SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

APRIL 12, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Saxe, McGuire, Manzanet-Daniels, Román, JJ.

2098 Residential Holdings III LLC, et al., Plaintiffs-Respondents-Appellants, Index 600095/08

-against-

Archstone-Smith Operating Trust, et al., Defendants-Appellants-Respondents.

[And a Third-Party Action]

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DLA Piper LLP (US), New York (Keara M. Gordon of counsel), for appellants-respondents.

Meister Seelig & Fein LLP, New York (Stephen B. Meister of counsel), for respondents-appellants.

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Order, Supreme Court, New York County (Richard B. Lowe III, J.), entered April 15, 2009, which denied defendants' and plaintiffs' motions for summary judgment, unanimously modified, on the law, to the extent of granting defendants' motion for summary judgment dismissing the complaint as well as summary judgment on defendants' counterclaims, and declare that defendants are not in breach of the agreements, and otherwise

affirmed, with costs. The Clerk is directed to enter judgment accordingly.

In late March 2007, plaintiffs, as purchasers, and defendants, as sellers, entered into 11 distinct but related agreements for the sale of multifamily properties for a total purchase price of more than $1.2 billion. Although the relevant contractual language can be read more narrowly, the parties agree that each agreement provides that a default under it constitutes a default under each of the other agreements. The planned closings on these properties were staggered into groupings. The sales of seven of the properties closed in early August 2007. The closing date for the final four properties, twice extended upon plaintiffs' request, was scheduled for January 10, 2008. This dispute between the parties centers on "Governor's Green," one of these four properties, a 478-unit property that was to be sold for $105 million.

By letter dated January 9, 2008, plaintiffs asserted that defendants had defaulted in connection with Governor's Green and informed defendants that they "hereby elect[ed] to terminate" all remaining agreements between the parties and made a demand for the immediate release of the contract deposits held by the parties' escrow agent, the third-party defendant. The reason

given was a tenant solicitation campaign by defendants at Governor's Green. Specifically, on January 2, 2008, defendants placed "door hangers," essentially advertisements, on the front doors of all of the apartments in the complex. These door hangers offered tenants both a free month's rent upon the signing of a lease before January 8, 2008 at a nearby residential complex owned by defendants that was not among those to be purchased by plaintiffs, and $100 off their final rent payment at Governor's Green. The door hangers were part of a larger campaign to increase the occupancy rate at the nearby property through advertisements and other marketing efforts directed at the public.

Plaintiffs claimed that the door-hanger solicitation violated a number of provisions of the Governor's Green agreement. The specific contentions plaintiffs made need not be detailed. Suffice it to say that whether defendants were free to solicit tenants at the properties they were selling (either before or after closing) is not addressed by any provision of the agreement. We note, too, that the agreement requires defendants to provide rent rolls, and certify their accuracy, at the time it is executed and at closing. The agreement, however, does not require defendants to maintain occupancy rates at any particular

level.

Defendants responded that same day with a letter denying that any default had occurred, asserting that the purported termination notice was of no force or effect (because, inter alia, plaintiffs had not provided the requisite notice and opportunity to cure) and informing plaintiffs that defendants were ready, willing and able to close. With respect to notice and opportunity to cure, Section 8.3 provides that:

> "Notwithstanding anything to the contrary set forth in this Agreement, no party shall be deemed in default hereof unless that party has received notice of such default from the other party and has failed to cure such default within five (5) days following such party's receipt of such notice. In the event the default cannot be cured within five (5) days, the defaulting party will be deemed to have cured the default if it begins curative action within five (5) days, diligently pursues to cure the default, and the default is in fact cured prior to Closing. In the event any such notice is received less than five (5) days prior to Closing, Closing shall be extended to that date which is five (5) days following the date of such party's receipt of the notice."

Apparently, plaintiffs did not respond. The agreement provided for the closing to occur by 5:00 P.M. on January 10 and defendants appeared for the closing. Plaintiffs were not present at that time but defendants tendered performance, a process that

concluded at 4:30 P.M. Shortly before 5:00 P.M., plaintiffs appeared, but defendants had left. Counsel for plaintiffs stated plaintiffs' position that the contracts properly were terminated.

Plaintiffs commenced this action in 2008, seeking a declaration that defendants were in default under each of the four remaining agreements for soliciting tenants at Governor's Green (and at another complex)[1] and that plaintiffs were entitled to the immediate return of the contract deposits. Plaintiffs also asserted they were entitled to the same relief under another cause of action, entitled "Breach of Contract - Implied Covenant of Good Faith and Fair Dealing." Plaintiffs also sought legal fees pursuant to Section 10.10 of the agreement, which grants "all reasonable costs, charges, and expenses, including attorneys' fees" incurred by the prevailing party in an action to enforce any of the provisions of the agreement.

In their answer, defendants denied the material allegations of the complaint and asserted counterclaims, inter alia, for breach of contract. Defendants then moved for summary judgment,

[1]The other complex was among the properties that closed in August 2007. Although plaintiffs alleged in their complaint that the solicitation of tenants at that property constituted defaults under the Governor's Green agreement and each of the remaining three agreements, they do not press that claim on appeal.

seeking dismissal of the complaint and requesting declaratory relief in the form of a declaration that they were not in breach of the agreements. Defendants also requested an award of legal fees, as well as the release of the funds in escrow, which the agreement specifies are to be delivered to the seller as liquidated damages in the event of default by the purchaser. Plaintiffs cross-moved for summary judgment on their claims and for dismissal of defendants' counterclaims.

The undisputed facts include the following: the occupancy rate at Governor's Green was 93.7% when the agreement was executed and 97.5% in January 2008 when the door hangers were hung. As of January 9, 2008, 1 of the 478 residents of Governor's Green took advantage of the offer made by the door hangers, which expired by its terms the day before, January 8. The tenant who moved had paid a monthly rent of $1,480 and the lease was scheduled to terminate on June 22, 2008.

Defendants argue that the use of the door hangers did not violate the Governor's Green agreement; that even if a breach occurred, it was immaterial; and that plaintiffs breached that agreement by declaring, without providing any opportunity to cure, that they were terminating the agreement as well as the remaining three agreements. Because we agree that defendants'

other arguments are correct, we need not determine whether the use of the door hangers violated the agreement.

As the parties specified in their agreements, their rights are governed by Maryland law. Under Maryland law, only a contractual breach that is material is grounds for rescission (*see Traylor v Graffton,* 273 Md 649, 687, 332 A2d 651, 674 [1975]; *Rogers Refrig. Co., Inc. v Pulliam's Garage, Inc.*, 66 Md App 675, 684, 505 A2d 878, 883 [1986]). A breach is material only if it "affects the purpose of the contract in an important or vital way" (*Gresham v Lumbermen's Mut. Cas. Co.*, 404 F3d 253, 260 [2005] [internal quotation marks and citation omitted]), as when "the act failed to be performed [goes] to the root of the contract or . . . render[s] the performance of the rest of the contract a thing different in substance from that which was contracted for" (*Traylor*, 273 Md at 687, 332 A2d at 674; *see also Speed v Bailey*, 153 Md 655, 660, 139 A 534, 536-537 [1927]). Moreover, contracts should not be interpreted so as to produce absurd results (*Middlebrook Tech, LLC v Moore,* 157 Md App 40, 849 A2d 63 [2004]).

