recused herself from the matter, unanimously dismissed, without costs, as taken from nonappealable orders.

The discovery order, issued after a discovery conference, is not appealable as of right (*Sidelev v Tsal-Tsalko*, 52 AD3d 398 [2008]). Also, the court's sua sponte recusal order is not

appealable as of right because it did not decide a motion made on notice (see Sholes *v Meagher*, 100 NY2d 333 [2003]).

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

ENTERED: MARCH 25, 2010

CLERK

Gonzalez, P.J., Moskowitz, Richter, Román, JJ.

2446N Allstate Insurance Company, et al., Index 603776/03
Plaintiffs-Respondents,

-against-

Alex Buziashvili,
Defendant-Appellant,

Numerous Others, et al.,
Defendants.

The Law Office of David A. Hoines, P.C., Brooklyn (Lawrence J. Eisenberg of counsel), for appellant.

Stern & Montana, LLP, New York (Daniel S. Marvin of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered December 17, 2008, which granted plaintiffs' motion to strike defendant Alex Buziashvili's answer and for a default judgment against him, unanimously reversed, on the law and the facts, without costs, the answer reinstated, and the matter remanded to the IAS court for consideration, after affording the parties an opportunity to be heard, of such penalty less than striking the answer as the court deems just.

To the extent the court believed it was constrained by the doctrine of law of the case to strike defendant's answer upon his failure to comply with a prior discovery order, this was error. That doctrine does not apply to discretionary rulings such as case management decisions (*Brothers v Bunkoff Gen. Contrs.*, 296 AD2d 764, 765 [2002]). Moreover, the prior order did not direct,

or even suggest, that defendant's answer be stricken in the event of noncompliance.

Nonetheless, the record shows that defendant's response to plaintiffs' discovery notice and court orders has been inexcusably lax (*see Figdor v City of New York*, 33 AD3d 560 [2006]). Plaintiffs first requested the patient files in dispute in a discovery notice dated August 2004. Although defendant indicated, in his March 2005 response, that he would produce any such responsive documents, he failed to do so for several years. In September 2007, in a subsequent discovery response, defendant indicated that the records were in his possession at a warehouse in Brooklyn, though he did not actually produce them at that time.

At a November 27, 2007 conference, the court ordered defendant to produce the records. In January 2008, defendant granted plaintiffs access to the warehouse where the files were kept. This access, however, was not meaningful because the records were intermixed among hundreds of boxes of nonresponsive and irrelevant documents. Plaintiffs sought further relief and at an April 25, 2008 conference, the court ordered defendant to review and segregate the documents and make them available for inspection at the warehouse by September 1, 2008. Despite the generous amount of time given by the court, defendant did not produce any of the patient files by the deadline. Nor did

defendant ask plaintiffs, or the court, for additional time to comply, or seek a protective order. Instead, defendant simply ignored the court order. It was not until several weeks after the deadline had passed that defendant produced only a small portion of the documents.

We find that defendant's course of conduct in failing to produce the files was willful and warrants imposition of some sanction. It took defendant four years from the first discovery request to produce only a small number of the documents in question. Even when the court gave defendant an additional four months to cure the noncompliance, defendant ignored the court mandate. Defendant offers no convincing explanation for the lengthy delay in turning over the patient files. He does not point to anything in the record to support his claim that there were outstanding issues as to privilege and ownership of the documents. Defendant's excuse that producing the documents was a drain on his time and that his energy and resources should be devoted to more important tasks is insufficient to justify violation of a court order.

Nevertheless, because defendant did make a partial production of the documents and, in response to plaintiffs' motion to strike, indicated his willingness to continue production, we do not believe that the extreme sanction of striking the answer was appropriate. We also note that the

court's orders did not warn defendant that his answer might be stricken if he did not comply, nor did the court issue a conditional order (*cf., Garcia v Defex, D.D.S.*, 59 AD3d 183 [2009]). There is no indication that such a warning was given orally at any conferences and there was no prior motion practice that might have apprised defendant of the serious consequences he faced for continued noncompliance.

Under these circumstances, we believe that a lesser sanction is appropriate. Although this Court normally would impose the penalty it deemed just, the parties here limited their argument to the issue of whether the appropriate penalty for defendant's behavior was striking the answer or no sanction at all. Since they did not address the possibility of a lesser sanction and because we believe that some penalty is warranted, we remand the matter (*see Quiceno v 101 Park Avenue Assoc.*, 272 AD2d 107 [2000]).

