SUPREME COURT, APPELLATE DIVISION
FIRST DEPARTMENT

JANUARY 4, 2011

THE COURT ANNOUNCES THE FOLLOWING DECISIONS:

Gonzalez, P.J., Tom, Andrias, Catterson, Moskowitz, JJ.

3016 Steven Simkin, Index 101501/09
Plaintiff-Appellant,

-against-

Laura Blank,
Defendant-Respondent.

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Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Mark H. Alcott of counsel), for appellant.

Emery Celli Brinkerhoff & Abady LLP, New York (Richard D. Emery of counsel), for respondent.

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Order, Supreme Court, New York County (Saralee Evans, J.), entered January 5, 2010, which granted defendant's motion to dismiss pursuant to CPLR 3211, reversed, on the law, without costs, the motion denied and the complaint reinstated.

Initially, we note that on a CPLR 3211 motion to dismiss, "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Plaintiff is a partner at a large New York law firm and

defendant is the deputy senior university director of labor relations at a university in New York. The parties married in 1973, separated in 2001, and were divorced during the summer of 2006. On June 27, 2006, they entered into an agreement to divide their property (hereinafter referred to as the "agreement"). Due to the length of their marriage, they agreed to an approximately equal division of marital property. They also agreed that property would be valued as of September 1, 2004 (hereinafter referred to as the "cut-off date").

Plaintiff received the parties' Scarsdale house and three of their automobiles; defendant received their Manhattan apartment (encumbered by a $370,000 mortgage) and an Audi. The parties agreed that each would keep accounts titled in his or her name. Plaintiff paid defendant $6,250,000 and transferred a further $368,000 to equalize the parties' retirement accounts.

Each party acknowledged "that the property he or she is receiving or retaining pursuant to this Article represents a fair and reasonable share of the marital property." The agreement contains mutual releases as well as a merger clause.

In the amended complaint, plaintiff alleges that at the time of their agreement the parties believed that they owned an account (hereinafter referred to as the "Madoff Account") with Bernard L. Madoff Investment Securities which was their largest

asset (purportedly $5.4 million as of the cut-off date). Of $6,618,000 that plaintiff paid defendant pursuant to the 2006 agreement, $2.7 million was attributable to defendant's share of what the parties believed to be their $5.4 million Madoff Account. This account was titled in plaintiff's name. Plaintiff alleges that in reality, there was no such account because Madoff was running a Ponzi scheme.

In the parties' agreement, plaintiff released, inter alia, "any and all claims to or upon the property of [defendant] . . . whether now owned or hereafter acquired or received, to the end that she shall have free and unrestricted right to dispose of her property now owned or hereafter acquired or received, free from any claim or demand of [plaintiff]." The releases in the parties' agreement did not bar plaintiff's claims as a matter of law (*see e.g. Littman v Magee*, 54 AD3d 14, 15 [2008]).

Plaintiff pleads mutual mistake with the requisite particularity (*see* CPLR 3016(b); *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008]), and the amended complaint states a cause of action for reformation based on mutual mistake (*see e.g. Banker v Banker*, 56 AD3d 1105 [2008]; *House v Wechsler*, 104 App Div 124 [1905]). Contrary to defendant's contention, mutual mistake can be based on a statement by a third party (*see e.g. D'Antoni v Goff*, 52 AD2d 973 [1976]; *House*, 104 App Div at

127). The cases cited by defendant where claims were dismissed pursuant to CPLR 3211(a)(5) did not involve mutual mistake.

The documentary evidence proffered by defendant (*see* CPLR 3211(a)(1)) does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law (*see e.g. McCully v Jersey Partners, Inc.*, 60 AD3d 562 [2009]). With respect to the branch of defendant's motion based upon CPLR 3211(a)(7), even though defendant submitted documents, "dismissal should not eventuate" unless she shows that a material fact alleged by plaintiff "is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). Such is not the case here.

The motion court and the dissent both err in relying on the claim - which was not in defendant's affidavit - that, for several years after the parties' agreement, plaintiff could have redeemed what the parties believed to be their account for cash in excess of its supposed value as of the cut-off date selected by the parties (*see e.g. Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). Both the motion court and the dissent also err by resolving a fact - the assumption on which the parties relied in dividing their property - in defendant's favor on a motion to

dismiss (*see Viskovich v Walsh-Fuller-Slattery*, 16 AD2d 67 [1962], *aff'd* 13 NY2d 1100 [1963] [trial was held when the plaintiff alleged that state of facts assumed to exist at time of the parties' agreement did not, in fact, exist]).

Indeed, the dissent speculates as to plaintiff's expectations that the "Madoff account [. . .] continue its highly profitable performance" and asserts "[a]ccordingly, he alone took on the risk that he might not be able to recoup his investment" citing *Reiss v Financial Performance Corp*. (97 NY2d 195, 201 [2001]).

A couple of observations are in order: First, in the context of a CPLR 3211 motion, plaintiff's motivations as alleged by defendant are irrelevant because the allegations in the amended complaint must be accepted as true. Second, *Reiss* is a declaratory injunction action concerning a stock swap; no allegation of mutual mistake is present.

Further, even though there is an express contract between the parties, it is unclear whether it covers the current dispute; therefore, plaintiff may plead unjust enrichment (*see e.g. IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 405 [2007]), and the amended complaint states such a cause of action (*see Simonds v Simonds*, 45 NY2d 233, 242 [1978]).

Finally, defendant and the dissent ignore the allegations of

mutual mistake as to the actual existence of the account itself. Both defendant and the dissent attempt to foreclose plaintiff's claims by transmogrifying the claim of mutual mistake into a claim of mistake in valuation.

The dissent states: "[a]t the time of the agreement, Steven had an account in his name with [Madoff]." Untrue. Steven *never* had an account in his name with Madoff; on Madoff's own admission there were no accounts within which trades were made on behalf of investors.

The dissent then states, "Steven liquidated part of the account to fund his payments to Laura." Untrue. In Madoff's Ponzi scheme what appeared to Steven and Laura to be a partial liquidation of an account was simply a payment to Steven that came from funds deposited by a more recent "investor" in what the "investor" believed was his own account.

The dissent further observes, "[Steven] did not liquidate the rest of the Madoff account . . . and he continued to invest in it." Untrue. There was no account which could be liquidated, as became apparent when Madoff received $7 billion worth of

"liquidation" calls from investors in 2008. Nor was Steven "investing" in an account; his further contributions went directly to pay other "investors" in the scheme.

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

MOSKOWITZ, J. dissenting:

Today the majority unravels a carefully negotiated divorce settlement in which the husband received the benefit of his bargain. Instead of enforcing the plain language of the agreement between the parties, the majority relies on the doctrine of "mutual mistake" to rewrite it. However, even if one accepts that mutual mistake is the appropriate analysis, the complaint fails. It fails first because the alleged mutual mistake does not involve a fundamental assumption of the contract. It further fails because the alleged mistake did not exist at the time the parties entered into their agreement. Moreover, the majority's approach undermines decades of established precedent favoring finality in divorce cases. Thus, the conclusion the majority reaches, not only fails to follow precedent, but is truly "divorced" from reality.

The Separation Agreement

Plaintiff Steven Simkin and defendant Laura Blank[1] married in 1973 and have two children, born in 1981 and 1984. The parties separated in 2001. On June 27, 2006, they entered into an agreement to divide their property (the agreement). The

[1] This dissent adopts the same delineations as are in the complaint and therefore refers to plaintiff as "Steven" and defendant as "Laura."

agreement involved a complex series of transactions – a fact the complaint fails to take into account. The division of property was quite specific. Steven, the monied spouse, was to pay Laura an aggregate sum of $6,250,000:

> "As and for an equitable distribution of property, excluding pension and retirement funds. . . and in satisfaction of the Wife's support and marital property rights, the Husband shall pay to the Wife an aggregate and all inclusive amount of $6,250,000."

In exchange, Laura waived all spousal support, and, upon payment, was to convey "all her right, title and interest" to the parties' residence in Scarsdale, New York to Steven. Laura also received the parties' Manhattan apartment and the $370,000 mortgage that encumbered it. In addition, Steven rolled over to Laura's retirement account an additional $368,000 "[t]o equalize the difference in value between the Husband's Retirement Accounts and the Wife's Retirement Accounts " as "the parties have agreed to divide the value of such accounts equally." This part of the agreement addressing the division of retirement accounts is the only place that mentions equal division or equalization of specific property. The parties also acknowledged in the agreement that they were waiving rights to equitable distribution of their property.

In addition, in the paragraph covering "Intangible Personal Property," Steven recognized that he retained "all right, title

and interest in and to all bank, brokerage and similar financial accounts in his name, including his capital account as a partner at Paul Weiss." Similarly, the preceding paragraph states that "[w]ife shall retain all right, title and interest in and to all bank, brokerage and similar financial accounts in her name." The Article of the agreement addressing "debts" states that "[h]usband covenants and agrees to pay all debts, charges and liabilities incurred by him before or after the execution of this agreement for which Wife may be or may become liable and to keep Wife free and harmless and indemnified of and from all and any such debts, charges or liabilities heretofore and hereafter contracted by him." Laura made a reciprocal covenant.

The parties also entered into mutual releases whereby they agreed to release "any and all claims to or upon the property of [the other]" whether real or personal and agreed to release and discharge the other from:

> "All debts, sums of money, accounts, contracts, claims, causes or causes of action, suits, dues, reckonings, bonds, bills, specialities, covenants, controversies, agreements, promises, variances, trespasses, damages, judgments, executions and demands whatsoever, in law or in equity, which each of them had, now has or hereafter can, shall or may have by reason of any matter from the beginning of the world to the execution of this agreement."

The parties acknowledged that they entered the agreement freely

and had obtained independent legal advice. The agreement also contains a merger clause:

> "No oral statement or prior written matter, extrinsic of this agreement, shall have any force or effect. The parties are not relying on any representation other than those expressly set forth herein."

It also states that "[t]his agreement is entire and complete and . . . no representations, agreements, promises, undertakings or warranties of any kind or nature have been made by either party."

At the time of the agreement, Steven had an account in his name with Bernard L. Madoff Investment Securities (the Madoff account), that was supposed to consist of securities and other assets. The agreement does not mention the Madoff account, but Steven liquidated part of the account to fund his payments to Laura under the agreement. Pursuant to the agreement, Steven retained title to all his accounts, including this account. He did not liquidate the rest of the Madoff account after the parties divorced, and he continued to invest in it. As we all now know, Bernie Madoff was operating the world's largest Ponzi scheme. Today, the Madoff account is presumably worthless.

As mentioned earlier, in exchange for Laura giving up spousal support, all interest in the marital home in Scarsdale, New York and certain personal property, Steven paid Laura $6.25 million. Although the agreement says nothing of the kind, Steven

now claims that $2.7 million of the $ 6.25 million he gave her was Laura's share of the Madoff account. He arrives at this figure by claiming that: (1) the parties were supposed to divide this particular marital asset equally; and (2) as of the valuation date of September 1, 2004, the parties valued the Madoff account at $5.4 million.