Under the agreements, as interpreted by the parties, a default under one agreement constitutes a default under each of the other agreements. Particularly given the absence of any

requirement that defendants maintain occupancy rates at any particular level, it would be absurd to conclude that a default potentially undoing a $1.2 billion real estate deal would occur if one or a handful of tenants at one of the properties determined on his, her or their own to move prior to the closing of that property. Not surprisingly, plaintiffs do not contend otherwise. Rather, plaintiffs stress the intentional character of the door-hanger solicitation. But the crux of this $1.2 billion deal is surely its economics and they are the same if a tenant moves to the adjoining property on his or her own initiative or is solicited to do so by defendants. For this reason, we fail to see why the intentional character of the door-hanger solicitation should be so critical to plaintiffs' claim of breach. Accordingly, no material default occurred when defendants intentionally caused one tenant to move from Governor's Green to the nearby property. Similarly, the materiality of this alleged default does not turn on whether it is correctly characterized by plaintiffs as "conscience-shocking," "brazen" or "wanton." The immateriality of the alleged default is all the more evident given the undisputed increase in occupancy rates between the execution of the agreement and the scheduled closing on January 10. Plaintiffs

correctly argue that, windfall or not, they are entitled to the benefit of that increase. However, especially when viewed against the backdrop of that increase, the loss of a single tenant in a 478-unit property cannot reasonably be seen as material.

Defendants also are correct that plaintiffs improperly terminated the agreements. The notice and cure provision of the Governor's Green agreement is unambiguous (*see Nationwide Mut. Ins. Co. v Regency Furniture*, 183 Md App 710, 723, 963 A2d 253, 260 [2009][under Maryland law, whether the words in a contract are ambiguous is a question of law to be decided by the court and reviewed de novo]). "'In deciding whether the [language of a] contract is ambiguous, the court may not resort to extrinsic evidence if it will alter the plain meaning of the writing. Instead, the court is confined to a review of the contract language itself; it must consider what a reasonable person in the position of the parties would have thought it to mean'" (*id.* [quoting *University of Baltimore v Iz*, 123 Md App 135, 162, 716 A2d 1107, 1121 [1998], *cert. denied* 351 Md 663, 719 A2d 1262 [1998]). The language of Section 8.3 ("no party shall be deemed in default hereof unless that party has received notice of such default from the other party and has failed to cure such

default") makes notice and an opportunity to cure conditions precedent to a default. As a matter of law, no default could have occurred when plaintiffs purported to declare the agreement terminated. Having improperly terminated the agreements, plaintiffs are "in a position analogous to one who has unjustifiably rescinded a contract. Such a party cannot prevail on a breach of contract action" (*Hubler Rentals, Inc. v Roadway Express*, Inc., 637 F2d 257, 260 [1981] [construing Maryland law]).

We are unpersuaded by plaintiffs' argument that defendants waived their cure rights by taking the position in their responsive letter of January 9, 2008 that they had not committed any default. Plaintiffs do not cite any authority in support of this argument and we reject its premise, i.e., that defendants should have insisted on the cure rights provided by the Governor's Green agreement even though plaintiffs were insisting that all of the agreements had been terminated.

Nor are plaintiffs persuasive in arguing they were not required "to close and hope for the best" because "they had no way of knowing how many tenants would *ultimately* relocate and what the eventual financial damage would be." Plaintiffs cite no authority in support of this argument, the implicit premise of

which is that they were entitled simply to assume the financial damage from the door-hanger solicitation would be non-trivial, unascertainable and thus incurable. Plaintiffs' acknowledged lack of knowledge about the number, if any, of tenants who might relocate actually cuts against, not in favor, of their position that they were free to declare the agreements terminated. This argument also ignores both that the door-hanger solicitation expired by its terms two days before the scheduled closing and that, as the new owners of Governor's Green, plaintiffs could refuse to release from his or her lease any tenant who sought to accept the solicitation despite its expiration. Provided they acted in accordance with their contractual duty to act in good faith (*Food Fair Stores, Inc. v Blumberg*, 234 Md 521, 200 A2d 166 [1964]), the sophisticated, well-counseled parties to these transactions certainly could have found ways to hold plaintiffs harmless against the possibility that the door-hanger solicitation might result in a non-trivial number of tenants moving to the nearby property. Instead, effectively foreclosing any possibility of such a negotiated resolution, plaintiffs precipitously declared all the agreements terminated.

Finally, Maryland law does not recognize an independent cause of

action for breach of the duty of good faith and fair dealing (*see G.M. Pusey and Assoc., Inc. v Britt/Paulk Ins. Agency, Inc.*, 2008 WL 2003747, *7, 2008 US Dist LEXIS 37525, *20-21 [D MD 2008]). Plaintiffs argue that they intended to assert in their second cause of action, not an independent cause of action for breach of the covenant of good faith and fair dealing, but only a cause of action for breach of contract that included a breach of the covenant of good faith and fair dealing. Assuming that to be the case, the second cause of action is subject to dismissal nonetheless, because it is duplicative of the first cause of action seeking both a declaration that defendants breached the agreements and the same damages, i.e., return of the deposit funds held in escrow (*see Bell BCI Co. v HRGM Corp.*, 276 F Supp 2d 462, 463 n1 [D Md 2002]).

For these reasons, we affirm the motion court's denial of plaintiffs' motion for summary judgment on their claims and for dismissal of defendants' counterclaims, and reverse so much of the motion court's order as denied defendants' motion for summary judgment. We grant that motion, dismiss the complaint, declare defendants were not in breach of the agreements and order the third-party defendant to deliver the escrow funds in the amount of $13,271,454 to defendants as liquidated damages. As

defendants are the prevailing party in this action, plaintiffs must pay legal fees in accordance with Section 10.10 of the agreement.

We have considered plaintiffs' remaining arguments, including the contention that under the agreements the materiality of a breach of an obligation, as opposed to a warranty or representation, is not relevant, and find them unavailing.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Friedman, Catterson, Renwick, Abdus-Salaam, JJ.

4253 In re Oscar G.,

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

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

Michael A. Cardozo, Corporation Counsel, New York (Elizabeth S. Natrella of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about December 9, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts that, if committed by an adult, would constitute the crimes of criminal mischief in the fourth degree, making graffiti, and possession of graffiti instruments, and placed him on enhanced supervised probation for a period of 12 months, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's determinations concerning credibility and identification. An officer testified that he did not lose sight

of appellant from the time he saw appellant spray painting graffiti to the time he arrested appellant. The officer also testified that he saw appellant discard a bag containing cans of spray paint, which the officer later recovered.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4750 In re Valery Juste, Index 116017/08
Petitioner-Appellant,

-against-

Joel I. Klein, Chancellor of the
Department of Education, et al.,
Respondents-Respondents.

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Raymond E. Kerno, Mineola, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Karen M. Griffin of counsel), for respondents.

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Order and judgment (one paper), Supreme Court, New York County (Marilyn Shafer, J.), entered August 6, 2009, which, among other things, denied the petition to vacate a hearing officer's determination, dated November 4, 2008, which found petitioner teacher guilty of various charges and recommended the termination of her employment with respondents, and dismissed the proceeding brought pursuant to Education Law § 3020-a(5) and CPLR 7511, unanimously affirmed, without costs.

While Supreme Court properly dismissed the petition, it should have done so based on petitioner's failure to file the

petition within the 10-day period set forth in § 3020-a(5) (*see Matter of Watkins v Board of Educ. of Port Jefferson Union Free School Dist.*, 26 AD3d 336, 337-338 [2006]).

In view of the foregoing, we need not reach petitioner's remaining contentions.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4751 The People of the State of New York, Ind. 2777/09
Respondent,

-against-

Alvin Ayala,
Defendant-Appellant.

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

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

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An appeal having been taken to this Court by the above-named appellant from a judgment of the Supreme Court, New York County (Michael J. Obus, J.), rendered on or about July 15, 2010,

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: APRIL 12, 2011

CLERK

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

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4754 In re Devon V.,

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

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Tamara A. Steckler, The Legal Aid Society, New York (Raymond E. Rogers of counsel), for appellant.

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

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Order of disposition, Family Court, New York County (Mary E. Bednar, J.), entered on or about September 14, 2010, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed the act of unlawful possession of a weapon by a person under 16, and placed him on probation for a period of 12 months, unanimously reversed, on the law, without costs, and the petition dismissed.