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

ENTERED: MARCH 25, 2010

CLERK

Andrias, J.P., Nardelli, Buckley, Catterson, JJ.

2480 Ellen Stella, etc., et al., Index 12172/05
Plaintiffs-Appellants,

-against-

The County of Nassau, et al.,
Defendants,

Rose A. Florio and Gerald Antonacci, as
Executors of the Estate of
Teresa Antonacci, et al.,
Defendants-Respondents.

Thomas F. Liotti, Garden City, for appellants.

Harry H. Kutner, Jr., Mineola, for respondents.

Order, Supreme Court, Nassau County (Zelda Jonas, J.), entered on or about June 21, 2006, which, to the extent appealed from as limited by the briefs, granted the Antonacci defendants' motion to dismiss the fourth cause of action and denied plaintiffs' cross motion for an extension of time to serve an amended summons and complaint, unanimously modified, on the law, plaintiffs' cross motion granted, and otherwise affirmed, without costs.

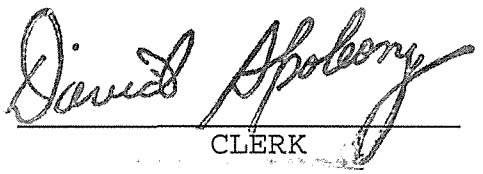
Plaintiff Ellen Stella and her children were evicted from their home after it was sold to David Antonacci and Gerald Antonacci by plaintiff's husband, Joseph Stella, in connection with a divorce. The complaint alleges that defendants illegally evicted them from the premises, ransacked their possessions, prevented them from removing their property, and videotaped the

proceedings, among other things. Such conduct, even if it occurred, does not, as a matter of law, constitute sufficient grounds for intentional infliction of emotional distress, which requires acts or omissions so extreme in degree and outrageous in character as to exceed all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]).

Nevertheless, plaintiffs' time to serve defendants should have been extended in the interest of justice (CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]).

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

ENTERED: MARCH 25, 2010



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Andrias, J.P., Nardelli, Buckley, Catterson, JJ.

2481N Genevieve Lane LoPresti, Esq., Index 12170/05
Plaintiff-Appellant,

-against-

Rose A. Florio and Gerald Antonacci,
as Executors of the Estate of
Teresa Antonacci, et al.,
Defendants-Respondents,

Dean Hansen, et al.,
Defendants.

Thomas F. Liotti, Garden City, for appellant.

Harry H. Kutner, Jr., Mineola, for respondents.

Order, Supreme Court, Nassau County (Zelda Jonas, J.), entered on or about June 22, 2006, which, to the extent appealed from, granted the motion by Gerald and David Antonacci to dismiss the first, third, fourth and fifth causes of action and denied without prejudice plaintiff's cross motion for an extension of time to serve amended pleadings, unanimously modified, on the law, plaintiff's cross motion to extend time to serve Gerald and David Antonacci granted, and otherwise affirmed, without costs.

Plaintiff represented a client who was allegedly evicted from her home by the Antonacci defendants. At the time of the eviction, defendants allegedly made certain defamatory remarks impugning plaintiff's competence as an attorney.

The claim for tortious interference with contract was defective because the contract was terminable at will and the

means allegedly employed by defendants to interfere with the contract did not include fraudulent representations, violation of a duty of fidelity or threats (*see Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193 [1980]). The claim for intentional infliction of emotional distress was properly dismissed because the conduct alleged is not so extreme in degree and outrageous in character as to exceed all possible bounds of decency or be regarded as atrocious and utterly intolerable in a civilized community (*Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]). There could be no negligent infliction of emotional distress in the absence of an allegation of contemporaneous or consequential physical injury (*see Johnson v State of New York*, 37 NY2d 378, 381 [1975]). The claim for injunctive relief was properly dismissed because there was no evidence of a sustained campaign to interfere with plaintiff's business that would justify a prior restraint on speech (*Rosenberg Diamond Dev. Corp. v Appel*, 290 AD2d 239 [2002]).