The Complaint

Plaintiff seeks to reform the Settlement agreement on the grounds of mutual mistake and seeks payment from Laura of an amount to be determined as restitution, indemnity or otherwise. Steven's far-flung request for relief relies on the theory that the Madoff account never really existed and therefore the parties were mistaken when they valued it at $5.4 million as of September 1, 2004. Because of this "mutual mistake," the parties' supposed intention to divide this asset equally did not come to fruition. Steven therefore seeks to reform the agreement. He also asserts a claim for unjust enrichment/restitution claiming Laura has been unjustly enriched based on the mutual mistake concerning the Madoff account and that she should pay him restitution that "would put the parties in the position they intended." Within his claim for unjust enrichment, Steven also contends that, should the Trustee overseeing the liquidation of Madoff Securities seek clawback from Steven, Laura should provide an

indemnification and defense. Steven asserts this claim against Laura even though the Trustee has not asserted a claim against him and may never do so.

To reform a contract on the ground of mutual mistake, the mutual mistake must involve a "fundamental assumption of the contract" (*True v True*, 63 AD3d 1145, 1147 [2009]). "Proof of mistake must be of the highest order and must show clearly and beyond doubt that there has been a mistake" (*id.* [internal quotation marks and citations omitted]). "When the writing expresses the actual agreement, it cannot be reformed and a stipulation, not assented to, can never be added." (*Curtis v Albee*, 167 NY 360, 364 [1901]).

In this case, the alleged mutual mistake does not undermine any "fundamental assumption" in the contract. Nothing in the agreement states that the parties agreed to divide the Madoff account equally. Nothing in the agreement attributes $2.7 million to Laura's share of the Madoff account. Indeed, the agreement does not even mention the Madoff account, even though this account was supposedly the "couple's largest asset." With the exception of a payment to equalize their retirement accounts, the agreement does not state that the parties were to divide any particular asset equally. Nor does the agreement dictate how Steven was to pay Laura. Significantly, however, the agreement

does mention that, for Steven's payment of $6.25 million, Laura was to forego spousal support, acquire property encumbered by a mortgage and forego her share of the parties' residence in Scarsdale as well as certain valuable personalty.

As the agreement does not address how Steven was to pay Laura, he was free to put together the fund by other means such as a home equity loan or borrowing against his retirement account. That he chose to liquidate in part the Madoff account, does not diminish one iota the amount that was due Laura under the agreement. To suggest otherwise contradicts the terms of the written agreement (*compare Lusk v Lusk*, 55 AD3d 408, 408 [2008] [although separation agreement did not address specific contingency of a tax refund from a post-divorce amended return, wife was entitled to half of refund pursuant to clear terms of the agreement stating that refunds "shall be divided equally"]; *True v True*, 63 AD3d at 1147-1148 [court found mutual mistake as to number of shares defendant was to receive where the stipulation between divorcing spouses specifically referred to the shares as being available for division between the parties]).

The Court of Appeals has repeatedly warned that "an omission or mistake in a contract does not constitute an ambiguity. . . Even where a contingency has been omitted, we will not necessarily imply a term since courts may not by construction add

or excise terms, nor distort the meaning of those used and thereby make a new contract for the parties under the guise of interpreting the writing" (*Reiss v Financial Performance Corp.*, 97 NY2d 195, 199 [2001] [internal quotation marks and citations omitted]). In total disregard for clear Court of Appeals precedent, the complaint, under the guise of a "mistake," seeks to rewrite the agreement between the parties. Steven received exactly what he bargained for, including sole title to a house in Scarsdale. To require Laura to give back any of the $6.25 million would result in a serious windfall to Steven, who received valuable consideration in exchange for this payment and, notably, does not suggest that he give back half the house or commence spousal support payments.

One would think that Steven would not have signed an agreement in which he waived equitable distribution if the parties had agreed to divide each particular asset equally. The parties were certainly capable of discussing equal division of specific property. They did so with respect to only one asset, the retirement accounts.

The majority ignores the plain language in the agreement. Instead, it leans on the doctrine of "mutual mistake" to rewrite the agreement between the parties. However, even under the majority's theory, the complaint cannot stand. Under the settled

doctrine of mutual mistake, the alleged mistake must exist at the time the parties executed their agreement (*Matter of Gould v Board of Educ. of Sewanhaka Cent. High School Dist.*, 81 NY2d 446, 453 [1993]). The amended complaint repeatedly identifies the mistake to be that the parties thought they had an investment account worth $5.4 million, when it was actually non-existent. However, this allegation clearly conflicts with the allegation in the Amended Complaint that Steven withdrew actual money from this "non-existent" account at the same time in 2006 to pay Laura. Thus, even looking at the amended complaint in isolation (i.e., without the agreement), plaintiff has failed to plead a mutual mistake that existed at the time the parties entered into their contract.

The majority also relies heavily on the circumstance that this is a motion to dismiss. However, a motion to dismiss is not an opportunity to set aside the clear language of a properly executed agreement (*see Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 13 NY3d 398 [2009]; *see also Sweeney v Sweeney*, 71 AD3d 989, 991[2010] ["(w)hen the moving party offers evidentiary material, the court is required to determine whether the proponent of the pleading has a cause of action, not whether she has stated one"] [internal quotation marks and citation omitted]). The majority also makes the conclusory assertion that

the documentary evidence "does not utterly refute plaintiff's factual allegations or conclusively establish a defense as a matter of law" but never explains why. Indeed, the majority barely addresses the agreement at all except to acknowledge that there is an express contract between the parties but claims, without explanation or addressing the arguments in this dissent, why it is "unclear whether it covers the current dispute."

The majority faults the citation to *Reiss v Financial Performance Corp.* (97 NY2d 195 [2001]), on the ground that this case did not involve a claim of mutual mistake. What the majority fails to comprehend is that plaintiff's theory of mutual mistake is irrelevant because the express terms of the agreement address the situation at hand. *Reiss* requires New York courts to enforce the express language of an agreement even where the results contradict expectations and disadvantage one party, while arguably resulting in a windfall to the other (97 NY2d 199-201; *see also McCaughey v McCaughey*, 205 AD2d 330 [1994] [no reformation of agreement even though husband lost his job as an investment banker where husband received substantial benefits, including a house, and was aware of the possibility he might become unemployed a year after he made the agreement]).

Because Steven received significant value in exchange for the payment of $ 6.25 million to Laura, his retention of the

Madoff account and subsequent losses render this case no different than the legion of cases denying a spouse's request to open up a divorce settlement where the final value of an asset was not what the parties believed at the time of the divorce (*see e.g. Greenwald v Greenwald*, 164 AD2d 706, 721 [1991], *lv denied* 78 NY2d 855 [1991] [post-trial depreciation of two investment accounts did not entitle husband to new trial because "post trial changes in value may not be used to reallocate the distribution of marital assets to strike a more equitable balance"]). Certainly, had the Madoff account substantially increased in value, Laura would not be able to share those benefits (*see e.g.*, *Etzion v Etzion,* 62 AD3d 646 [2009], *lv dismissed* 13 NY3d 824 [2009] [no mutual mistake where market value of warehouse property substantially increased in value after City announced rezoning plan subsequent to the divorce]; *Kojovic v Goldman*, 35 AD3d 65 [2006] *lv denied* 8 NY3d 804 [2007] [wife precluded from challenging validity of settlement agreement where husband sold his minority interest in company after divorce]; *Siegel v Siegel*, 132 AD2d 247 [1987], *appeal dismissed* 71 NY2d 1021 [1998], *lv denied* 74 NY2d 602 [1989] [plaintiff's motion for a new trial denied when artist Diego Giacommetti died after the trial and artwork, now defendant's sole property, substantially increased in value]). Steven negotiated successfully to retain the Madoff

account, presumably because he expected the Madoff account to continue its highly profitable performance. After the valuation date of September 1, 2004, he invested more money in it. Accordingly, he alone took on the risk that he might not be able to recoup his investment (*see Reiss*, 97 NY2d at 201 [noting while "[w]e should not assume that one party intended to be placed at the mercy of the other . . . [, i]t does not follow, however, that Financial should be given a comparable remedy to save it from the consequences of its own agreements and its own decision"]). Laura cannot be responsible for Steven's independent decision to continue to hold his investment with Madoff. Just as she would not have benefitted from any increase in the value of the account, she should not have to bear the burden of its loss.

"In general, a final judgment of divorce issued by a court having both subject matter and personal jurisdiction has the effect of determining the rights of the parties with respect to every material issue that was actually litigated or might have been litigated" (*Rainbow v Swisher*, 72 NY2d 106, 110 [1988]). "[A]bsent unusual circumstances or explicit statutory authorization, the provisions of the judgment are final and binding on the parties, and may be modified only upon direct challenge" (*id.*). The reason courts routinely reject attempts to

revalue assets is obvious. To recognize unforseen changes in the value of property to modify the distribution "would effectively undermine the finality of judgments in matrimonial actions" (*Siegel v Siegel*, 132 AD2d at 254; *see also Kojovic*, 35 AD3d at 68; *Greenwald*, 164 AD3d at 722 [barring wife's action "out of respect for the integrity and finality of divorce settlements"]). As the Court of Appeals has noted, the "essential objective" in a matrimonial action "is to dissolve the marriage relationship" (*Boronow v Boronow*, 71 NY2d 284, 290 [1988]). To continue unnecessary litigation is "particularly perverse" in the divorce context because it continues the relationship and conflict between the parties (*id. at 291*). By accepting plaintiff's argument, the majority effectively grants leave to litigants in matrimonial actions to seek repeatedly to modify final judgments based on allegations that certain of the assets distributed may have depreciated in value or disappeared because of outside events since the time of the trial or settlement and judgment. The majority's decision will result in chaos, not only for the court system, but for the litigants as well, who deserve finality and to move on (*see Denburg v Parker Chapin Flattau & Klimpl*, 82 NY2d 375, 383 [1993] ["a settlement produces finality and repose upon which people can order their affairs"]).

Finally, the motion court properly rejected Steven's claim

for unjust enrichment. "Where the parties executed a valid and enforceable written contract governing a particular subject matter, recovery on a theory of unjust enrichment for events arising out of that subject matter is ordinarily precluded" (*IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009], *citing Clark-Fitzpatrick, Inc. v. Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Steven cannot assert an alternative claim for unjust enrichment because the terms of the agreement control.

To the extent the unjust enrichment claim seeks to compel Laura to indemnify and defend Steven from any attempts by the Trustee overseeing the liquidation of Madoff Securities to seek clawback from Steven, this lawsuit is not yet ripe, and indeed may never be.[2] First, the Trustee is not pursuing Steven at this time. Moreover, for the Trustee ever to recover against Steven as an innocent investor in a Ponzi scheme, the Trustee would likely have to show that Steven was: (1) a "net winner" and (2) that amounts Steven received in profit were within the limitations period (*see, e.g., Donell v Kowell*, 533 F3d 762, 776 [9th Cir 2008], *cert denied* _ US _, 129 S Ct 640 [2008]; *Citicorp Trust Bank, FSB v Makkas*, 67 AD3d 950, 952 [2009] [statute of limitations for constructive fraud under New York's Debtor and

[2] The majority does not address this point.

Creditor law is six years from the date of the fraudulent transfer]). Thus, if and when Steven will be liable is a far-off contingency (*see Heine v Heine*, 176 AD2d 77, 91 [1992] [tax impact evidence too speculative to support a claim for credit for taxes]). Accordingly, the unjust enrichment claim should be dismissed as speculative. Whether Steven can state a claim for unjust enrichment against Laura, if and when the Trustee does bring a claim against Steven, is a question for another day.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., McGuire, Acosta, Renwick, Freedman, JJ.