The petition, together with the supporting deposition, did not contain nonhearsay allegations to support the age element of unlawful possession of weapons by persons under 16 (Penal Law § 265.05). This failure to satisfy the statutory requirements (*see* Family Court Act § 311.2[3]; *Matter of Jahron S.*, 79 NY2d 632, 636 [1992]) was a nonwaivable jurisdictional defect (*see Matter*

of Detrece H., 78 NY2d 107, 109 [1991]).

While a juvenile delinquency adjudication is normally based on an act that would constitute a crime if committed by an adult, Penal Law § 265.05 is unique in that it authorizes such an adjudication on the basis of an offense that, by definition, can only be committed by a person under 16. Accordingly, we agree with the Second Department that the accused's age is an element of the offense, subject to the requirement of sworn, nonhearsay allegations (*see Matter of Matthew W.*, 48 AD3d 587 [2010]).

Here, the petition and supporting deposition stated appellant's date of birth. The deposition also stated, without elaboration, that during arrest processing the officer was able to determine that appellant was 15 years old. This did not meet the requirement of a nonhearsay allegation because there was no explanation, on the face of the petition or deposition, of how the officer learned appellant's age. Surmise, or even a reasonable inference, that the officer got this information from appellant himself or some other unspecified nonhearsay source does not satisfy the statute, because "the test of the sufficiency of the petition is a facial one" (*Matter of Rodney J.*, 83 NY2d 503, 507 [1994]).

Since the defect was nonwaivable, it was not affected by any

acknowledgments of his age that appellant may have made during the Family Court proceedings. We have considered and rejected the presentment agency's remaining claims.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4757 The People of the State of New York, Ind. 4855/07
Respondent,

-against-

Leron Smith, etc.,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Christopher P. Marinelli of counsel), for respondent.

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Judgment, Supreme Court, New York County (Laura A. Ward, J.), rendered December 22, 2008, convicting defendant, upon his plea of guilty, of attempted criminal possession of a controlled substance in the fourth degree, and sentencing him, as a second felony drug offender whose prior conviction was a violent felony, to a term of 3 years, unanimously affirmed.

Defendant's claim that the sentencing court should have held a hearing on his challenge to the constitutionality of his predicate felony conviction "relate[s] to presentence procedures" (*People v Samms*, 95 NY2d 52, 58 [2000]), and thus requires preservation. We decline to review this unpreserved claim in the interest of justice. As an alternative holding, we also reject it on the merits. Defendant did not substantiate his claim that

he received ineffective assistance in connection with the predicate conviction, and the plea minutes from that case clearly establish that the conviction was constitutionally obtained (*see People v Harris*, 61 NY2d 9, 15-16 [1983]; *see also People v Ford*, 86 NY2d 397, 404 [1995]). In particular, the plea allocution from the prior case shows that defendant was aware of the elements of the crime to which he pleaded guilty. Accordingly, the court was not required to conduct a hearing (*see People v Boychet*, 255 AD2d 193 [1998], *lv denied* 92 NY2d 1028 [1998]; *People v Roberson*, 160 AD2d 200 [1990], *lv denied* 76 NY2d 795 [1990]).

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4758 In re Maximilian Y.,

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

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Andrew J. Baer, New York, for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Janet L. Zaleon of counsel), for presentment agency.

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Order of disposition, Family Court, New York County (Susan R. Larabee, J.), entered on or about April 17, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed an act that, if committed by an adult, would constitute the crime of attempted assault in the third degree, and placed him on probation for a period of 2 years, unanimously affirmed, without costs.

The court's finding was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the court's credibility determinations. The victim's injuries, along with the surrounding circumstances, indicated that appellant angrily pushed the victim into a wall

with a high degree of force. This evidence was inconsistent with an accidental bump or push, and it supports the inference that appellant intended to cause physical injury to the victim, which was the natural consequence of his act (*see People v Getch*, 50 NY2d 456, 465 [1980]). Since the court only found an attempted assault, the finding did not require proof that the victim actually sustained physical injury. In any event, there was ample evidence that the victim's face was severely bruised.

Appellant's challenges to the petition are without merit. There was no need for the petition to allege serious physical injury, since it only charged appellant with committing an act that would constitute third-degree assault.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4765 The People of the State of New York Ind. 5253/07
Respondent,

-against-

Daniel Santos,
Defendant-Appellant.

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Richard M. Greenberg, Office of the Appellate Defender, New York (Eunice C. Lee of counsel), for appellant.

Cyrus R. Vance Jr., District Attorney, New York (Mary C. Farrington of counsel), for respondent.

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Judgment, Supreme Court, New York County (William A. Wetzel, J.), rendered November 10, 2008, as amended February 25, 2009, convicting defendant, after a jury trial, of attempted rape in the first degree and sexual abuse in the first degree, and sentencing him to an aggregate term of 10 years, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's credibility determinations. The jury had ample basis on which to reject defendant's claim that the sexual conduct at issue was consensual. Although some of the summation remarks were inappropriate, any such error was harmless.

The court's *Sandoval* ruling was a proper exercise of discretion (*see People v Hayes*, 97 NY2d 203 [2002]). The court gave defendant a very favorable compromise ruling, and it providently declined defendant's request to sanitize his prior conviction even further. The jury is presumed to have followed the court's instruction not to consider the prior conviction for any purpose other than to evaluate defendant's credibility (*see People v Davis*, 58 NY2d 1102, 1104 [1983]). In any event, any error in the *Sandoval* ruling was harmless.

We perceive no basis for reducing the sentence.

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

ENTERED: April 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4766 Marie Spiconardi, et al., Index 100470/05
Plaintiffs-Respondents,

-against-

Macy's East, Inc., et al.,
Defendants-Appellants.

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Lester Schwab Katz & Dwyer, LLP, New York (Harry Steinberg of counsel), for Macy's East, Inc. and Federated Department Stores, Inc., appellants.

Cozen O'Connor, New York (John J. McDonough of counsel), for Liz Claiborne, Inc., appellant.

Koss & Schonfeld, LLP, New York (Simcha D. Schonfeld of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered August 25, 2010, which, insofar as appealed from, in this action for injuries sustained when the shirt that plaintiff was wearing caught on fire as she was cooking, denied defendants' motions for summary judgment dismissing the complaint, unanimously reversed, on the law, without costs, and the motions granted. The Clerk is directed to enter judgment in favor of defendants dismissing the complaint.

Defendants, alleged seller and manufacturer of the subject garment, established their prima facie entitlement to judgment as matter of law. Defendant Liz Claiborne, Inc. demonstrated that

the shirt was not contained in any of the product "line books" offered during the relevant time period and that the garment was not contained in Fabric Utilization Reports (FUR), which showed all garments manufactured and shipped to the subject store during the relevant time frame. Contrary to plaintiffs' position, the FUR may be considered, as it was not an existing business record subject to the motion court's discovery orders, but rather was a document created for litigation (*see Slavenburg Corp. v North Shore Equities*, 76 AD2d 769, 770 [1980]).

In opposition, plaintiffs failed to raise a triable issue of fact. Subjective statements about where a product was purchased are not sufficient to create a triable issue of fact where there is objective proof that a defendant did not sell the allegedly defective product (*see Whelan v GTE Sylvania*, 182 AD2d 446 [1992]).

In any event, defendants also established that the garment was reasonably safe. Indeed, defendants' expert tested an exemplar of the shirt pursuant to the federal regulations contained in 16 CFR part 1610, and found that both the "ignite time" and the "burn time" met or exceeded federal regulations, which was sufficient to satisfy defendants' burden on a motion for summary judgment (*cf. Boyle v City of New York*, 79 AD3d 664,

665 [2010]). The opinion of defendants' expert was sufficient in that it exhibited "a degree of confidence in his conclusions sufficient to satisfy accepted standards of reliability" (*Matott v Ward*, 48 NY2d 455, 459 [1979]).