The application for an extension of time to serve amended pleadings on certain defendants should have been granted in the interest of justice (CPLR 306-b; *Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 104 [2001]). Where a complaint is dismissed after a traverse hearing, the court would lack jurisdiction to grant an extension. Here, the remaining cause of action for defamation will be time-barred if the extension is not granted.

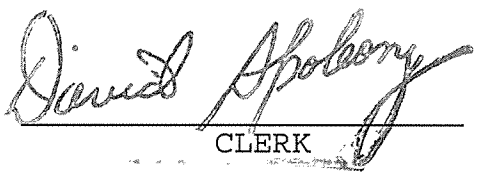
Plaintiff moved promptly after she learned certain defendants were claiming improper service. Defendants will suffer no cognizable prejudice from the extension.

M-5743 - LoPresti v Florio, etc., et al.

Motion for substitution for deceased party granted.

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

ENTERED: MARCH 25, 2010



CLERK

Andrias, J.P., Nardelli, McGuire, Acosta, DeGrasse, JJ.

342 Jane S. Murphy, Index 602286/04
Plaintiff-Appellant,

-against-

RMTS Associates, LLC, et al.,
Defendants-Respondents.

Lynn & Cahill LLP, New York (James P. Lynn of counsel), for appellant.

Cleary Gottlieb Steen & Hamilton LLP, New York (Molly M. Lens and Jeffrey A. Rosenthal of counsel), for respondents.

Order, Supreme Court, New York County (Charles E. Ramos, J.), entered February 19, 2008, which, insofar as appealed from, denied plaintiff's motion for partial summary judgment on her fourth and fifth causes of action for fraudulent conveyance, unanimously modified, on the law, to the extent of dismissing such causes of action upon a search of the record. The Clerk is directed to enter judgment dismissing the complaint as against all defendants.

After establishing the validity of her claimed membership interest in defendant RMTS Associates, LLC (*Bartfield v RMTS Assoc., LLC*, 11 AD3d 386 [2004], *lv denied* 4 NY3d 708 [2005]), plaintiff commenced the instant action seeking, inter alia, a valuation of such interest. Thereafter, and with no notice to plaintiff, defendant Axon, RMTS Associates' majority member,

caused virtually all of RMTS Associates' assets to be transferred to a new limited liability company, RMTS, LLC, pursuant to an asset purchase agreement that he signed on behalf of both the seller and the buyer. When plaintiff learned of this transfer, she amended the complaint to include new causes of action for, inter alia, fraudulent conveyance under Debtor and Creditor Law §§ 273 and 276. Supreme Court, after referring the valuation issues to a Special Referee, struck a balance in favor of plaintiff, to which the parties agreed; the parties also agreed to the dismissal of all of plaintiff's claims other than the two for fraudulent conveyance.

After defendants paid the stipulated amount, resulting in the extinguishment of plaintiff's interest in RMTS Associates, plaintiff moved for partial summary judgment on her causes of action for fraudulent conveyance. Having already collected the full value of her interest in RMTS Associates, she sought counsel fees and punitive damages. Defendants opposed, arguing that the fraudulent conveyance causes of action were rendered academic by the settlement because plaintiff had recovered the full amount of damages to which she is entitled. The IAS court denied plaintiff's motion on the ground that there is an issue of fact as to whether the transfer of the assets was an attempt to defraud plaintiff or merely to separate her from Associates.

Plaintiff's motion should be denied, not because of any questions of fact, but because plaintiff cannot recover any additional damages under the fraudulent conveyance claims; accordingly, those claims are moot (*Sygrove v Sygrove*, 15 AD3d 291 [2005]). As defendants argue in their brief without contradiction from plaintiff in her reply brief, plaintiff has abandoned the contention she advanced in Supreme Court that she is entitled to punitive damages and, pursuant to Debtor and Creditor Law § 276-a, attorneys' fees. In any event, she is entitled to neither. Even assuming the asset sale was surreptitious, it indisputably had the lawful effect of separating plaintiff from Associates and, in any event, the alleged fraud was not so gross and wanton as to justify an award of punitive damages (*James v Powell*, 19 NY2d 249, 260 [1967]). Because plaintiff was fully compensated for her interest in Associates without regard to the fraudulent conveyance claims, and there is no reason to suppose that the asset sale itself caused plaintiff to incur additional attorneys' fees (*cf. Posner v S. Paul Posner 1976 Irrevocable Family Trust*, 12 AD3d 177, 179 [2004] [motion court "err(ed) in awarding fees for services not directly related to or inextricably intertwined with the fraudulent conveyance issue"]), we hold that the fraudulent conveyance claims cannot be prosecuted for the sole purpose of

obtaining a finding of actual intent to deceive and thus an award of attorneys' fees. Under these circumstances, such an award would be tantamount to an award of punitive damages.