3545 Leonilda Chevalier, Index 20779/06
Plaintiff,

-against-

368 E. 148th Street Associates, LLC, et al.,
Defendants,

Notias Construction Corp.,
Defendant-Respondent.

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Notias Construction Corp.,
Third-Party Plaintiff-Respondent,

-against-

Consolidated Edison Company Of New York, Inc.,
Third-Party Defendant,

Triboro Plumbing & Heating Corp.,
Third-Party Defendant-Appellant.

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Gallo Vitucci & Klar, LLP, New York (Yolanda L. Ayala of counsel), for appellant.

Milber Makris Plousadis & Seiden, LLP, White Plains (Peter J. Morris of counsel), for respondent.

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Order, Supreme Court, Bronx County (Mark Friedlander, J.), entered January 29, 2010, which, upon granting third-party plaintiff Notias Construction's motion to renew, vacated so much of a prior order dismissing its third-party claims for common-law indemnification and contribution against third-party defendant Triboro Plumbing & Heating, and denied Triboro's cross motion for

summary judgment dismissing those third-party claims, affirmed, without costs.

Based on the totality of the circumstances, the motion court did not abuse its discretion in vacating its order dismissing the third-party complaint brought by third-party plaintiff Notias against third-party defendant Triboro. The relevant procedural history of the action is as follows: Plaintiff, a nonparty to this appeal, alleges that in May 2006 she slipped and fell on a road covered with mud that came from a nearby construction site. She brought this action against, among others, Notias, the general contractor for the construction project.

In September 2008, Notias commenced a third-party action against Triboro, a subcontractor. By notice dated February 19, 2009, defendant 368 East 148th Street Associates, LLC (368), also a nonparty to this appeal, moved for summary judgment dismissing the complaint and all cross claims against it. By notice dated March 24, 2009, Triboro moved, by cross motion to the 368 motion, for summary judgment dismissing Notias's third-party complaint as against Triboro.[1] Notias defaulted in opposing the cross motion,

[1]Although not raised by the parties, the validity of Triboro's cross motion is questionable because it was untimely pursuant to CPLR 2215, which requires a cross movant to serve papers "[a]t least three days prior to the time at which the motion is noticed to be heard," if not earlier under CPLR 2214 [b]. Triboro's papers, which were dated March 24, were not

and as a result by order entered June 9, 2009, the motion court granted Triboro summary judgment on default and dismissed the third-party complaint.

By notice dated June 10, 2009, Notias moved, among other things, for vacatur of the June 9 order. In an affirmation in support, Notias's then-counsel stated that the default was unintentional and offered the following explanation: in February 2009, counsel received Triboro's "Notice of Cross-Motion," which made the cross motion returnable April 10, 2009. At that time, 368's summary judgment motion was pending; originally the motion was returnable March 25, 2009, but it had been adjourned to April 14, 2009, apparently without Notias's consent. Notias's counsel indicated that he "believed that the [cross motion] had not been accepted by the court" because it was "returnable on Good Friday, and [the "e-law" website] did not indicate that the [cross motion] was pending before the Court . . ." As a result, counsel stated, he "expected to receive an Amended [cross motion] with a new return date, at which time this office intended to oppose the [cross motion]."

By decision and order dated July 13, 2009, Supreme Court denied the motion to vacate on the ground that the papers were

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served by March 22 as required by statute.

procedurally defective, but granted leave to renew on proper papers. Although the Court noted that Notias had been lax, it stated that it would be willing to entertain the motion to vacate because Notias did not intend to default and "such matters as are raised in these applications are better resolved on the merits."

In October 2009, Notias moved by newly-retained counsel for leave to renew its motion for vacatur. In January 2010, the court granted renewal, and upon renewal vacated its dismissal and reinstated Notias's third-party claims "pursuant to the [long]-standing policy of the Courts to favor adjudication of the merits over default dismissals, and pursuant to an adequate showing herein that there are issues of fact to be resolved at trial as to Triboro's possible responsibility for the injuries sustained by plaintiff."

An application to vacate an order of default may be granted if the movant shows that the default was excusable and that the defense to the action is meritorious (*38 Holding Corp. v City of New York*, 179 AD2d 486, 487 [1992]). It is within the court's sound discretion to determine whether the movant's excuse for the default is sufficient (*id.*; *see also Chelli v Kelly Group, P.C.*, 63 AD3d 632, 633 [2009] [court abused its discretion in denying motion to vacate where defendants' failure to appear "was purely the result of inadvertent law office failure" by their

attorneys]; *SS Constantine and Helen's Romanian Orthodox Church of Am. v Z. Zindel, Inc.*, 44 AD3d 744, 745 [2007] [court providently exercised its discretion in determining that excuse was reasonable, where counsel's failure to oppose summary judgment motion was isolated and unintentional with no evidence of willful neglect]). The determination whether a reasonable excuse has been offered is sui generis and should be based on all relevant factors, among which are the length of the delay chargeable to the movant, whether the opposing party has been prejudiced, whether the default was willful, and the strong public policy favoring the resolution of cases on the merits (*Harcztark v Drive Variety, Inc.*, 21 AD3d 876, 876-877 [2005]).

The excuses that Notias's prior counsel gave are sufficient because any law office failure was inadvertent. Further, the short delay caused by the default, the lack of prejudice to Triboro, the public policy concerns, and Notias's retention of new counsel, also militate in favor of vacating the default.

We find that granting permission to resubmit the motion upon proper papers was also a proper exercise of discretion, and that upon granting renewal, the court properly reinstated the third-party claims for common-law indemnification and contribution as against Triboro (*see* CPLR 2221[e]).

Finally, as to the merits of the defense, an issue of fact

exists as to whether any negligence by Triboro contributed to the accident, and whether Notias could itself be found negligent. As a result, the motion court properly denied Triboro's cross motion to dismiss the indemnification and contribution claims (*see Gallagher v Levien & Co.*, 72 AD3d 407, 409 [2010]; *Hanley v McClier Corp.*, 63 AD3d 453, 455 [2009]).

All concur except McGuire, J. who dissents in a memorandum as follows:

McGUIRE, J. (dissenting)

I dissent and would reverse the order granting Notias's motion to renew and, upon renewal, vacating a prior order dismissing Notias's third-party complaint against Triboro and denying Triboro's cross motion for summary judgment dismissing the third-party complaint as against it. I would not reach the question of whether a proper basis for renewal was established as Notias did not in any event establish a reasonable excuse for its default.

As Notias defaulted with respect to Triboro's cross motion (another defendant in the main action had moved for summary judgment dismissing the complaint against it) to dismiss Notias' third-party complaint as against it, Supreme Court granted the cross motion and dismissed the third-party complaint against Triboro. Thereafter, in moving, inter alia, to vacate the default, Notias was required to establish both a reasonable excuse for its default and that it had potentially meritorious claims against Triboro (*JP Morgan Chase Bank, N.A. v Bruno*, 57 AD3d 362 [2008]). Apparently, but understandably, the majority is unwilling to go so far as to say that the proffered excuse is reasonable and instead says only that the "excuses [*sic*] . . . are sufficient because any law office failure was inadvertent." But the inadvertence of a failure to do something is not

sufficient to make the failure reasonable. If law office failure constitutes a reasonable excuse whenever it is inadvertent, virtually all law office failures will pass muster. By setting the bar too low, the majority invites rather than discourages lax practice. Moreover, the majority is wrong for another reason: in opposing Notias's motion to vacate the default, Triboro blew Notias's excuse to smithereens with a factual assertion that Notias made no attempt to deny in its reply submission.

Supreme Court granted Triboro's cross motion by a decision and order dated June 3, 2009, almost two months after the original return date of the motion. The following constitutes the excuse offered by Notias's attorney: "As the 'Cross-Motion' received by this office was returnable on Good Friday, and as E-Law did not indicate that the Motion was pending before the Court, your affirmant believed that the Motion had not been accepted by the Court, and expected an Amended Notice of Cross Motion with a new return date." As this belief is unreasonable, the "excuse" is, too. Good Friday is not, of course, a legal holiday and Notias has never attempted to explain the relevance of this apparent makeweight. The critical facts are that Notias was served with the cross motion and never contacted opposing counsel. Other than check E-Law at some unspecified date, Notias did nothing. It is manifestly irresponsible for an attorney to

do nothing after being served with a motion simply because the motion does not show up on E-Law. At best, this was the kind of "sloppy practice" the Court of Appeals decried in *Brill v City of New York* (2 NY3d 648, 653 [2004]). Of course, trial courts have some discretion in determining whether an excuse is reasonable and their determinations should not be made in a vacuum. Nonetheless, some "excuses" just will not do (*see Okun v Tanners*, 11 NY3d 762 [2008]).

Nor did Supreme Court ever pronounce this excuse a reasonable one. To the contrary, in its July 13, 2009 decision and order Supreme Court had this to say about Notias's excuse: "it remains unclear . . . how Notias could properly wait, uncurious, as eight weeks passed from the initial return date of the cross motion, which Notias should have suspected was being rescheduled. As Triboro points out, no inquiries were made to it by Notias." Like the majority, Supreme Court overlooked the default because of the public policy in favor of resolving disputes on the merits. This public policy does not negate the requirement of a "reasonable excuse." Although it should encourage courts to be forgiving when deciding whether an excuse is reasonable, it does not justify setting the bar so low as to countenance torpor.

In any event, Notias's claimed excuse was blown apart by the

affirmation submitted by Triboro's attorney in opposition to Notias's motion to vacate the default. Counsel averred as follows:

> "Although [Triboro] initially noticed its cross motion for April 10, 2009, it subsequently sent a second notice indicating that the cross motion was returnable on April 14, 2009 . . . . This Court also received that second notice, along with the affidavit indicating that it had been served on Notias' counsel."

Obviously, if Notias received such a second notice, it would have no excuse at all. Although one of Notias' attorneys submitted a reply affirmation, it did not deny Triboro's assertion that it had sent a second notice. Nor did it deny Triboro's assertion that the court had received the second notice and an affidavit of service. Rather, Notias simply ignored these assertions. Under these circumstances, Notias should be deemed to have admitted these factual assertions (*SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [2006]). Although the majority apparently disagrees, it provides nothing by way of an explanation of why Notias should not be deemed to have admitted the assertions. In its brief, Notias asserts that its predecessor counsel "claimed that his office never received Triboro's amended notice of cross motion and consequently never learned of the new return date for the motion." In fact,

however, predecessor counsel never made any such claim.[1]

Although Supreme Court noted Triboro's assertion in its opposition that Notias had been served with a second notice, it concluded that the assertion was "not determinative" because Triboro had not also provided a copy of the affidavit of service of the second notice. I think the opposite conclusion is the only reasonable one. As Notias did nothing to deny an assertion it easily could deny, its failure to do anything should not be excused on the ground that Triboro could have done even more. Moreover, although Notias bore the burden of establishing a reasonable excuse, Supreme Court's reasoning effectively put the burden on Triboro to negate the excuse. In this regard, I note that Supreme Court did not purport to contradict Triboro's assertion that the court had received an affidavit of service of the second notice.