Although mere compliance with minimum industry standards is, at most, some evidence to be considered and is not a shield to liability (*see Feiner v Calvin Klein, Ltd.*, 157 AD2d 501, 502 [1990], the conclusory allegations raised by plaintiffs' expert, absent evidence that the product violated other relevant industry standards or accepted practices, or statistics showing the frequency of injuries arising out of the use of the product (*see Scivoletti v New York Mercantile Exch., Inc.*, 38 AD3d 326, 327 [2007], *lv denied* 9 NY3d 802 [2007]; *Cornwell v Otis El. Co.*, 275 AD2d 649 [2000]), were insufficient to create issues of fact warranting the denial of the motions.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4769 Gerald Phillipps, Index 111645/07
Plaintiff-Respondent,

-against-

New York City Transit Authority,
et al.,
Defendants-Appellants.

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

Alan M. Greenberg, P.C., Garden City (Lisa M. Comeau of counsel), for respondent.

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Judgment, Supreme Court, New York County (Carol E. Huff, J.), entered July 9, 2010, upon a jury verdict awarding plaintiff $300,000 for past pain and suffering and $300,000 for future pain and suffering, unanimously affirmed, without costs.

The verdict was not contrary to the weight of the evidence adduced at trial (*see Cohen v Hallmark Cards*, 45 NY2d 493 [1978]). In light of the unrefuted testimony of plaintiff's medical expert that a medical record entry, reflecting plaintiff's statement to hospital personnel that his injuries occurred when he fell on his back due to a sudden, violent movement of a bus he was exiting, was relevant to diagnosis and treatment, it was a proper exercise of discretion for the court

to allow the entry into evidence (*see People v Ortega*, 15 NY3d 610 [2010]).

Defendants' claim that plaintiff's testimony failed to establish a prima facie case of negligence is not preserved for appellate review, since they failed to move for a directed verdict at trial (*see Rodgers v 72nd St. Assoc.*, 269 AD2d 258, 259 [2000]). In any event, plaintiff's description of the incident and the nature of his injuries was sufficient to satisfy the requirement of showing that the bus's departure caused a jerk or lurch that was unusual and violent (*see DiSalvatore v New York City Tr. Auth.*, 45 AD3d 402 [2007]; *Fonseca v Manhattan & Bronx Surface Tr. Operating Auth.*, 14 AD3d 397 [2005]).

The damages awarded do not materially deviate from what would be reasonable compensation under the circumstances (CPLR 5501[c]; *see e.g. Morales v Heron*, 250 AD2d 408 [1998]).

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4770 Lakeysha L. Noel, Individually and as Mother and Natural Guardian of Phillip Garvin, etc., Plaintiffs-Respondents,

-against-

Ambassador Foods Corporation, et al., Defendants,

Nyall Management, Ltd., et al., Defendants-Appellants.

Index 350064/09

Marjorie E. Bornes, New York, for appellants.

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered August 12, 2010, which denied defendants Nyall Management, Ltd. and Henry Matos-Batista's motion for summary judgment dismissing the complaint as against them, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

Defendants established their prima facie entitlement to judgment as a matter of law. The record demonstrates that defendant Matos-Batista was driving his vehicle southbound with plaintiffs as his passengers when a vehicle owned by defendant Ambassador Foods Corporation, which was traveling northbound, made a sharp, sudden turn, and crashed into the driver's side of

Matos-Batista's car, pushing it into a parked car; the Ambassador vehicle then fled the scene. Matos-Batista testified that he had only a second to react, and he, and plaintiff Noel, testified that he applied the brakes immediately before contact and unsuccessfully attempted to maneuver his vehicle away from the Ambassador vehicle. Under the circumstances presented, defendants demonstrated that Matos-Batista was confronted by an emergency situation and that he acted reasonably in the context thereof (*see Ward v Cox*, 38 AD3d 313, 314 [2007]; *Bender v Gross*, 33 AD3d 417 [2006]).

No triable issues of fact were raised to defeat the motion, as neither plaintiffs nor co-defendants responded to the motion, nor have they submitted a brief on appeal.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4771	The People of the State of New York,	Ind. 3448/07
4771A	Respondent,	SCI 632/08
4771B		SCI 633/08

-against-

Miguel Torres,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (David P. Stromes of counsel), for respondent.

_____

An appeal having been taken to this Court by the above-named appellant from judgments of the Supreme Court, New York County (Micki A. Scherer, J.), rendered on or about April 23, 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 judgments so appealed from be and the same are hereby affirmed.

ENTERED: APRIL 12, 2011

CLERK

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

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4772 Julian Camacho, an Infant by His Mother and Natural Guardian, Janina Rivera, et al., Plaintiffs-Respondents,

-against-

New York City Housing Authority, Defendant-Appellant.

Index 110475/06

_____

Landman Corsi Ballaine & Ford P.C., New York (William G. Ballaine of counsel), for appellant.

Glenn H. Shore, P.C., New York (Mark J. Elder of counsel), for respondents.

_____

Order, Supreme Court, New York County (Debra A. James, J.), entered December 10, 2009, which, insofar as appealed from, denied defendant New York City Housing Authority's (NYCHA) motion for summary judgment dismissing the complaint's first, third and fourth causes of action, and granted plaintiffs' cross motion to the extent of awarding them summary judgment as to liability on their first and third causes of action, unanimously modified, on the law, to deny plaintiffs' motion for summary judgment on their first and third causes of action, the matter remanded for further proceedings, and otherwise affirmed, without costs.

Plaintiffs' first cause of action alleged plaintiff infant's injurious exposure to lead paint, while he was under the age of

seven years, and during his residence in defendant's multiple dwelling, built pre-1960. Plaintiffs' third cause of action alleges similar exposure to hazardous lead paint while attending a daycare facility in a building owned by NYCHA during the same time period. Under the circumstances, NYCHA is deemed to have constructive notice of any hazardous lead paint conditions (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628 [1996]; New York City Administrative Code § 27-2056.1, *et seq.*). The final, unchallenged administrative determinations that the lead paint conditions found on both premises were hazardous are binding under the circumstances of this case (*Perez v New York City Hous. Auth.*, 304 AD2d 736 [2003]). However, triable issues of fact remain whether NYCHA's efforts to correct the minimal hazardous lead paint conditions were reasonable, whether there was evidence of lead paint dust at the subject locations, whether the identified lead paint conditions caused hazardous lead paint

dust, and whether plaintiff-infant was injured by lead paint dust attributable to the identified lead paint hazards.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4773 Rafael Mejias, Index 309137/08
Plaintiff-Respondent,

-against-

Mastic Associates of New York, LLC,
et al.,
Defendants,

Quality Building Contractor, Inc.,
Defendant-Appellant.

_____

Gallo Vitucci & Klar, New York (Chad E. Sjoquist of counsel), for appellant.

Greenberg & Stein, P.C., New York (Ian Asch of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Lucindo Suarez, J.), entered on or about September 13, 2010, which, in this action for personal injuries sustained when portions of a fence allegedly struck plaintiff in the head, denied the motion of defendant-appellant Quality Building Construction, LLC s/h/a Quality Building Contractor, Inc. for summary judgment dismissing the complaint and all cross claims as against it, unanimously reversed, on the law, without costs, and the motion granted. The Clerk is directed to enter judgment accordingly.

We decline to consider those papers in the record on appeal

that were not submitted to the motion court (*see Vick v Albert*, 47 AD3d 482, 484 [2008], *lv denied* 10 NY3d 707 [2008]). In any event, the motion should have been granted. Quality met its prima facie burden by tendering uncontroverted evidence that the work it performed at the accident site was completed three years before the accident, and that its sister company performed work at the site six months after the accident (*see Soumas v Consolidated Edison*, 40 AD3d 478, 479 [2007]). In addition, Quality submitted uncontroverted evidence that it was not responsible for erecting or maintaining the fence. In opposition, plaintiff failed to submit any evidence that Quality's work was negligent and a proximate cause of his injury (*id.*). The general contractor's affidavit did not assert that Quality was present at the site at or near the time of plaintiff's accident.