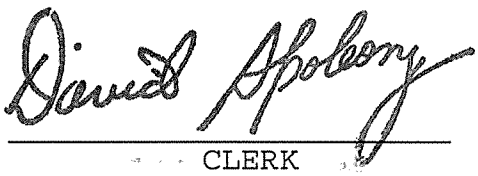
The mootness of the fraudulent conveyance claims is not affected by plaintiff's claim for nominal damages. Because she sustained actual damages for which she was fully compensated, the justification for an award of nominal damages -- to provide a remedy for "a technical invasion of [a plaintiff's] right or a breach of defendant's duty . . . where the plaintiff has failed to prove actual damages or a substantial loss or injury to be *compensated" (Brian E. Weiss, D.D.S., P.C., v Miller*, 166 AD2d 283 [1st Dept 1990], *affd* 78 NY2d 979 [1991] [emphasis added]) -- is absent (*see also Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 95 [1993] [nominal damages "are allowed in tort *only* when needed to protect an important technical right"] [internal quotation marks omitted]).

As the fraudulent conveyance claims are moot, we affirm the denial of plaintiff's motion for partial summary judgment. Searching the record, we determine that, for the same reason, summary judgment should be granted in favor of defendants dismissing the remaining fourth and fifth causes of action

(*Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 109-110 [1984] [Appellate Division has power to search record and award summary judgment to a nonmoving party that did not appeal]).

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

ENTERED: MARCH 25, 2010



CLERK

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

2415-
2416 The People of the State of New York, Ind. 5844/06
Respondent,

-against-

William Gray,
Defendant-Appellant.

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

William Gray, appellant pro se.

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

Judgment, Supreme Court, New York County (Gregory Carro, J.), rendered February 4, 2008, convicting defendant, upon his plea of guilty, of attempted criminal sale of a controlled substance in the third degree, and sentencing him, as a second felony offender, to a term of 3½ years, and order, same court and Justice, entered on or about November 12, 2008, which denied defendant's CPL 440.10 motion to vacate the judgment, unanimously affirmed.

The record establishes that defendant knowingly, intelligently and voluntarily pleaded guilty. After sufficient inquiry, the court properly denied defendant's motion to withdraw his plea (*see People v Frederick*, 45 NY2d 520 [1978]). "[T]he nature and extent of the fact-finding procedures on such motions rest largely in the discretion of the court" (*People v*

Fiumefreddo, 82 NY2d 536, 544 [1993]). The record of the plea allocution and other proceedings, and the reasonable inferences to be drawn therefrom, refute defendant's assertion that he did not understand what was meant by an agency defense, or that his attorney gave him inadequate advice on that subject.

Defendant's other challenge to the voluntariness of his plea is without merit. During the plea allocution, the court expressly advised defendant that his sentence would include a three-year term of postrelease supervision, and it imposed that term at sentencing. This satisfied the requirements of *People v Catu* (4 NY3d 242 [2005]), and defendant was not entitled to be informed about postrelease supervision at any earlier stage of the proceedings.

The additional claims in defendant's pro se supplemental brief are both procedurally defective and without merit.

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

ENTERED: MARCH 25, 2010

CLERK

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

2421 The People of the State of New York, Ind. 3182/05
Respondent,

-against-

Jonah McLaughlin,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Lindsey M. Kneipper of counsel), for respondent.

An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Charles J. Tejada, J.), rendered on or about November 29, 2006,

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

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

ENTERED: MARCH 25, 2010

CLERK

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

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

2422-
2422A Index 113633/07

Myron Zuckerman,
Plaintiff-Appellant,

-against-

Sydell Goldstein, et al.,
Defendants-Respondents.

McElroy, Deutsch, Mulvaney & Carpenter, LLP, New York (I. Michael Bayda of counsel), for appellant.