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[1]In a footnote, the majority states that "the validity of Triboro's cross motion is questionable because it was untimely pursuant to CPLR 2215, which requires a cross movant to serve papers '[a]t least three days prior to the time at which the motion is noticed to be heard.'" What is questionable, however, is whether Triboro's motion is a "cross" motion to which CPLR 2215 is applicable. Although denominated as a "cross" motion by Triboro, the motion was made returnable on April 10, 2009, not on March 25th, the day 368 E. 148th Street Associate's motion was noticed to be heard, and it did not request any relief against the original movant, 368 E. 148th Street Associates. As is evident, Notias had ample time to respond. Why the majority raises this issue of form when Notias does not is unclear.

The majority does not dispute that if Notias received the second notice it would have no excuse at all. Nor does it take issue with me on any of the other points I make in the prior paragraph. Unfortunately for the rule of law, the majority ignores all these points.

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

ENTERED: JANUARY 4, 2011

CLERK

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

3604 Pamela Stewart, Index 401269/09
Petitioner,

-against-

Gladys Carrion, etc., et al.,
Respondents.

_____

Legal Services NYC-Bronx, Bronx (Maxine A. Ketcher of counsel), for petitioner.

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

Michael A. Cardozo, Corporation Counsel, New York (Marta Ross of counsel), for municipal respondent.

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Determination of respondent Commissioner of the New York State Office of Children and Family Services, dated January 27, 2009, which, after a fair hearing pursuant to Social Services Law § 422(8)(b), denied petitioner's request to expunge a report of maltreatment maintained in the New York State Central Register of Child Abuse and Maltreatment, unanimously annulled, without costs, the petition in this proceeding brought pursuant to CPLR article 78 (transferred to this Court by order of the Supreme Court, New York County [Marylin G. Diamond, J.], entered October 26, 2009), granted, and the report expunged.

On a petitioner's application for expungement, this Court's review is limited to whether the determination was supported by

substantial evidence in the record (*see Matter of Hattie G. v Monroe County Dept. of Social Servs., Children's Servs. Unit*, 48 AD3d 1292, 1293 [2008]). To establish maltreatment, it was necessary to demonstrate, by a fair preponderance of the evidence, that petitioner "did not exercise a minimum degree of care and that, as a result, the child's physical, mental or emotional condition was impaired or in imminent danger of being impaired" (*Matter of James HH.*, 234 AD2d 783, 783-784 [1996], *lv denied* 89 NY2d 812 [1997]; *see Matter of Hofbauer*, 47 NY2d 648, 655 [1979]; *Matter of Alexander D.*, 45 AD3d 264 [2007]).

Respondent's finding that petitioner maltreated a two-year-old foster child is unsupported by any evidence of record that petitioner failed to exercise a minimal degree of care or that any failure impaired or was in imminent danger of impairing the foster child's physical condition.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Andrias, Sweeny, DeGrasse, Román, JJ.

3821-
3822 &
[M-4807] In re John Whitfield, Index 110706/08
Petitioner-Appellant,

-against-

Patricia J. Bailey, etc.,
Respondent-Respondent.

_____

John Whitfield, appellant pro se.

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

_____

Order, Supreme Court, New York County (Joan A. Madden, J.), entered on or about September 15, 2009, which, upon reargument, granted the petition to compel respondent to disclose certain documents pursuant to the Freedom of Information Law (FOIL) to the extent of directing that respondent submit the available documents to the court for in camera inspection, and order, same court and Justice, entered on or about November 25, 2009, which, after an in camera review, directed respondent to provide those documents to petitioner in redacted form, unanimously affirmed, without costs.

In May 2008, petitioner, an inmate serving a 25 year to life sentence for second-degree murder (committed in 1988), made a FOIL request seeking the entire file related to Richard Doyle's

1989 arrest for petit larceny. Doyle, who was serving a 25 year sentence for manslaughter (committed in 1998), testified against petitioner at the trial that resulted in petitioner's murder conviction. After an in camera review of five documents related to Doyle's petit larceny conviction, the court directed that respondent redact the names, addresses and dates of birth of the civil witness and Doyle's co-defendant, and Doyle's address and date of birth, "to protect these individuals' privacy and safety."

Petitioner's contention that the court erred in conducting an in camera hearing is unpreserved because he did not alert the court to his objection to the procedure. In any event, it is without merit, as is petitioner's contention that there was no basis to deny his FOIL request because Doyle pleaded guilty in open court and therefore the records connected to his subsequent incarceration are "public property."

Pursuant to FOIL, government records are presumptively available to the public unless they are statutorily exempted by Public Officers Law § 87(2) (*Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]). When a document subject to FOIL falls within an exemption, the agency "may be required to prepare a redacted version with the exempt material removed" (*Matter of Data Tree, LLC v Romaine,* 9 NY3d 454, 464 [2007];

Matter of Scott, Sardano & Pomeranz v Records Access Officer of City of Syracuse, 65 NY2d 294, 298 [1985]).

Pursuant to Public Officers Law § 87(2), an "agency may deny access to records or portions thereof that ... if disclosed, would constitute an unwarranted invasion of personal privacy" (subd [2][b]) or "endanger the life or safety of any person" (subd [2][f]). While these exemptions are to be narrowly interpreted to effectuate the purpose of FOIL (*Matter of Washington Post Co. v New York State Ins. Dept.*, 61 NY2d 557, 564 [1984]), respondent articulated a basis to deny disclosure and the court applied the correct procedure when it ordered an in camera inspection of the requested documents to determine which material could be appropriately disclosed (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996]; *Matter of Bellamy v New York City Police Dept.*, 59 AD3d 353 [2009]).

After conducting the in camera review, the court correctly ordered that certain pedigree information be redacted from the documents. Although respondent's assertions may have been insufficient to warrant the blanket denial of access to the requested records, there is a sufficient showing in the record that disclosure of the redacted personal information to petitioner, who has a history of violence, would pose the risk of

harm covered by the claimed exemptions (*see Matter of Scott*, 65 NY2d at 298; *Matter of Edwards v New York State Police*, 44 AD3d 1216 [2007]; *Matter of Boddie v Goord*, 251 AD2d 799 [1998]), *lv denied* 92 NY2d 810 [1998]).

M-4807 - *In re Whitfield v Bailey*

Motion seeking poor person relief granted.

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

ENTERED: JANUARY 4, 2011

CLERK

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

3830 Amy Legow Cohn, Index 5618/05
Plaintiff-Respondent-Appellant,

-against-

Charles D.F. Cohn,
Defendant-Appellant-Respondent.

_____

Blank Rome LLP, New York (Caroline Krauss-Browne of counsel), for appellant-respondent.

Law Offices of George P. Leshanski, New York (George P. Leshanski of counsel), for respondent-appellant.

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Judgment, Supreme Court, Bronx County (Ellen Gesmer, J.), entered June 4, 2009, after trial, inter alia, granting plaintiff a divorce by reason of abandonment by defendant, unanimously modified, on the law and the facts and in the exercise of discretion, to the extent of striking the 6th decretal paragraph granting defendant a credit for interest charged in the amount of $40,000, and the 9th decretal paragraph granting plaintiff a credit of $128,212.18 for payments associated with defendant's prior divorce, adjusting the 3rd, 7th, 16th and 17th decretal paragraphs to reflect such changes, removing the 12th decretal paragraph relating to defendant's future residual income and replacing it with "ORDERED AND ADJUDGED that the Defendant's future residual income is found to be marital property and the Plaintiff is awarded the sum of $7,500 representing half the

stipulated value of the future income; and it is further," and remanding this matter for consideration of the tax consequences to both parties of the equitable distribution of retirement assets and for such other proceedings as are necessary to determine the amount of the credit to defendant for interest charged, and otherwise affirmed, without costs.

Plaintiff is not entitled to a credit for monies paid by defendant during the marriage to satisfy spousal maintenance, child support and other legal obligations to his previous wife and their son (*see Mahoney-Buntzman v Buntzman*, 12 NY3d 415 [2009]). Nor is she entitled to recoup spousal maintenance from a previous marriage that was lost by virtue of her marriage to defendant.

The trial court, having considered the tax consequences to plaintiff in distributing the marital share of her pension funds to defendant, should, in fairness, have given such consideration to the distribution of defendant's retirement assets (*see Caffrey v Caffrey*, 2 AD3d 309 [2003]).

The trial court correctly noted that the precise amount of the interest attributable to the debt incurred for the acquisition and renovation of the marital home could not be determined; that defendant had obtained a tax benefit by deducting the interest payments from his investment income; and

that plaintiff had overpaid her 50% share of the interest during a certain period of some 2½ years. For these reasons, the trial court correctly found that it could not determine the actual net cost to defendant of paying the interest on the debt. Nonetheless, and without explaining how it determined the amount of the credit, the trial court awarded defendant a credit of $40,000 against the equitable distribution award. Although the award should be vacated, we think it appropriate, particularly because some credit to defendant concededly is warranted, to remand for such further proceedings as are necessary to address the matters noted by the trial court and to determine the amount of the credit.

There is no basis in the record for disturbing the parties' valuation of defendant's future residual income. Accordingly, the court's equitable distribution of that income should not have been contingent on any factors.

Plaintiff has not established his entitlement to counsel

fees pursuant to Domestic Relations Law § 237 (*see Silverman v Silverman*, 304 AD2d 41 [2003]).

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3967 The People of the State of New York, Ind. 4415/07
Respondent,

-against-

Dave Shepard,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Ellen Stanfield Friedman of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Michael R. Ambrecht, J., at initial informant disclosure application; Bruce Allen, J. at further application, jury trial and sentence), rendered October 31, 2008, convicting defendant of criminal sale of a controlled substance in the fourth degree, and sentencing him to a conditional discharge, unanimously affirmed.

The verdict 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 jury's credibility determinations. The police executed a no-knock search warrant at an apartment where defendant resided. As the police came through the door, the codefendant threw an opaque bag, later found to contain drugs, to defendant. Defendant immediately threw the bag out of a window. This evidence

permitted the jury to reasonably infer that defendant knew the contents of the bag (*see generally People v Reisman*, 29 NY2d 278, 285-286 [1971], *cert denied* 405 US 1041 [1972]; *see also People v Alexander*, 37 NY2d 202, 204 [1975] [discarding of evidence upon approach of police evinces consciousness of guilt]). The jury's mixed verdict does not warrant a different conclusion (*see People v Rayam*, 94 NY2d 557 [2000]).

The motion and trial courts properly denied defendant's requests for disclosure of the identity of a confidential informant (*see People v Goggins*, 34 NY2d 163 [1974], *cert denied* 419 US 1012 [1974]). Defendant sought to elicit from the informant that the codefendant, acting alone, made a series of drug sales to the informant at the apartment, resulting in the search warrant. To the extent that defendant is arguing that his nonparticipation in the sales tended to show that the drugs in the bag he threw out the window belonged to the codefendant, that argument is unavailing. The issue was not which defendant "owned" the drugs, but whether defendant knowingly possessed the drugs at the time he discarded them. Furthermore, defendant's lack of involvement in these sales had little or no probative value regarding his knowledge of the contents of the bag, and did not require disclosure of the informant's identity (*see People v Rice*, 30 AD3d 172, 174 [2006], *lv denied* 7 NY3d 817 [2006]). To

the extent that defendant was attempting to establish that his lack of participation in the prior sales showed his lack of predisposition to commit the instant crime (*see People v Lawson*, 71 NY2d 950, 952 [1988]), it is equally impermissible. "Just as evidence of prior criminal conduct cannot be admitted as evidence-in-chief to establish a predisposition to commit the crime charged, evidence tending to establish that a defendant did not commit uncharged crimes is, because of its irrelevancy, similarly inadmissible as evidence-in-chief to establish that the defendant did not commit the charged crime" (*People v Johnson*, 47 NY2d 785, 786 [1979][citations omitted]). The trial court properly precluded defendant from eliciting what the informant told an officer regarding the uncharged sales, since that testimony would have been both hearsay and irrelevant. In any event, defendant was not prejudiced by any of the rulings at issue, because the police testimony made it clear to the jury that the codefendant was the sole target of the investigation and search warrant. Accordingly, we find that none of these rulings

violated defendant's right to confront witnesses and present a defense.