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

ENTERED: APRIL 12, 2011

CLERK

Gonzalez, P.J., Sweeny, Moskowitz, Renwick, Richter, JJ.

4774 & M-747 — In re Barbara Demeri, Petitioner, — Index 102087/11

-against-

Hon. Sara Lee Evans, Respondent.

_____

Barbara Demeri, petitioner pro se.

Eric T. Schneiderman, Attorney General, New York (Susan Anspach of counsel), for respondent.

Cohen Rabin Stine Schumann LLP, New York (Harriet Newman Cohen of counsel), attorney for the child.

_____

The above-named petitioner having presented an application to this Court praying for an order, pursuant to article 78 of the Civil Practice Law and Rules,

Now, upon reading and filing the papers in said proceeding, and due deliberation having been had thereon,

It is unanimously ordered that the application be and the same hereby is denied and the petition dismissed, without costs or disbursements.

ENTERED: April 12, 2011

CLERK

Mazzarelli, J.P., Friedman, Catterson, DeGrasse, Manzanet-Daniels, JJ.

3527N Mohammed Chaudhary, et al., Index 401258/08
3527NA Plaintiffs-Respondents,

-against-

Brian D. Gold Sr., et al.,
Defendants-Appellants.

_____

Law Offices of Lorne M. Reiter, LLC, New York (Lorne M. Reiter of counsel), for appellants.

David J. DeToffol, P.C., New York (David J. DeToffol of counsel), for respondents.

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Order, Supreme Court, New York County (Paul Wooten, J.), entered June 16, 2009, which denied defendants' motion to compel plaintiff Mohammed Chaudhary to appear at a neuropsychological examination by an expert designated by defendants, or, in the alternative, to preclude plaintiffs from presenting evidence of damages at the time of trial, reversed, on the law and as a matter of discretion, without costs, defendants' motion granted, and plaintiff is directed to appear for said examination by an expert designated by defendants. Appeal from order, same court and Justice, entered October 13, 2009, denying defendants' motion to reargue, unanimously dismissed, without costs, as taken from a nonappealable paper.

Although "discovery determinations rest within the sound

discretion of the trial court, the Appellate Division is vested with a corresponding power to substitute its own discretion for that of the trial court, even in the absence of abuse" (*Andon v 302-304 Mott St. Assoc.*, 94 NY2d 740, 745 [2000]). Here the motion court erred in denying defendants' motion to compel plaintiff to submit to a neuropsychological examination. Defendants established the significant differences between a neuropsychiatric examination (already conducted by defense expert Fayer) and the proposed neuropsychological examination.

Defendants asserted that a neuropsychologist utilizes a different methodology and would administer a standardized battery of psychological tests that would quantify the type of brain injury and the degree of cognitive dysfunction related to possible damage of the brain. By contrast, a neuropsychiatrist focuses on emotional and psychiatric functioning.

In support of their motion, defendants submitted an affidavit from a neuropsychologist. That expert stated that his examination of plaintiff would quantify the type of brain injury that he allegedly suffers and would help distinguish between what is functional (i.e., psychiatric depression) or organic (i.e., cognitive dysfunction). He further stated that a neuropsychological examination would provide quantitative data

about plaintiff's functioning, such as his IQ score and memory test score. The expert also stated that his testing could aid in forming an ultimate opinion as to the nature and cause of plaintiff's injury as well as to any symptom amplification or exaggeration, an essential defense for defendant.

CPLR 3101(a) requires the "full disclosure of all matter material and necessary in the prosecution or defense of an action." Pursuant to CPLR 3121, following the commencement of an action, if a plaintiff's physical condition is in controversy, the defendant may require the plaintiff to submit to a physical examination (*see Koump v Smith*, 25 NY2d 287 [1969]). Further, it is within the trial court's discretion to require a plaintiff to submit to more than one physical examination (*see Brown v Metropolitan Transp. Auth.*, 256 AD2d 17, 18 [1998]). However, the party seeking the examination must demonstrate the necessity for it (*see Radigan v Radigan*, 115 AD2d 466, 467 [1985]).

Defendants have demonstrated that a neuropsychological

examination is material and necessary in order to defend against plaintiff's claim that he has suffered head injuries with cognitive impairment (*see e.g. Chelli v Banle Assoc., LLC*, 22 AD3d 781 [2005], *lv denied* 7 NY3d 703 [2006]).

All concur except Mazzarelli, J.P. and Manzanet-Daniels, J. who dissent in a memorandum by Manzanet-Daniels, J. as follows:

MANZANET-DANIELS, J. (dissenting)

I would affirm. Defendants failed to make the requisite showing that a further neuropsychological examination is material and necessary for the defense of the action (*see* CPLR § 3101 [a]; *compare Radigan v Radigan*, 115 AD2d 466, 467 [1985]).

This personal injury action arises from a motor vehicle accident that occurred on November 1, 2005, when plaintiff's taxi was struck from behind by a truck being driven by defendant Brian D. Gold and owned by defendant Penske Truck Leasing Corp. Plaintiff alleges that as a result of the collision, his head struck the car's windshield, causing him to suffer traumatic brain injury. The primary diagnosis, upon admission to the emergency room, was left frontal lobe contusion. An initial CT scan showed a questionable hyperdense focus in the left frontal lobe but a follow-up CT showed no areas of abnormal attenuation and no evidence of acute intracranial hemorrhage, midline shift or mass effect.

Following the accident, plaintiff complained of a variety of symptoms including depression, anxiety, headaches, lack of coordination, personality change, behavioral disturbances and cognitive impairment marked by inattentiveness, poor short-term memory, confusion, and difficulty recognizing familiar people and

places. Plaintiff's bill of particulars enumerated injuries including closed head trauma with concussion, cognitive impairment with dementia, slow speech, poor attentiveness, poor short-term memory and insight, headaches, depression, anxiety, post-traumatic stress disorder and panic attacks. The case management order, dated July 29, 2008, directed that examinations of plaintiff be completed by January 13, 2009.

On December 18, 2008, plaintiff appeared for a neurological evaluation conducted by Jerome M. Block, M.D. Dr. Block performed a neurologic examination of plaintiff and found no abnormality of cranial nerves, reflexes, motor or sensory systems. Dr. Block tested plaintiff's cognitive status, including tests of memory, logic, intelligence and mathematical ability. He found that plaintiff's cognitive status was "not normal." Dr. Block noted that plaintiff's answers were "slow," "frequently indirect," and "indefinite."

Dr. Block reviewed the emergency room records at length, including the CT scans. Dr. Block opined that it was "clear the questionable abnormality initially reported was not due to any bleeding within the brain, contusion of the brain, etc.," noting that "[t]he test was repeated and proved to be normal," and that "[i]ntracerebral hemorrhages do not disappear within a matter of

hours." Dr. Block noted that plaintiff denied headache, visual or speech disturbance, weakness, or loss of consciousness following the accident, and at that time had a normal neurological examination.

Dr. Block concluded that evidence of reported cognitive disturbance and personality aberrations following the accident, if present, were not the result of traumatic brain injury but consequent to emotional factors and/or maladaptive behaviors. Dr. Block stated:

> "By literature and personal experience, the affects [*sic*] of significant traumatic brain injury are apparent in the immediate post trauma stage and are relatively easily documented. Awareness of symptoms may evolve and symptoms may worsen if there is cerebral edema over a number of days to possibly a week or two, but thereafter symptoms stabilize and/or improve. There is no organic cause for slow deterioration over months or years."