Lance A. Landers, New York, for respondents.

Order, Supreme Court, New York County, (Carol R. Edmead, J.) entered December 7, 2009, which, upon reargument, adhered to a prior order, entered October 2, 2009, which granted plaintiff's motion for indemnification of legal expenses from defendant corporation to the extent of directing a hearing on the issue of whether plaintiff acted in good faith and in the best interest of the corporation, unanimously affirmed, without costs. Appeal from order, same court and Justice, entered October 2, 2009, unanimously dismissed, without costs, as superseded by the appeal from the order on reargument.

Following the dismissal of defendant's counterclaims as barred by a release executed among the parties in 2002, plaintiff moved for indemnification of his legal expenses by the corporate defendant. Supreme Court concluded that plaintiff's entitlement to indemnification would be predicated on a finding, after a

hearing, that he had acted in good faith and in the best interests of the corporation (*see* Business Corporations Law § 721, *et seq.*).

Plaintiff alleges error, asserting that he is entitled to indemnification by virtue of his being successful on the merits. This argument fails. As the Court of Appeals has noted, a prerequisite to an officer's or director's right to indemnification is a showing of good faith in dealing with the corporation. A judgment on the merits is not necessarily dispositive of whether the director or officer acted in good faith (*Biondi v Beekman Hill House Apt. Corp.*, 94 NY2d 659, 664 [2000]). Accordingly, a hearing is warranted.

We have considered the remaining arguments and find them unavailing.

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

ENTERED: MARCH 25, 2010

CLERK

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

2423 In re Friendly Convenience, Inc., Index 114362/08
Petitioner,

-against-

The New York City Department of
Consumer Affairs, et al.,
Respondents.

Albert Kostrinsky, Great Neck, for petitioner.

Michael A. Cardozo, Corporation Counsel, New York (Larry A. Sonnenshein of counsel), for respondents.

Determination of respondents, dated June 27, 2008, after a hearing, that petitioner had sold cigarettes to a minor, imposing a fine of $2,050 and assigning two points to petitioner's retail dealer's record, unanimously confirmed, the petition denied, and the proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of Supreme Court, New York County [Alice Schlesinger, J.], entered March 31, 2009) dismissed, without costs.

The administrative law judge exercised his discretion in admitting into evidence the cigarette pack allegedly sold to a minor, which had not been inspected or analyzed, as well as a redacted copy of the purchaser's birth certificate that lacked a raised seal. The Rules of the Department of Consumer Affairs allow introduction of "relevant evidence" at an administrative

hearing "without regard to the technical or formal rules or laws of evidence in effect in the courts of the State of New York" (6 RCNY 6-35[b]). The ALJ properly admitted these items because they were material and relevant, and not unreliable.

Petitioner's request to subpoena the purchaser for cross-examination was correctly denied. There is only "a limited right to cross-examine adverse witnesses in administrative proceedings" (*Matter of Gordon v Brown*, 84 NY2d 574, 578 [1994]). The ALJ properly determined that cross-examination in this instance was neither necessary nor required. Petitioner's due process rights were protected by, among other things, its opportunity to confront the inspectors about the purchaser's age and the reliability of his birth certificate (*see generally id.* at 579).

Petitioner was in violation of the City's Tobacco Product Regulation Act (New York City Administrative Code § 17-620) for selling a tobacco product to a person under 18 years of age. Because § 17-620 is a strict liability statute, it is no defense that the employee who sold the cigarettes was not acting within the scope of his authority. Since it was also determined that petitioner violated the State's statutory prohibition (Public Health Law § 1399-cc[1]), and the employee who actually sold the cigarettes was unable to produce a valid certificate of

completion from a state-certified tobacco sales training program, the ALJ properly assigned two points to petitioner's record (*see* § 1399-ee[3][a]).[1]

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

ENTERED: MARCH 25, 2010

CLERK

[1]The ALJ erroneously referred to a violation of subdivision one of § 1399-cc, evidently misled by an erroneous reference to that effect in § 1399-ee(3)(a).

Tom, J.P., Andrias, Sweeny, Renwick, JJ.

2424 Ziaurrahia Murshed, individually and as father and natural guardian of Taqia Choudhury, etc., Plaintiffs-Appellants,

-against-

The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc., et al., Defendants-Respondents.