We have considered and rejected defendant's remaining claims.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3968-
3968A Eric Elmore, Jr., etc., et al., Index 8580/04
Plaintiffs-Appellants,

-against-

2720 Concourse Associates, L.P., et al,
Defendants-Respondents.

_____

Wingate, Russotti & Shapiro, LLP, New York (Philip Russotti of counsel), for appellants.

Kopff, Nardelli & Dopf LLP, New York (Martin B. Adams of counsel), for respondents.

_____

Order, Supreme Court, Bronx County (Stanley Green, J.), entered May 28, 2010, which granted infant plaintiff's motion to appoint a guardian ad litem to the extent of determining that one shall be appointed if infant plaintiff is not produced for specified scheduled medical examinations and an examination before trial, and granted infant plaintiff's motion for a stay preventing his mother from retaining a new attorney to the extent of requiring the mother to make an application to the court prior to retaining a new attorney, unanimously modified, on the facts, to the extent of providing for the immediate appointment of a guardian ad litem for infant plaintiff, and otherwise affirmed, without costs. Order, same court and Justice, entered May 28, 2010, granting defendants' motion to compel to the extent that if

infant plaintiff does not appear at specified scheduled medical examinations and supplemental deposition, plaintiffs will be precluded from offering any evidence on the issue of damages, unanimously modified, on the facts, to delete that portion of the order imposing the sanction of preclusion for failure to comply, and otherwise affirmed, without costs.

"The statutory preference is for a parent to represent the child" (*Mazzuca v Warren P. Wielt Trust*, 59 AD3d 907, 908 [2009]; *see* CPLR 1201; *Sutherland v City of New York*, 107 AD2d 568 [1985], *affd* 66 NY2d 800 [1985]). However, CPLR 1201 confers broad authority upon the court to substitute a guardian ad litem for a parent representative when the court believes it necessary to protect the infant's interests (*see Mazzuca* at 908-909).

In this case, infant plaintiff's mother repeatedly failed to comply with discovery orders and to produce the infant for examinations and depositions. This was conduct that was clearly detrimental to infant plaintiff's interests. She also repeatedly hired and fired counsel, and prevented the case from progressing. This conduct risked the imposition of substantial sanctions, as demonstrated by the conditional preclusion order entered by the court, and even potential dismissal of the action. Under the circumstances presented, the court should have immediately appointed a guardian ad litem.

In the context of the mother's actions, it was an improvident exercise of discretion to conditionally impose the severe sanction of precluding plaintiffs from offering evidence on damages in the event that infant plaintiff was not produced for the scheduled medical examinations and supplemental deposition. In view of the court's recognition that the mother had not proceeded in her son's interests, the child should not be penalized for conduct not within his control (*see generally Mazzuca*, 59 AD3d at 908).

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3969 In re Erica D.,

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

Maria D.,
Respondent-Appellant,

New Alternatives For Children, Inc.,
Petitioner-Respondent.

_____

George E. Reed, Jr., White Plains, for appellant.

Law Offices of James M. Abramson, PLLC, New York (James M. Abramson of counsel), for respondent.

Tamara A. Steckler, The Legal Aid Society, New York (Amy Hausknecht of counsel), attorney for the child.

_____

Order of disposition, Family Court, Bronx County (Sidney Gribetz, J.), entered or on about January 5, 2010, which, upon a finding of mental retardation, terminated the respondent mother's parental rights to the child, and committed custody and guardianship of the subject child jointly to petitioner and the Administration for Children's Services, unanimously affirmed, without costs.

Clear and convincing evidence demonstrates that respondent is presently and for the foreseeable future unable, by reason of mental retardation, to provide proper and adequate care for the subject child, who was diagnosed with Down's Syndrome. Testing

by a senior psychologist employed by the Family Court, indicated that respondent's full scale IQ was 48, which the expert characterized as "extremely low." The director of the Family Court Mental Health Services opined, after interviewing respondent and reviewing her records, that she was of "subaverage intellectual functioning with impairment in adaptive behavior." He stated that if the child were returned to her care, the child would be in danger of becoming a neglected child, now and for the foreseeable future. This evidence was sufficient to satisfy the statutory standard (*see* Social Services Law § 384-b [4][c]; *Matter of Joyce T.*, 65 NY2d 39, 50 [1985]).

The mother contends that her due process rights were violated by limitations the court placed on the testimony of lay witnesses concerning her ability to care for her other child and on broad based generalized anecdotal evidence. However, this claim is raised for the first time on appeal, and is unpreserved (*see Matter of Kimberly Carolyn J.*, 37 AD3d 174, 175 [2007], *lv dismissed* 8 NY3d 968 [2007]).

On the merits, the court properly excluded irrelevant testimony and evidence.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3970 The People of the State of New York, Ind. 1193/08
Respondent,

-against-

Keyshawn Johnson,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Mary C. Farrington 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 (Edward J. McLaughlin, J.), rendered on or about October 14, 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: JANUARY 4, 2011

CLERK

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

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3971-
3972 Angelo Diaz, Index 116703/03
Plaintiff-Respondent-Appellant,

-against-

The City of New York,
Defendant-Appellant-Respondent.

_____

Michael A. Cardozo, Corporation Counsel, New York (Norman Corenthal of counsel), for appellant-respondent.

Peña & Kahn, PLLC, Bronx (Diane Welch Bando of counsel), for respondent-appellant.

_____

Judgment, Supreme Court, New York County (Kibbie F. Payne, J.), entered September 4, 2009, upon a jury verdict in favor of plaintiff, awarding him $800,000 for six years of past pain and suffering, $150,000 for future pain and suffering over 31 years, $350,000 for future medical expenses over 31 years, and $1.7 million for future lost earnings over 19 years, unanimously modified, on the facts, the award vacated, and the matter remanded for a new trial solely on the issue of damages, and otherwise affirmed, without costs, unless the parties stipulate, within 20 days of service of a copy of this order with notice of entry, to reduce the award for future lost earnings from $1.7 million to $1,012,358, to reduce the award for future medical expenses from $350,000 to $260,075, and to increase the award for

future pain and suffering from $150,000 to $600,000, and to entry of an amended judgment in accordance therewith. Appeal from order, same court and Justice, entered May 7, 2009, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

The jury found that defendant was negligent in that the worksite was in an unsafe condition. The jury's conclusion that the unsafe condition caused plaintiff's injury was not against the weight of the evidence (*see McDermott v Coffee Beanery, Ltd.*, 9 AD3d 195, 206 [2004]). The evidence adduced at trial established that plaintiff slipped on oil or grease while descending from a collection truck, as a result of which he suffered injuries including a torn meniscus. It is uncontroverted that plaintiff underwent four separate arthroscopic surgeries. At the time of trial he was disabled, and is highly likely to require knee replacement during his lifetime. Furthermore, he will ultimately require revision surgery on that knee replacement.

The awards for future lost earnings and future medical expenses were not supported by the record and materially deviated

from reasonable compensation to the extent indicated (*see Wilson v City of New York*, 65 AD3d 906, 907, 909 [2009]; *Brewster v Prince Apts.*, 264 AD2d 611, 617 [1999], *lv denied* 94 NY2d 762 [2000]). The awards for past and future pain and suffering likewise materially deviated from what would be reasonable compensation, to the extent indicated (CPLR 5501[c]; *see Kelly v City of New York*, 6 AD3d 188 [2004]; *Calzado v New York City Tr. Auth.*, 304 AD2d 385 [2003]).

We have considered the parties' remaining contentions and find them without merit.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3973 Andrew Mark, etc., Index 601949/02
Plaintiff-Appellant,

-against-

H.F. Lenfest, et al.,
Defendants-Respondents.

_____

Eric W. Berry, New York, for appellant.

Kramer Levin Naftalis & Frankel LLP, New York (Gary P. Naftalis of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered August 14, 2009, which, insofar appealed from as limited by the briefs, denied plaintiff's motion pursuant to CPLR 5015(a)(3) to vacate an order, same court (Ira Gammerman, J.), entered February 28, 2003, granting defendants' motion to dismiss the complaint, unanimously affirmed, with costs.

A CPLR 5015(a)(3) motion must be brought within a reasonable time (*see e.g. Sieger v Sieger*, 51 AD3d 1004, 1006 [2008], *appeal dismissed* 14 NY3d 750 [2010]). Because there is a "policy favoring the finality of judgments" (*Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d 451, 453 [1987]), we reject plaintiff's argument that the statute of limitations for a de novo fraud action (*see* CPLR 213[8]) should be imported into CPLR 5015(a)(3).

The record reflects that plaintiff knew about defendants'

alleged fraud no later than November 20, 2003. On February 24, 2005, he brought a separate action claiming that defendants in this action had committed fraud on the court (the *Comcast* action). However, he did not bring this CPLR 5015(a)(3) motion until October 2007, almost four years after he allegedly discovered the fraud, and more than 4½ years after the February 2003 dismissal. This is clearly not a reasonable time (*see Green Point Sav. Bank v Arnold*, 260 AD2d 543 [1999]; *City of Albany Indus. Dev. Agency v Garg*, 250 AD2d 991, 993 [1998]).

It was not an improvident exercise of the motion court's discretion (*see Greenwich Sav. Bank v JAJ Carpet Mart*, 126 AD2d at 452) to deem plaintiff's 14-month delay in bringing the *Comcast* action unreasonable, especially since there is no evidence explaining why it took him 14 months to obtain advice from new counsel (*see City of Albany Indus. Dev. Agency v Garg*, 250 AD2d at 993 [party's failure to provide excuse for delay constitutes additional grounds for finding that a CPLR 5015(a)(3) motion was not made within a reasonable time]).

Finally, we note that this is plaintiff's fourth attempt at litigating essentially the same dispute that was resolved unfavorably to him over seven years ago. The record is replete with plaintiff's contradictory positions asserted in a series of filings over the years. On the third such action, Supreme Court

sanctioned both plaintiff and his counsel. The sanctions for "frivolous conduct" were affirmed in 2009 by this Court. The instant appeal is no less frivolous.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3974 The People of the State of New York, Ind. 4608/06
Respondent,

-against-

Carl Orridge,
Defendant-Appellant.

_____

Stanley Neustadter, New York (Mark M. Baker of counsel) for appellant.

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

_____

Judgment, Supreme Court, New York County (Thomas Farber, J.), rendered November 15, 2007, as amended December 6, 2007, convicting defendant, after a jury trial, of murder in the second degree, attempted murder in the second degree, assault in the first degree and criminal possession of a weapon in the second and third degrees, and sentencing him to an aggregate term of 40 years to life, unanimously affirmed.