On December 18, 2008, plaintiff appeared for a neuropsychiatric independent medical examination ("IME") conducted by Steven A. Fayer, M.D. Dr. Fayer performed a comprehensive psychiatric evaluation including mental status and cognitive skills, as well as a Reyes 15-symbol screening test, designed to detect malingering. Dr. Fayer noted, inter alia, that plaintiff "would stare vacantly at times," that "there was

hesitancy in some of his responses," and that his "facial expression and body posture reflected fatigue and depression." Dr. Fayer noted that while attention and concentration were adequate throughout, plaintiff's affect was "markedly constricted," and his mood depressed. Plaintiff demonstrated difficulty with recall, similarities, and simple questions designed to elicit information. Dr. Fayer concluded that plaintiff manifested a major depressive disorder with psychotic features, marked by depression, sadness, difficulty with focus and concentration, and paranoid beliefs that his family was plotting against him. Plaintiff also complained of a "multitude" of "diverse symptoms," including headaches and difficulties with memory. Dr. Fayer concluded, as to these symptoms, that "there is considerable evidence of conscious and unconscious exaggeration and elaboration of symptoms and complaints." Dr. Fayer concluded that

> "[t]here is an enormous disparity between complaints and objective findings. The depression he manifests, in my opinion, is not a direct sequelae of the accident. Furthermore, the screening test of the Reyes brings up the distinct likelihood of malingering of symptoms."

Fayer stated that "it would be helpful to get a battery of neuropsychological tests to substantiate issues of symptom

magnification, motivation and issues of secondary gain."

The motion court rightfully rejected defendants' notice for a further neuropsychological exam on the grounds that plaintiff had already been subjected to both a neurological and a neuropsychiatric examination. Plaintiff, a California resident, attended two IMEs in New York, with no time limit imposed.

In his comprehensive 17-page report, Dr. Block outlined the results of plaintiff's neurological examination and his review of the relevant records, and concluded that plaintiff had not sustained a traumatic brain injury that would account for his symptoms. Dr. Fayer, similarly, conducted a comprehensive neuropsychiatric examination of plaintiff and concluded that plaintiff's depression was not directly attributable to the accident. Both doctors performed tests of plaintiff's mental status and cognition, including tests of memory, logic, intelligence, language and mathematical reasoning. Defendants have failed to show a compelling need for further neuropsychological testing. Dr. Block did not express a need for further neurological testing. The defense's motion was predicated on Dr. Fayer's statement that a further battery of neuropsychological tests would be "helpful" to ascertain the extent of plaintiff's malingering. This was insufficient to

demonstrate need under the circumstances. Defendants' request for a further examination, where defendants' experts evidently have more than enough data to opine as to the cause and extent of plaintiff's neurological problems, is, under the circumstances, nothing less than harassment. It cannot seriously be disputed that the injuries plaintiff alleges flowed from the head trauma – depression, anxiety, headaches, lack of coordination, personality change, behavioral disturbances and cognitive impairments such as poor short-term memory – are consistent with a traumatic brain injury. To subject plaintiff to a further examination, where it has not been demonstrated that such testing is material and necessary to the defense, is merely to give defendant more fodder for their malingering theory, not to illuminate further the nature of plaintiff's neurological maladies.

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

ENTERED: APRIL 12, 2011

CLERK

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

3839-
3839A

Dorothy Singer, et al.,
Plaintiffs-Respondents,

-against-

Robert Seavey, et al.,
Defendants-Appellants,

John Edmonds,
Defendant-Respondent.

Index 602568/08

Gibson, Dunn & Crutcher LLP, New York (Anne Coyle of counsel), for appellants.

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

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

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

motion granted, and all proceedings stayed pending arbitration, except plaintiffs' fourth cause of action seeking a declaration as to the extent of defendant John Edmonds' interest in the partnership.

Defendants did not waive their right to arbitrate by moving to dismiss the complaint and appealing from the partial denial of the motion (*see Flynn v Labor Ready*, 6 AD3d 492 [2004]). Nor, since defendants made their demand for arbitration before serving their answer, did they waive the right by asserting the cross claim (*see City Trade & Indus., Ltd. v New Cent. Jute Mills Co.*, 25 NY2d 49, 55 [1969]).

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

> The Decision and Order of this Court entered herein on December 9, 2010 is hereby recalled and vacated (*see* M—11 decided simultaneously herewith).

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

ENTERED: APRIL 12,2011

CLERK

Tom, J.P., Mazzarelli, Renwick, Freedman, Manzanet-Daniels, JJ.

4142 Ryan, Inc., etc., Index 110480/08
Plaintiff-Appellant,

-against-

New York State Department of
Taxation and Finance, et al.,
Defendants-Respondents.

_____

Morrison & Foerster LLP, New York (Paul H. Frankel of counsel), for appellant.

Andrew M. Cuomo, Attorney General, New York (Richard O. Jackson of counsel), for respondents.

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Order, Supreme Court, New York County (Walter B. Tolub, J.), entered November 13, 2009, which granted defendants' motion to dismiss the complaint as moot and denied plaintiff's cross motion for summary judgment, unanimously affirmed, without costs.

The New York State franchise tax on S corporations was calculated for tax years 2003 through 2007 as a fixed-dollar-minimum tax (FDMT) based on the corporation's national gross payroll (wages, salaries and other personal compensation), which included all the taxpayer's employees, after exclusion of its chief executive officer payroll, within and without New York State (*see* Tax Law § 210[1][d][2][A]). Plaintiff commenced this action seeking a declaration that this

provision of the Tax Law violates the Due Process and Commerce Clauses of the United States Constitution to the extent it imposes tax based on gross payroll regardless of whether any of the gross payroll is related to services provided by individuals located in New York. Plaintiff also filed an administrative petition asserting this claim. Thereafter, respondents took the remedial actions of refunding plaintiff the amounts of its FDMT payments for tax years 2004 through 2006 that were based on its out-of-state payroll, cancelling the notice of deficiency they had issued against plaintiff for tax year 2004, and assuring plaintiff that they would not assess a deficiency against it for tax year 2007. These actions, which provided a full remedy to plaintiff, along with the Legislature's subsequent amendment to the statute revising the unapportioned tax scheme (*see* L 2008, ch 57, part AA-1, § 2; Tax Law § 210[d][4]), rendered this action moot.

Plaintiff failed to establish an exception to the mootness doctrine by showing that the flawed tax scheme is likely to be imposed again or that the issues raised typically evade review or are substantial and novel (*see Matter of Hearst Corp. v Clyne*, 50 NY2d 707, 714-715 [1980]; *Encore Coll. Bookstores, Inc. v City Univ. of N.Y.*, 75 AD3d 442 [2010]).

Plaintiff's contention that an actual controversy remains because respondents refused to refund all the tax payments it made under the statute is unavailing, since plaintiff did not allege in either the petition or the complaint that the franchise taxes it voluntarily paid based on its own computation derived from its in-state payroll were improper, and did not request a refund of those amounts. Indeed, plaintiff's voluntary payment of those amounts shows that plaintiff considered its calculated tax liability based on its New York State payroll to be proportional and constitutionally valid.

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

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

ENTERED: APRIL 12, 2011

CLERK

Mazzarelli, J.P., Acosta, DeGrasse, Richter, Manzanet-Daniels, JJ.

4435N Lisa Bishop, et al., Index 575/05
Plaintiffs-Appellants-Respondents,

-against-

Rona Maurer, etc.,
Defendant-Respondent-Appellant.

_____

Lawrence H. Silverman, Commack, for appellants-respondents.

Richard L. Herzfeld, P.C., New York (Richard L. Herzfeld of counsel), for respondent-appellant.

_____

Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered November 23, 2009, which, to the extent appealed from as limited by the briefs, granted plaintiffs' motion for leave to amend their complaint insofar as it sought to include an allegation of forgery in their existing claim for undue influence, and denied the motion insofar as it sought to add a cause of action for fraud, without prejudice to bringing such a motion before the Supreme Court, New York County, unanimously modified, on the law, to deny leave to add a cause of action for fraud, and otherwise affirmed, without costs.