Index 16341/02
86211/07

Klein Calderoni & Santucci, LLP, Bronx (Thomas Santucci of counsel), for appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for The New York Hotel Trades Council and Hotel Association of New York City Health Center, Inc., New York Hotel Trades Council and Hotel Association of New York City, Inc., respondents.

Gordon & Silber, P.C., New York (Andrew B. Kaufman of counsel), for K.B. Security Inc., respondent.

Order, Supreme Court, Bronx County (Kenneth L. Thompson Jr., J.), entered on or about January 7, 2009, which granted defendants' motions for summary judgment dismissing the complaint, unanimously affirmed, without costs.

Plaintiff's infant left the Health Center where family members had gone for treatment, to see if her family had gone to a nearby fast food restaurant. Upon finding otherwise, she returned to the front lobby security desk in the company of an unidentified man who had approached her outside the building. The child did not respond to the guard's inquiry as to whether

her mother was a visiting patient, but she did offer her mother's name, which the guard then announced over the building's intercom system. The mother did not appear. The child, meanwhile, engaged in a conversation with the unidentified man who persuaded her that he had seen her family a half a block away from the building. The unidentified man appeared to the guard to be genuinely concerned about the child's welfare. The child and the man left the building together, without informing the security guard, although the guard did observe their departure.

The abduction and sexual assault of the infant was unforeseeable, given all the circumstances. There was no basis for finding that defendants had breached their obligation to implement reasonable, minimal security measures in light of the largely criminal-free Health Center environment (*see Maheshwari v City of New York*, 2 NY3d 288 [2004]). The argument that defendants assumed an additional duty when the lobby security guard -- approached by an 11-year-old girl who was looking for her mother, and who was accompanied by a seemingly concerned, middle-age male -- paged the mother's name over the building's intercom system, is unavailing. There was no evidence that the child was lulled into relying on the security guard's assistance (*see Piazza v Regeis Care Ctr., L.L.C.*, 47 AD3d 551, 553 [2008]), nor any evidence that the child was placed in a more vulnerable position than when she first walked into the lobby with the

unidentified male (*cf. Nallan v Helmsley-Spear, Inc.*, 50 NY2d 507, 522-523 [1980]).

There was no express provision in the Health Center's security agreement with defendant KB Security that extended the security benefits under the agreement to third parties such as plaintiffs (*see generally Alicea v City of New York*, 145 AD2d 315 [1988]). There was also no argument that KB had assumed full security obligations at the Health Center (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136 [2002]; *Piazza*, 47 AD3d at 553).

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

ENTERED: MARCH 25, 2010

CLERK

Tom, J.P., Andrias, Sweeny, Nardelli, JJ.

2425 The People of the State of New York, Ind. 5560/05
Respondent,

-against-

Michael Hughes,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Nicole Coviello of counsel), for respondent.

Order, Supreme Court, New York County (Michael J. Obus, J.), entered on or about September 28, 2007, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

Although we agree with defendant that his correct point score is 70, making him a presumptive risk level one offender, the record supports the court's alternative finding that an upward departure to level two is warranted. Defendant's very serious criminal conduct involving an undercover officer posing as a 13-year-old girl, combined with his affinity for child

pornography (*see People v Liguori*, 48 AD3d 773 [2008], *lv denied* 10 NY3d 711 [2008]), demonstrated a grave danger to children not adequately accounted for in the risk assessment instrument.

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

ENTERED: MARCH 25, 2010

CLERK

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

2426 Nathan Gwynn, Index 18619/04
Plaintiff-Respondent,

-against-

Victor Soriano, et al.,
Defendants-Appellants,

Dennis Sullivan, et al.,
Defendants.

Baker, McEvoy, Morrissey & Moskovits, P.C., New York (Stacy R. Seldin of counsel), for appellants.

Michelstein & Associates, PLCC, New York (Mark D. Plush of counsel), for respondent.

Order, Supreme Court, Bronx County (Alan Saks, J.), entered November 12, 2009, which, to the extent appealed from, upon reargument, denied the motion of defendants Victor Soriano, Hector F. Mota, and Felix Tejeda for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, the motion granted, and the complaint dismissed against all defendants. The Clerk is directed to enter judgment accordingly.