The verdict was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342, 348-349 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. There was extensive evidence,

provided by multiple witnesses, to establish defendant's identity as the assailant.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3975-
3975A Rezu Enterprises, Inc., Index 650156/09
doing business as Coffee Beanery,
et al.,
Plaintiffs-Appellants,

-against-

Altaf Isanim, et al.,
Defendants-Respondents.

_____

John C. Klotz, New York, for appellants.

Agins, Siegel, Reiner & Bouklas, LLP, New York (Richard H. Del Valle of counsel), for respondents.

_____

Order, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered July 14, 2010, which, inter alia, granted defendants' motion for summary judgment to the extent of dismissing the first cause action for payment of a negotiable instrument and the third cause of action for fraud, denied plaintiffs' cross motion for partial summary judgment on the first cause of action and dismissed plaintiffs' punitive damages claims, unanimously affirmed, without costs. Order, same court and J.H.O., entered November 10, 2010, which, inter alia, granted defendants' motion for summary judgment dismissing the second cause of action for breach of contract, unanimously affirmed, without costs.

Plaintiffs contend that there are issues of fact concerning

the parties' intent surrounding the delivery of the subject check. These issues are not material to the determination of defendants' summary judgment motion. The record reveals that closing never took place prior to the check being dishonored, and defendants' failure to honor the check was simply part of the breach of contract. Thus, plaintiffs were not entitled to payment on the check.

The fraud cause of action was properly dismissed because plaintiffs failed to establish that the alleged fraud was independent of the breach of contract (*see MBW Adv. Network v Century Bus. Credit Corp.*, 173 AD2d 306 [1991]). Nor did plaintiff allege that defendants violated a legal duty separate from that owed under the contract (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]).

Recovery on plaintiffs' breach of contract claim is limited by the clear, unambiguous liquidated damages clause (*see Cellular Tel. Co. v 210 E. 86th Corp.*, 44 AD3d 77, 83 [2007]). Since plaintiff is already in possession of the sum set forth in that clause, the claim was properly dismissed.

The dismissal of plaintiffs' claims for punitive damages was proper. The conduct of defendants as alleged by plaintiffs did not evince a "criminal indifference to civil obligations," which was "directed at the general public" (*Samovar of Russia Jewelry*

Antique Corp. v Generali, Gen. Ins. Co. of Trieste & Venice, 102 AD2d 279, 282 [1984]).

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: JANUARY 4, 2011

CLERK

Sweeny, J.P., Catterson, Renwick, DeGrasse, JJ.

3976 Hoffinger Stern & Ross, LLP, Index 113111/09
Plaintiff-Respondent,

-against-

Philip Neuman, et al.,
Defendants-Appellants.

_____

Bolatti & Griffith, New York (Edward Griffith of counsel), for appellants.

Hoffinger Stern & Ross, LLP, New York (Philip S. Ross of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Louis B. York, J.), entered May 11, 2010, awarding plaintiff the total sum of $832,482.74 as against Phillip Neuman, and bringing up for review an order, same court and Justice, entered May 6, 2010, which, inter alia, granted plaintiff's motion for summary judgment on its cause of action for an account stated as against Neuman and for summary judgment dismissing defendants' affirmative defenses, unanimously reversed, on the law, without costs, the judgment vacated, plaintiff's motion denied, and defendants' application for leave to replead their affirmative defenses granted.

Summary judgment was improperly granted on plaintiff's account stated cause of action. Plaintiff alleges that defendants retained and did not object to a billing statement that was issued only one day before plaintiff brought a prior

action on the claims asserted in this action. According to the instant complaint, that was the only statement defendants allegedly retained without objection. The prior action was dismissed on defendants' cross motion for summary judgment. In making their cross motion, defendants challenged, among other things, the amount allegedly due for plaintiff's services. Given this history, there is, to say the least, a triable factual issue as to whether defendants held the statement without objection (*see e.g. Cohen Tauber Spievak & Wagner LLP v Alnwick*, 33 AD3d 562, 562-563 [2006], *lv dismissed* 8 NY3d 840 [2007]).

Plaintiff did not establish that it would be prejudiced by defendants' repleading their affirmative defenses with specificity (*see* CPLR 3025[b]; *Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3977-
3978 JPMorgan Chase Bank, N.A., Index 117237/04
Plaintiff-Respondent-Appellant,

-against-

Rocar Realty Northeast, Inc.,
Defendant-Respondent,

Jefferson Valley Mall Limited Partnership,
Defendant-Appellant-Respondent.

_____

Axelrod, Fingerhut & Dennis, New York (Osman Dennis of counsel), for appellant-respondent.

Rosenberg & Estis, P.C., New York (Norman Flitt of counsel), for respondent-appellant.

Davidoff Malito & Hutcher LLP, New York (Patrick J. Kilduff of counsel), for respondent.

_____

Judgment, Supreme Court, New York County (Joan A. Madden, J.), entered November 16, 2009, in a commercial landlord-tenant dispute, awarding plaintiff JPMorgan Chase Bank damages against defendant Jefferson Valley Mall Limited Partnership (Jefferson) in the principal amount of $30,166.66 and dismissing Jefferson's cross claim against defendant Rocar Realty Northeast, Inc., pursuant to an order, same court and Justice, entered October 6, 2009, which granted Chase's motion for summary judgment against

Jefferson and denied Jefferson's cross motion for summary judgment on its cross claim against Rocar, unanimously affirmed, with costs.

The motion court properly determined that, based upon this Court's resolution of issues in the prior appeal (47 AD3d 425 [2008] *lv dismissed* 11 NY3d 761 [2008]), Chase, the subtenant of the premises, was entitled to recover the subject rent payments it made to Jefferson, the paramount landlord, which "were made in good faith and under compulsion" (*id.* at 427). The motion court properly determined that it would be inequitable to hold Chase liable to Jefferson for the two months of rent Chase paid to Rocar (*see* CPLR 3017[a]; *State of New York v Barone*, 74 NY2d 332, 336 [1989]), which Rocar, in turn, paid to Jefferson.

Summary judgment was also properly granted to Rocar upon a search of the record (CPLR 3212[b]), as Jefferson, having negotiated Rocar's rent checks, failed to submit any evidence showing that Rocar had accepted Jefferson's refund checks.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3979 The People of the State of New York, Ind. 2422/08
Respondent,

-against-

Leonardo Mas,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Matthew C. Williams 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 (Rena Uviller, J.), rendered on or about March 4, 2009,

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

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

ENTERED: JANUARY 4, 2011

CLERK

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

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3980 Boulevard Housing Corp., Index 570472/07
Petitioner-Respondent-Appellant,

-against-

Lauren Bisk,
Respondent-Appellant-Respondent.

_____

Meister Seelig & Fein LLP, New York (Howard S. Koh of counsel), for appellant-respondent.

Moses & Singer LLP, New York (Joel David Sharrow of counsel), for respondent-appellant.

_____

Order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered on or about December 19, 2008, which reversed a final judgment of Civil Court, New York County (David B. Cohen, J.), entered on or about April 23, 2007, granting respondent tenant's motion to dismiss the petition for possession and rent arrears and awarding her partial attorney's fees, and directed entry of judgment in petitioner landlord's favor, unanimously reversed, on the law, with costs, and the proceeding remanded for a new trial.

The Appellate Term erred in directing judgment in favor of the landlord because the Civil Court had directed judgment for the tenant at the close of the landlord's case but before the tenant put forward her affirmative proof. By reversing and directing a verdict for the landlord, the Appellate Term deprived

the tenant of an opportunity to put forward any proof (*see* CPLR 4401; *Vera v Knolls Ambulance Serv.*, 160 AD2d 494, 496 [1990]).

The landlord's continued demand for payment of past amounts due that had been settled as of November 30, 2005, created an issue of fact as to whether the tenant was entitled to apply the money paid toward that settlement to her rent from that date forward (*see Computer Possibilities Unlimited v Mobil Oil Corp.*, 301 AD2d 70, 80 [2003], *lv denied* 100 NY2d 504 [2003]).

As petitioner is no longer a prevailing party, it is not entitled to attorney's fees.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3981-
3981A CPA Mutual Insurance Company Of America Risk Retention Group, Plaintiff-Respondent, Index 603967/06

-against-

Weiss & Company, et al., Defendants-Appellants.

_____

Orans, Elsen, Lupert & Brown LLP, New York (Leslie A. Lupert of counsel), for appellants.

Traub Lieberman Straus & Shrewsberry LLP, Hawthorne (Stephen D. Straus of counsel), for respondent.

_____

Order and judgment (one paper), Supreme Court, New York County (Marylin G. Diamond, J.), entered August 25, 2009, granting plaintiff summary judgment and declaring that plaintiff does not have an obligation to defend or indemnify defendants against a professional liability claim asserted in federal court, unanimously affirmed, with costs. Order, same court and Justice, entered April 9, 2010, which, insofar as appealable, denied defendants' motion to renew, unanimously affirmed, with costs.

The court correctly found that the unambiguous prior knowledge exclusion, which entitled plaintiff to disclaim its obligation to defend or indemnify defendants for "any Interrelated Acts or Omissions" which, before the effective date of the policy, defendants "believed or had a basis to believe

might result in a "Claim," applied here. The evidentiary record establishes that defendants, prior to the policy's effective date, had subjective knowledge of numerous facts pertaining to a fraudulent scheme undertaken by their clients, which involved or implicated defendants as well. Given this evidence, it was unreasonable for defendants to have failed to foresee that these facts might form the basis of a claim against them (*see Executive Risk Indem. Inc. v Pepper Hamilton LLP*, 13 NY3d 313, 322-323 [2009]; *see also Quanta Lines Ins. Co. v Investors Capital Corp.*, 2009 US Dist LEXIS 117689 [SD NY 2009], *affd* 2010 US App LEXIS 23594 [2010]; *Westport Ins. Corp. v Goldberger & Dubin, P.C.*, 255 Fed Appx 593, 594-595 [2d Cir 2007]).

The court properly denied defendants' motion to renew. Defendants' subjective belief they were not facing a claim in connection with the fraud committed by their clients, even if set forth in the affidavit of defendant Weiss, would not have warranted a different result. The record shows that such a belief would not have been reasonable under the circumstances. Moreover, defendants' speculation as to what their prior attorneys "apparently believed" did not excuse their failure to submit Weiss's affidavit when the original motion was heard. "Renewal is granted sparingly . . .; it is not a second chance freely given to parties who have not exercised due diligence in

making their first factual presentation" (*Matter of Beiny*, 132 AD2d 190, 210 [1987], *lv dismissed* 71 NY2d 994 [1988]).

In light of the foregoing, we need not reach plaintiff's alternative grounds for disclaimer of coverage.

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3982-
3983 The People of the State of New York, Ind. 6176/07
Respondent,

-against-

Jose Diaz,
Defendant-Appellant.

_____

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

Cyrus R. Vance, Jr., District Attorney, New York (Sheila L. Bautista of counsel), for respondent.

_____

Order, Supreme Court, New York County (Carol Berkman, J.), entered March 19, 2008, which adjudicated defendant a level two sex offender pursuant to the Sex Offender Registration Act (Correction Law art 6-C), unanimously affirmed, without costs.

The court properly assessed points under the risk factor for drug abuse, based on defendant's statements contained in his presentence report. In any event, even without that assessment, defendant would remain a level two offender, and we find no basis

for a discretionary downward departure (*see People v Mingo*, 12 NY3d 563, 568 n 2 [2009]; *People v Johnson*, 11 NY3d 416, 421 [2008]).