Contrary to defendant's claim, decedent did not previously acknowledge that he signed the retainer agreement on which defendant allegedly forged his signature. On the contrary, he

alleged that *defendant* retained the lawyers who prepared the documents that he sought to set aside (a trust agreement and an agreement relating to his Individual Retirement Account [IRA] and Employee Stock Ownership Plan [ESOP]). The reference in decedent's brief on a prior appeal to a conflict waiver did not unambiguously mean the conflict waiver in the retainer agreement, as there was also a conflict waiver in the IRA/ESOP agreement.

The question of whether decedent signed the retainer letter was not at issue on the prior appeal (33 AD3d 497 [2006], *affd* 9 NY3d 910 [2007]). Accordingly, law of the case does not apply here (*see generally People v Evans*, 94 NY2d 499, 502 [2000]). The Court of Appeals' reference to "the estate planning documents decedent signed" (9 NY3d at 911) must have meant the trust agreement and the IRA/ESOP agreement, since a retainer letter is not an estate planning document.

Defendant contends that plaintiffs' motion for leave to amend the complaint was untimely. However, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983] [internal quotation marks and citation omitted]). In opposition to plaintiffs' motion, defendant did not show how she would be prejudiced. We

decline to consider arguments that she advanced for the first time in her motion for renewal and reargument, as we previously denied her request to enlarge the appellate record to include the papers from that motion (*see Bishop v Maurer*, 2010 NY Slip Op 87017[U][2010]).

The fraud claim that plaintiffs sought to add was based on entirely different facts from the fraud claim that Supreme Court had previously dismissed. Therefore, plaintiffs were neither seeking to vacate or modify Supreme Court's decision (*cf.* CPLR 5015[a][5]), nor to renew or reargue it (*cf.* CPLR 2221). Accordingly, Surrogate's Court should have decided the motion instead of referring it to Supreme Court. On the merits, the motion should have been denied. "A motion for leave to amend the complaint pursuant to CPLR 3025(b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit" (*Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809, 811 [2008] [internal quotation marks and citation omitted]). Here, the proposed fraud claim is clearly insufficient because there is no allegation of

any misrepresentation or reliance on the part of decedent (*see e. g. Sehera Food Servs. Inc. v Empire State Bldg. Co. L. L. C.*, 74 AD3d 542 [2010]).

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

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

ENTERED: APRIL 12, 2011

CLERK

Saxe, J.P., Friedman, Catterson, Acosta, Richter, JJ.

4186 Lisa Bruno, 116822/08
Plaintiff-Appellant-Respondent,

-against-

Stephen Bruno, et al.,
Defendants-Respondents-Appellants,

Dalton Greiner Hartman Maher & Co., LLC,
et al.,
Defendants-Respondents.

_____

Brown & Whalen, P.C., New York (Rodney A. Brown of counsel), for appellant-respondent.

Wachtel & Masyr LLP, New York (Evan S. Weintraub of counsel), for Stephen Bruno, respondent-appellant.

Matalon Shweky Elman PLLC, New York (Howard I. Elman of counsel), for Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., respondent-appellant.

Hughes Hubbard & Reed LLP, New York (Kenneth E. Lee of counsel), for respondents.

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Order, Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 1, 2009, affirmed, with costs.

Opinion by Acosta J. All concur.

Order filed.

SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT,

David B. Saxe, J.P.
David Friedman
James M. Catterson
Rolando T. Acosta
Rosalyn H. Richter, JJ.

4186
Index 116822/08

_____x

Lisa Bruno,
Plaintiff-Appellant-Respondent,

-against-

Stephen Bruno, et al.,
Defendants-Respondents-Appellants,

Dalton Greiner Hartman Maher & Co., LLC,
et al.,
Defendants-Respondents.

_____x

Cross-appeals from the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 1, 2009, which granted the motions of Dalton Greiner Hartman Meier & Co., LLC and Boston Private Financial Holdings, Inc. to dismiss the complaint against the on collateral estoppel grounds, granted that portion of defendants Stephen Bruno's and Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.'s motions seeking to dismiss the complaint as against them on collateral estoppel grounds and denied that portion of the motions seeking sanctions.

Brown & Whalen, P.C., New York (Rodney A. Brown and Melissa Alcantara of counsel), for appellant-respondent.

Wachtel & Masyr LLP, New York (Evan S. Weintraub and George E. Patterson, Jr. of counsel),for Stephen Bruno, respondent-appellant.

Matalon Shweky Elman PLLC, New York (Howard I. Elman and Yosef Rothstein of counsel), for Mintz Levin Cohn Ferris Glovsky and Popeo, P.C., respondent-appellant.

Hughes Hubbard & Reed LLP, New York (Kenneth E. Lee of counsel), for respondents.

ACOSTA, J.

This action requires us to apply the doctrine of collateral estoppel to a judicial determination of a sister state. Specifically, we consider the preclusive effect of a determination in a contempt motion in the context of a divorce proceeding in Connecticut, which expressly found that the husband and his former employer did not engage in a fraudulent scheme to deprive the wife of assets in equitable distribution, on a New York action subsequently commenced by the wife alleging the same fraud. Applying the well established principles of collateral estoppel, we hold that the wife cannot maintain the New York action.

Defendant Stephen Bruno and plaintiff Lisa Bruno were married in 1987. On December 12, 2005, Stephen commenced a divorce action against Lisa in the Superior Court of Connecticut. At the time the action was filed, Stephen was the co-president and a member of Dalton Greiner Hartman Meier & Co., LLC (DGHM), which is managed by and 80% owned by defendant Boston Private Financial Holdings, Inc. (BPFH). While employed at DGHM, Stephen acquired equity interests in DGHM as well as in nonparty 1100 Fifth Avenue Partners, Inc. (FAP).

In October 2006, Stephen was terminated from DGHM for cause on the ground that he manipulated his performance attribution

number in order to receive a more favorable bonus. Stephen contested the termination, but, rather than litigate the issue, he retained the law firm of Mintz Levin to negotiate the terms of his departure. Pursuant to these negotiations, Stephen entered into a settlement agreement with DGHM, BPFH, and FAP whereby, among other things, Stephen's termination would be treated as one "for cause," and as a result, would forfeit certain equity interests in DGHM and FAP. In return, Stephen would be released from certain noncompete provisions, and DGHM would not publicly disclose the reasons for his termination.

By motion dated February 12, 2007, Lisa moved in the Connecticut action to hold Stephen in contempt of that court's order. Specifically, Lisa alleged that Stephen violated "Automatic Order #1," which prohibited the parties from disposing of any property without the consent of the other or approval by the court. According to Lisa, Stephen was not actually terminated for cause, did not actually forfeit his equity interests, would ultimately receive monetary consideration for his equity interests, and devised a fraudulent scheme with DGHM, BPFH and Mintz Levin in order to deprive her of assets that would otherwise have been available to her in equitable distribution.

In connection with her motion, Lisa subpoenaed and received documents from DGHM and Mintz Levin and deposed Stephen, DGHM's

CEO, Bruce Geller, and an attorney from Mintz Levin. After several months of discovery, the Connecticut court held an evidentiary hearing over the course of five days. During the hearing, both Stephen and Geller testified regarding the settlement agreement and Stephen's termination.

On March 17, 2008, the Connecticut court denied Lisa's contempt motion. The court found that "the reason advanced by [DGHM] for [Stephen's] termination would have constituted valid grounds for the termination of [Stephen] for cause if a settlement agreement had not been arrived at between the parties and would have constituted wilful or gross misconduct on the part of [Stephen]." Moreover, the Court found:

> "A fraud scheme has not occurred and . . . none of the allegations of a fraud scheme have . . . been proven. The plaintiff will not receive any money from DGHM or BPFH other than is disclosed in the separation agreement . . . Further, no person or entity will be receiving anything of value on behalf of [Stephen] as the result of his termination."

The court further determined that Lisa failed to present credible evidence of any act of bad faith by DGHM or Mintz Levin to substantiate her claim that Mintz Levin was retained to "mastermind" the fraudulent conveyance of marital property and help negotiate DGHM's participation in the fraud and subsequent cover up.