In opposition to defendants' prima facie showing that plaintiff did not suffer a serious injury within the meaning of Insurance Law § 5102(d), plaintiff proffered neither objective medical evidence of significant limitations in his knee that were caused by the accident (*see Jean v Kabaya*, 63 AD3d 509 [2009]) nor competent medical proof substantiating his 90/180-day claim (*see Nguyen v Abdel-Hamed*, 61 AD3d 429 [2009]).

In view of the foregoing, the complaint should be dismissed against all defendants (*see Lopez v Simpson*, 39 AD3d 420 [2007]).

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

ENTERED: MARCH 25, 2010

CLERK

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

2427-
2428 Kat House Productions, LLC Index 106781/08
doing business as Surf Chick, et al.,
Plaintiffs-Appellants,

-against-

Paul, Hastings, Janofsky & Walker, LLP,
Defendant-Respondent.

Egan & Golden, LLP, Patchogue (Brian T. Egan of counsel), for appellants.

Kavanagh Maloney & Osnato LLP, New York (James J. Maloney of counsel), for respondent.

Order, Supreme Court, New York County (Louis B. York, J.), entered April 13, 2009, which granted defendant's motion to dismiss the complaint, unanimously affirmed, without costs.

When a nonresident sues in New York's courts on a cause of action accruing outside the state, our "borrowing statute" (CPLR 202) requires that the cause of action be timely under the limitation periods of both New York and the jurisdiction where the claim arose (*see Global Fin. Corp. v Triarc Corp.*, 93 NY2d 525, 528 [1999]). Generally, a tort action accrues "at the time and in the place of the injury," and "[w]hen an alleged injury is purely economic, the place of injury usually is where the plaintiff resides and sustains the economic impact of the loss" (*id.* at 529).

Applying these principles, it is clear that plaintiffs'

legal malpractice claim accrued in California, where their residences and principal place of business were located and the alleged economic injury was sustained, at the latest, in March 2006. Under that state's applicable one-year statute of limitations (Cal Civ Proc Code § 340.6), this action, commenced in November 2007, was time-barred.

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

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

ENTERED: MARCH 25, 2010

CLERK

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

2430N Stephan Loewentheil, et al., Index 601761/05
Plaintiffs-Appellants,

-against-

White Knight, Ltd.,
Defendant-Respondent.

- - - - -

Edith O'Hara, etc.,
Third-Party Plaintiff-Respondent,

-against-

Gordon Milde, et al.,
Third-Party Defendants.

Katten Muchin Rosenman LLP, New York (Evan A. Belosa of counsel), for appellants.

Stern & Zingman LLP, New York (Joel S. Stern of counsel), for respondents.

Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 9, 2009, which granted third-party plaintiff leave to file and serve an amended third-party complaint with a claim against plaintiffs, unanimously affirmed, with costs.

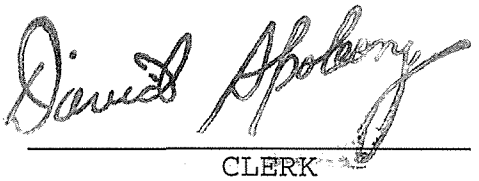
Leave to amend pleadings, which should be liberally granted, is a function of the trial court, and the discretionary grant of such relief will not be overturned on appeal "absent a showing that the facts supporting the amendment do not support the purported claim or claims" (*Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [2007]). Supreme Court did not abuse its discretion by granting leave to amend for the purpose of

asserting, in effect, a counterclaim that plaintiffs' election as officers of the corporate defendant was null and void under the terms of a 1983 Cross Purchase Agreement. In a prior unappealed decision in 2008, the court rejected plaintiffs' argument, raised again in opposition to the motion for leave to amend, that the 1983 agreement was without force and effect. This established as law of the case that there is a triable issue of what rights third-party plaintiffs may claim under the agreement (*see Moore v Washington*, 34 AD2d 903, 904 [1970]).

Nor did the court abuse its discretion by granting leave to amend in order to assert a claim against plaintiffs for breach of fiduciary duty, as there is evidence in the record to support the third-party plaintiff's allegation that having installed themselves as officers of the corporate defendant, plaintiffs acted contrary to the corporation's interests by bringing suit against it in their individual capacities and then allowing it to suffer a default judgment.

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

ENTERED: MARCH 25, 2010



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