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

ENTERED: JANUARY 4, 2011

CLERK

Mazzarelli, J.P., Sweeny, Catterson, Renwick, DeGrasse, JJ.

3986N-
3987N Angelica Lopez, et al., Index 104601/02
Plaintiffs-Appellants,

-against-

The City of New York,
Defendant-Respondent,

Consolidated Edison Company of New York,
Defendant.

_____

Annette G. Hasapidis, South Salem, for appellants.

Michael A. Cardozo, Corporation Counsel, New York (Cheryl Payer of counsel), for respondent.

_____

Order, Supreme Court, New York County (Karen S. Smith, J.), entered May 7, 2010, which denied plaintiffs' motion for leave to amend their bill of particulars except as to the worsening of the injury to the L5/S1 disc, and order, same court and Justice, entered on or about July 1, 2010, which, to the extent appealed from as limited by the briefs, denied plaintiffs' motion to correct certain facts set forth in the May 7, 2010 order, unanimously affirmed, without costs.

Plaintiffs' motion to amend their bill of particulars was brought nearly six years after the note of issue was filed and eight years after the action was commenced, and thus was

unreasonably late (*see e.g. Keene v Columbia-Presbyterian Med. Ctr.*, 214 AD2d 430 [1995]). Further, the motion was made only one month before trial (*see e.g. Kassis v Teachers Ins. & Annuity Assn.*, 258 AD2d 271, 272 [1999]). Plaintiffs' excuse for the delay, that the injured plaintiff's treating neurosurgeon only connected the hydrocephalus to the accident in 2010 after reviewing certain recent records, was also unreasonable, since the neurosurgeon was aware of the car accident and the existence of hydrocephalus by 2007 at the latest (*see Oil Heat Inst. of Long Is. Ins. Trust v RMTS Assoc.*, 4 AD3d 290, 293 [2004]). Because of the change in counsel, plaintiffs' current counsel was granted an extension of time to update discovery and to find an expert for trial. However, as the motion court stated, this leeway was not meant to permit plaintiffs to "recast" the case.

The proposed amendments would severely prejudice defendants (*see Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [2007]). Plaintiffs' theory of the case has changed so drastically that defendants would not be prepared to present a defense at trial. Specifically, neither the original bill of particulars nor the first amended bill of particulars mentioned hydrocephalus or the exacerbation thereof. In addition, plaintiffs' expert notice had disclosed that their theory of the case was that the injured plaintiff's cognitive deficits were

attributable to the accident and were not related to his subsequent hydrocephalus.

Finally, the proposed amendments lack merit because they are speculative. The treating neurosurgeon was uncertain whether the inflammatory process he described could have preceded the car accident. In addition, no expert affidavits were provided to establish the merit of the proposed amendments as to the knee and back injuries or to show that the amendments were merely "amplifications" of the previously pleaded injuries (*see e.g. Kyong Hi Wohn v County of Suffolk*, 237 AD2d 412 [1997]).

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

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3988 The People of the State of New York, Ind. 10590C/05
Respondent,

-against-

Gerard Jenkins,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Karen Swiger of counsel), for respondent.

_____

Judgment, Supreme Court, Bronx County (Peter J. Benitez, J.), rendered September 25, 2008, convicting defendant, after a jury trial, of manslaughter in the first degree, and sentencing him to a term of 20 years, unanimously affirmed.

The verdict was based on legally sufficient evidence and was not against the weight of the evidence (*see People v Danielson*, 9 NY3d 342 [2007]). There is no basis for disturbing the jury's determinations concerning credibility and identification. We note that the testimony of the People's identifying witness was corroborated by persuasive circumstantial evidence.

We perceive no basis for reducing the sentence.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3989 Cesar Rodriguez, Index 7247/06
Plaintiff-Appellant,

-against-

3251 Third Avenue LLC,
Defendant-Respondent,

Computers & Technology Center, et al.,
Defendants.

_____

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

Herzfeld & Rubin, PC, New York (Linda M. Brown of counsel), for respondent.

_____

Order, Supreme Court, Bronx County (Cynthia S. Kern, J.), entered on or about December 28, 2009, which denied plaintiff's motion for summary judgment on the issue of liability under Labor Law § 240(1), unanimously reversed, on the law, without costs, and the motion granted.

Plaintiff testified that he fell off an unsecured ladder while preparing to paint office space in a building owned by defendant 3251 Third Avenue LLC. No issue of fact as to plaintiff's version of events or his credibility is raised by the absence of corroboration of his testimony or by anything in the record, whether in the testimony itself or in evidence presented

by defendant (*see Perrone v Tishman Speyer Props., L.P.*, 13 AD3d 146 [2004]; *Wise v 141 McDonald Ave.*, 297 AD2d 515, 517 [2002]; *Gontarzewski v City of New York*, 257 AD2d 394 [1999]; *Robinson v NAB Constr. Corp.*, 210 AD2d 86 [1994]; *Urrea v Sedgwick Ave. Assoc.*, 191 AD2d 319 [1993]).

In an attempt to raise an issue of fact whether plaintiff was an employee entitled to the protections of the Labor Law, defendant submitted an unsworn statement by plaintiff's employer that he did not know plaintiff and that plaintiff did not work for him. This statement is hearsay, unaccompanied by any other evidence tending to show that plaintiff's presence on the work site was not authorized, and is therefore insufficient to demonstrate the existence of a question of fact (*see Matter of New York City Asbestos Litig.*, 7 AD3d 285 [2004]).

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3990 The People of the State of New York, SCI 682/09
Respondent,

-against-

William Scott,
Defendant-Appellant.

_____

Steven Banks, The Legal Aid Society, New York (Joanne Legano Ross of counsel), for appellant.

Cyrus R. Vance, Jr., District Attorney, New York (Mary C. Farrington 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 (Patricia Nunez, J.), rendered on or about June 5, 2009,

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

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

ENTERED: JANUARY 4, 2011

CLERK

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

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3991 In re Willis Avenue Bridge Replacement Index 650/07

– – – – – –

Waste Management of New York, LLC, et. al.,
Claimants-Respondents,

-against-

The City of New York,
Condemnor-Appellant.

_____

Michael A. Cardozo, Corporation Counsel, New York (Fred Kolikoff of counsel), for appellant.

Harris Beach PLLC, Pittsford (Philip G. Spellane of counsel), for Waste Management of New York, LLC, and USA Waste Services of NYC, Inc., respondents.

Goldstein, Rikon, & Rikon, P.C., New York (Philip A. Sanchez of counsel), for Harlem River Yard Ventures, Inc., respondent.

_____

Order, Supreme Court, Bronx County (Howard Silver, J.), entered August 26, 2009, which in this eminent domain proceeding, granted claimants Waste Management of New York, LLC and USA Waste Services of NYC, Inc.'s (collectively referred to herein as Waste Management) motion to direct the condemnor City of New York to issue Waste Management an advance payment in the amount of $925,000 plus interest and denied the City's cross motion for, inter alia, an order directing co-claimant, Harlem River Yard Ventures, Inc. to pay to Waste Management that portion of an advance payment made by the City to Harlem River, that Harlem

River is allegedly obligated to pay Waste Management under Harlem River's sublease with Waste Management, unanimously affirmed, without costs.

This proceeding arises out of the Willis Avenue Bridge Replacement Project. In 1991, pursuant to a 99-year written lease, Harlem River leased a portion of Lot 62 from the State of New York. In 1997, Harlem River subleased a portion of the property to Waste Management. By vesting order entered on or about March 27, 2007, title to the ten damage parcels in Lot 62 relevant to this proceeding vested in the City. By notice of condemnation advance payment or award dated June 13, 2007, the City notified Harlem River that there was available to it an advance payment in the amount of $1,448,000 plus interest for damage parcels 1, 1A, 1B, 3, 3A and 3B in Lot 62. It is undisputed that Harlem River accepted and received this payment. By notice of condemnation advance payment or award, also dated June 13, 2007, the City notified Waste Management that there was available to it an advance payment in the amount of $925,000 plus interest for damage parcels 2, 4, 4A and 4B in Lot 62. Prior to Waste Management receiving this payment, on or about September 19, 2009, the City notified Waste Management that the advance payment for damage parcels 2, 4, 4A and 4B was erroneously authorized to Waste Management and should have been authorized to

Harlem River, as owner/landlord, subject to Waste Management's interests as sublessee.

Consequently, Waste Management moved in Supreme Court for an order directing the City to remit the advance payment in the amount of $925,000 plus interest to Waste Management. The City cross-moved for an order, inter alia, directing Harlem River to pay to Waste Management that portion of the advance payment which Harlem River is obligated to pay to Waste Management under their sub-lease agreement.

The City cites no legal authority in support of its claim that a single advance payment must be made to the owner/landlord and that an advance payment cannot be made directly to a subtenant to compensate it for its leasehold interest. Moreover, the lease agreement between Harlem River and Waste Management does not preclude an advance payment award being made directly to Waste Management. Rather, the lease merely sets forth how a condemnation award is to be allocated between the parties, and directs that if the parties cannot agree on the allocation, that either party may request the court to determine as between them, the division of the compensation.

The City's reliance upon *Great Atl. & Pac. Tea Co. v State of New York* (22 NY2d 75 [1968]) is misplaced. There, the Court set forth the proper method for assessing damages where there are

two or more interests or estates in a condemned parcel. First, the damage to the fee as if it were unencumbered is to be ascertained and then that amount is to be apportioned among all of the estates and interests which are held in the property. Thus, according to *Great Atlantic*, if the City had made a single advance payment to Harlem River for all ten of the damage parcels, including those subject to Waste Management's sublease, it would then have been incumbent upon Harlem River to allocate the award pursuant to the parties' lease agreement, and, in the event of a dispute, either party could have brought the matter before the court for a determination. *Great Atlantic* does not specifically address the issue raised here, to wit, the propriety of the City issuing a separate advance payment directly to a subtenant to compensate for the loss of its leasehold interest on damage parcels not otherwise compensated for by the City in a prior advance payment award made to the landlord.

Moreover, the City's reliance on *Great Atlantic*, in support of its initial contention that Waste Management's compensation for its leasehold should have come from the advance payment paid to Harlem River, is also misplaced. The advance payment award to Harlem River was to compensate it for damage parcels 1, 1A, 1B, 3, 3A, and 3B. That would leave damage parcels 2, 4, 4A and 4B uncompensated. Apparently, the City recognized this error by

authorizing a supplemental advance payment to Harlem River, subject to Waste Management's interests. The supplemental advance payment award, however, fails to comply with Eminent Domain Procedure Law § 303, in that it does not itemize the amounts attributable to the respective parcels.

Accordingly, the motion court properly directed the City to re-issue the advance payment award to Waste Management in the amount of $925,000 plus interest to compensate it for its leasehold interest in parcels 2, 4, 4A and 4B.

We have considered the City's remaining arguments and find them without merit.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3993 Emmanuelle Gonik, Index 150057/09
Plaintiff-Appellant,

-against-

Israel Discount Bank of New York, etc.,
Defendant-Respondent.

_____

Johathan Charles Capp, New York, for appellant.

Graber PLLC, New York (Daniel Graber of counsel), for respondent.