Thereafter, Lisa filed this action in the Supreme Court of New York, alleging that there was a conspiracy between Stephen and the other defendants to devise and execute a "fraudulent conveyance scheme" with the intent of hindering, delaying, or defrauding plaintiff from receiving equitable distribution of Stephen's equity interests in DGHM. In her complaint, Lisa repeated all of the allegations that she made in the Connecticut action, including that Stephen was not actually terminated for cause, that he did not actually forfeit his equity interests, and that he conveyed his interests to deny plaintiff her equitable share.

In February 2009, the defendants each moved to dismiss the complaint on the ground that the claims are collaterally estopped by the decision in the Connecticut action. Stephen and Mintz Levin also sought sanctions. The motion court dismissed the complaint and denied the motion for sanctions. We now affirm.

The motion court properly noted that New York courts apply the law of the rendering jurisdiction to determine the preclusive effect of the decisions of sister states (*see e.g. Schultz v Boy Scouts of Am.* 65 NY2d 189, 204 [1985]). Under Connecticut law, collateral estoppel precludes a party from relitigating an issue that has been "fully and fairly litigated" in a prior suit (*Aetna Cas. & Sur, Co. v Jones*, 220 Conn 285, 296, 596 A2d 414, 421

[1991] [internal quotation marks omitted]). Application of the doctrine is appropriate where, in a prior action between the same parties or those in privity with them, the issues and facts were actually litigated and necessarily determined (*see Efthimiou v Smith*, 268 Conn 499, 506, 846 A2d 222, 227 [2004]). "An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined . . . An issue is *necessarily determined* if, in the absence of a determination of the issue, the judgment could not have been validly rendered" (*Cumberland Farms, Inc. v Town of Groton*, 262 Conn 45, 58 n 17, 808 A2d 1107, 1116 n 17 [2002] quoting *Dowling v Finley Associates, Inc.*, 248 Conn 364, 373-374, 727 A2d 1245 [1999]).

Applying these principles, the motion court correctly found that plaintiff is collaterally estopped by the determination in the Connecticut action from asserting her claims in this action. The main issues raised in this action, relating to the central allegation that defendants conspired to create a fraud scheme to deprive plaintiff of assets in equitable distribution, were actually litigated and necessarily determined in the Connecticut action. Indeed, the Connecticut court was required to consider those allegations in order to determine whether Stephen had willfully disobeyed one of its orders.

Lisa's argument that the motion court erred in giving preclusive effect to the Connecticut proceeding since it did not involve the same parties in this action or those in privity with them, is unavailing. The motion court correctly noted that "collateral estoppel precludes a party from relitigating issues and facts actually and necessarily determined in an earlier proceeding between the same parties or those in privity with them upon a different claim." Although only Stephen was a party to the Connecticut action, the Connecticut court specifically found that there was no evidence that the other defendants in this case committed any acts in bad faith or were part of a fraudulent scheme. Morever, under Connecticut law mutuality of parties in a subsequent action is not necessary to invoke collateral estoppel (*see Aetna Cas. & Sur. Co. v Jones*, 220 Conn at 302, 596 at 424 [1991] ["To allow a party who has fully and fairly litigated an issue at a prior trial to avoid the force of a ruling against him simply because he later finds himself faced by a different opponent is inappropriate and unnecessary"]; *see also Efthimiou*, 268 Conn at 507, 846 A2d at 227-28 [when the liability of a defendant in an action is derivative of the liability of a defendant in a prior action, and the liability of the prior defendant was "properly raised in the pleadings or otherwise, submitted for determination, and in fact determined" and "that

determination was essential to the judgment in the companion case, and it remains unchallenged," the plaintiff in the present action is collaterally estopped from relitigating that issue in the present action]). Similarly here, the liability of the remaining defendants is derivative of Stephen's liability, and since Stephen was found not to have engaged in a fraud scheme with DGHM, BPFH and Mintz Levin in the Connecticut action, Lisa is collaterally estopped from bringing her claims against the remaining defendants in the present action.

Nor did, as plaintiff urges, the motion court err by conflating the doctrines of res judicata and collateral estoppel and by applying res judicata to this case. Citing to *Delahunty v Massachusetts Mut. Life Ins. Co.* (236 Conn 582, 674 A2d 1290 [1996]), plaintiff argues that the motion court misapplied Connecticut law as the doctrine of res judicata does not bar the litigation of tort claims that might have been made in a prior marital dissolution action. Initially, the motion court specifically noted that while the doctrines of res judicata and collateral estoppel are related, they are distinct. The court then went on to apply the doctrine of collateral estoppel to this action. In any event, in *Weiss v Weiss* (297 Conn 446, 464, 998 A2d 766 [2010]), the Connecticut Supreme Court clarified that its holding in *Delahunty* was that tort actions are not required to be

litigated in a divorce action, but noted that those issues that are litigated in a divorce proceeding generally are precluded from subsequently being relitigated.

Plaintiff also relies on *Delahunty* to argue that Connecticut public policy prohibits the application of "preclusion principles" to divorce proceedings, and that the divorce proceeding did not provide her a fair and adequate forum to litigate. Her argument is based on the power of New York Supreme Court to award legal, rather than only equitable relief. Thus, according to plaintiff, collateral estoppel is "inapplicable to a marital dissolution proceeding because of the unique circumstances and jurisdictional limitations such a proceeding presents." These arguments are flawed and are a misreading of Connecticut law.

In *Weiss* (297 Conn 446, 998 A2d 766), during divorce proceedings, a dispute arose about the meaning of an agreement executed by the parties to divide their law practice. Almost two years after the dispute was resolved, the wife filed a complaint alleging breach of contract and breach of fiduciary duty claims against the husband in connection with the same agreement. The Connecticut Supreme Court rejected the wife's argument that collateral estoppel did not bar a subsequent proceeding to the divorce action involving claims founded in tort or contract,

holding, as noted, that tort actions do not *have to be* litigated in the marital dissolution proceedings, but when a claim *was actually litigated* in the divorce proceedings, that decision has preclusive effects.

For this Court to reach a different result would be to go against the significant public policy considerations of collateral estoppel. As the Connecticut Supreme Court noted in *Cumberland*, the decision to apply collateral estoppel should be made upon a consideration of the doctrine's underlying purpose, namely, "(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose . . ." (262 Conn at 59, 808 A2d at 1117, quoting *Isaac v Truck Serv. Inc.*, 253 Conn 416, 422, 752 A2d 509, 513 [2000]).

Plaintiff also asserts that the motion court misconstrued the scope of her contempt motion inasmuch as that motion concerned only whether Stephen should be held in contempt for willfully violating the Connecticut court's order. However, in order for the Connecticut court to determine whether Stephen had willfully violated the order, it was necessary to determine whether he had in fact been involved in a fraud scheme, an issue which was actually litigated and necessarily determined. Thus, plaintiff's argument is unavailing.

Finally, the motion court properly exercised its discretion in denying the motions by Mintz Levin and Stephen for sanctions against plaintiff. The conduct in the present action does not rise to the level of conduct New York courts find sanctionable (*cf. Romeo v Romeo*, 225 AD2d 753 [1996]; *Matter of Rosenhain*, 222 AD2d 745, *lv dismissed* 87 NY2d 1053 [1996]).

Accordingly, the order of the Supreme Court, New York County (Melvin L. Schweitzer, J.), entered September 1, 2009, which granted the motions of DGHM and BPFH to dismiss the complaint against them on collateral estoppel grounds, granted that portion of defendants Stephen Bruno's and Mintz Levin Cohn Ferris Glovsky and Popeo, P.C.'s motions seeking to dismiss the complaint as against them on collateral estoppel grounds and denied that portion of the motions seeking sanctions, should be affirmed, with costs.

All concur.

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

ENTERED: APRIL 12, 2011

CLERK