_____

Order, Supreme Court, New York County (Richard B. Lowe, III, J.), entered April 16, 2010, which granted defendant IDB Bank's motion to dismiss the first amended complaint and denied plaintiff's cross motion for leave to file a second amended complaint, unanimously affirmed, without costs.

The motion court properly dismissed the amended complaint in its entirety, as all claims asserted are barred by the applicable statutes of limitations (*see* CPLR 3211[a][5]). Plaintiff's claims for breach of fiduciary duty, fraud, negligence, and breach of contract accrued no later than December 1991, when the second of the two bank accounts held at defendant bank was closed (*see* CPLR 203[a]). Hence, even giving plaintiff the benefit of the tolling period during her infancy, the statutes of limitations applicable to her claims began to run no later than March 1996, when plaintiff attained her majority (*see* CPLR 208),

and her claims, which were not asserted until April 2009, are therefore time-barred (*see* CPLR 213[1], 213[2], 213[8], 214[4]; *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009]; *Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399, 402 [1993]).

Contrary to plaintiff's contention, the discovery rule does not revive her claims. The discovery rule, which would only arguably apply to the fraud and breach of fiduciary duty claims in any event (*see* CPLR 213[8]; *Kaufman v Cohen*, 307 AD2d 113, 122 [2003]; *Yatter v William Morris Agency,* 268 AD2d 335, 335-336 [2000]), is inapplicable here because plaintiff has failed to allege sufficient facts that she could not, with reasonable diligence, have discovered the fraud earlier than September 2008. To the extent that plaintiff claims constructive fraud, the discovery rule does not apply (*see Baxter v Columbia Univ.*, 72 AD3d 558, 559 [2010]; *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 168 [1995], *lv dismissed in part and denied in part* 86 NY2d 882 [1995]).

Nor is there any basis to apply the doctrine of equitable estoppel to bar defendant from asserting the statute of limitations as a defense (*see Simcuski v Saeli*, 44 NY2d 442, 448-449 [1978]). As plaintiff readily admits, she had no contact with defendant at any time during her life – either before or

after the alleged wrongful acts were committed – and thus has failed to sufficiently allege that defendant made an actual misrepresentation separate from or subsequent to the alleged tortious acts which form the basis of her complaint, upon which she relied, and which was performed in an effort to conceal her claims from her and allow the statute of limitations to expire (*see Ross v Louise Wise Servs., Inc.*, 8 NY3d 478, 491 [2007]; *East Midtown Plaza Hous. Co. v City of New York*, 218 AD2d 628, 628 [1995]; *Powers Mercantile Corp. v Feinberg*, 109 AD2d 117, 122 [1985], *affd* 67 NY2d 981 [1986]). Nor has plaintiff alleged sufficient facts that she and defendant had a fiduciary relationship such that defendant can be estopped from asserting the statute of limitations as a defense on the ground that it concealed facts which it was required to disclose (*see Gleason v Spota*, 194 AD2d 764, 765 [1993]; *Fallon v Wall St. Clearing Co.*, 182 AD2d 245, 250 [1992]; *see generally Solicitor for Affairs of His Majesty's Treasury v Bankers Trust Co.*, 304 NY 282, 291 [1952]).

Finally, the motion court correctly denied plaintiff's cross motion for leave to file a second amended complaint. All of the proposed new causes of action are governed by statutes of limitations of six years or less, and are not subject to the discovery rule or the doctrine of equitable estoppel. They are

therefore clearly time-barred, and thus plaintiff fails to demonstrate that any of them state prima facie a viable cause of action (*see* CPLR 3025[b]; *see also* CPLR 213[2], 213[8], 215[3]; *Klein v Gutman*, 12 AD3d 417, 419 [2004]; *Heffernan v Marine Midland Bank*, 283 AD2d 337, 338 [2001]; *Solow v Tanger*, 258 AD2d 323, 323 [1999]; *Board of Educ. of Sachem Cent. Sch. Dist. at Holbrook v Jones*, 205 AD2d 486, 487 [1994], *appeal dismissed* 84 NY2d 919 [1994]; *Falmouth Bldg. Corp. v Zottoli*, 189 AD2d 569, 569 [1993]; *Campbell v Chabot*, 189 AD2d 746, 747 [1993]). Contrary to plaintiff's contention, her proposed claims sounding in conversion did not require a demand (*see* CPLR 206[a]; *Tillman v Guaranty Trust Co.*, 253 NY 295, 297 [1930]; *MacDonnell v Buffalo Loan, Trust & Safe Deposit Co.*, 193 NY 92, 101 [1908]; *Heffernan*, 283 AD2d at 338).

In light of the foregoing, we need not reach plaintiff's remaining contentions.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3994 In re Kevin R.,

A Person Alleged to be a
Juvenile Delinquent,
Appellant.

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Presentment Agency

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Tamara A. Steckeler, The Legal Aid Society, New York (Diane Pazar of counsel), for appellant.

Michael A. Cardozo, Corporation Counsel, New York (Tahirih M. Sadrieh 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 March 11, 2009, which adjudicated appellant a juvenile delinquent upon a fact-finding determination that he committed acts which, if committed by an adult, would constitute the crimes of sexual abuse in the second and third degrees, and placed him on probation for a period of 12 months, unanimously affirmed, without costs.

The court properly denied appellant's motion to suppress his statements. The police fully complied with the parental notification provision of Family Court Act § 305.2(3). The fact that a parent who appears at a juvenile's interrogation is also the parent of the complainant is not disqualifying, but is simply a factor to be considered in evaluating the voluntariness of the

statement (*Matter of James OO.*, 234 AD2d 822 [1996], *lv denied* 89 NY2d 812 [1997]; *see also Matter of Arthur O.*, 55 AD3d 1019, 1020 [2008]). There was no coercive police conduct, and the totality of the circumstances establishes that the statement was voluntarily made (*see Arizona v Fulminante*, 499 US 279, 285-288 [1991]; *People v Anderson*, 42 NY2d 35, 38-39 [1977]).

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]). Appellant's challenges to the reliability of his confession are unavailing.

We have considered and rejected appellant's remaining claims.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3995 The People of the State of New York, Ind. 5596/07
Respondent,

-against-

Jose Colon,
Defendant-Appellant.

_____

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

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

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Judgment, Supreme Court, New York County (Bruce Allen, J. at hearings; Maxwell Wiley, J. at plea and sentence), rendered July 22, 2009, convicting defendant of criminal possession of a controlled substance in the third degree, and sentencing him, as a second felony drug offender, to a term of 3½ years, unanimously reversed, on the law and on the facts, defendant's suppression motion granted, and the indictment dismissed.

The police obtained a warrant that authorized a search of defendant and his vehicle, but did not authorize any kind of body cavity search. The police took defendant to the precinct, where a patdown search revealed a gravity knife and currency but no drugs. The police then conducted a strip search and visual body cavity search which led an officer to notice a white object in defendant's buttocks. The police removed the white object, which

was a piece of toilet paper rolled in a ball around 29 glassines of heroin, and removed another object they saw behind the toilet paper, which also contained drugs.

Whether or not there was a manual body cavity search (*see People v Hall*, 10 NY3d 303, 306-307 [2008]), *cert denied* 555 US __, 129 S Ct 159 [2008]), in addition to the visual body cavity search we find that the facts here did not even provide reasonable suspicion justifying a visual body cavity search. To conduct "a visual cavity inspection, the police must have a specific, articulable factual basis supporting a reasonable suspicion to believe the arrestee secreted evidence inside a body cavity . . . [V]isual cavity inspections . . . cannot be routinely undertaken as incident to all drug arrests or permitted under a police department's blanket policy that subjects persons suspected of certain crimes to these procedures" (*People v Hall*, 10 NY3d at 311).

There were no such particularized facts here. The police officers' generalized knowledge that drug sellers often keep drugs in their buttocks, and the fact that no drugs were found in a search of defendant's clothing were insufficient. While there may be scenarios where the logical inference to be drawn from the absence of drugs in a defendant's clothing is that he or she must have them in a body cavity, because the drugs had to be

somewhere, no such inference could be drawn here. The information that led to the issuance of a warrant nine days earlier gave the police reason to believe that defendant was a person likely to be carrying drugs, but gave no specific reason to believe he ever carried them in his buttocks. Under the facts presented, the absence of drugs in his clothing was consistent with the possibility that he was not carrying drugs at all on that particular occasion.

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3996 The People of the State of New York, Ind. 1258/07
Respondent,

-against-

Josue Pierre,
Defendant-Appellant.

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

Cyrus R. Vance, Jr., District Attorney, New York (Craig A. Ascher of counsel), for respondent.

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Judgment, Supreme Court, New York County (Bruce Allen, J.), rendered December 4, 2008, convicting defendant, upon his plea of guilty, of criminal sale of a controlled substance in the second degree, and sentencing him, as a second felony offender, to a term of 9 years, unanimously affirmed.

Defendant's plea was not rendered involuntary by the fact that the court did not advise him that his conviction could be used to enhance his sentence in his then-pending federal prosecution, and the court properly denied defendant's motion to withdraw his plea on that ground. The record establishes the voluntariness of the plea (*see People v Fiumefreddo*, 82 NY2d 536, 543 [1993]). In accepting a guilty plea, the court is only obligated to advise a defendant of direct rather than collateral consequences (*People v Catu*, 4 NY3d 242, 244-45 [2005]). Here,

an enhanced sentence was a collateral consequence, at most. Generally, an enhanced sentence resulting from a subsequent conviction is a collateral consequence of a guilty plea (*see People v Lancaster*, 260 AD2d 660, 661 [1999]). Although defendant's federal case was already pending, at the time of the state plea, it was not known whether he would even be convicted of any federal charges. Moreover, although defendant characterizes his state conviction as "presumptively" enhancing his federal sentence, it appears that any enhancement was entirely discretionary. In any event, as defendant concedes, the state conviction was not actually used to enhance the federal sentence. Accordingly, there was no "consequence." Finally, we also note that the federal sentence was shorter than, and concurrent with, the state sentence.

Defendant's argument that his counsel provided ineffective assistance by not informing him about the possibility that his plea might affect his sentence in the federal prosecution is not reviewable on direct appeal, since, without development of the record by way of a CPL 440.10 motion, it cannot be determined what advice, if any, his counsel had provided on this subject (*see People v Love*, 57 NY2d 998 [1982]). On the existing record, to the extent it permits review, we find that regardless of what advice counsel should have provided concerning the impact of the

plea on the federal case, defendant has not shown any prejudice (*see Hill v Lockhart*, 474 US 52, 59 [1985]).

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3997 In re Perry Bellamy, Index 401463/98
Petitioner-Respondent,

-against-

The New York City Police Department,
Respondent-Appellant.

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

Perry Bellamy, respondent pro se.

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Judgment, Supreme Court, New York County (Alice Schlesinger, J.), entered July 31, 2009, to the extent appealed from as limited by the briefs, granting the petition brought pursuant to the Freedom of Information Law to compel respondent to disclose police reports containing the names and statements of witnesses who did not testify at petitioner's trial, and order, same court and Justice, entered November 18, 2009, which, inter alia, denied respondent's motion to renew, unanimously affirmed, without costs.

Respondent failed to meet its burden of establishing that the documents at issue fall within an exemption from disclosure

as provided in Public Officers Law § 87(2) (*see Matter of Fappiano v New York City Police Dept.*, 95 NY2d 738, 746 [2001]; *Matter of O'Donnell v Donadio*, 259 AD2d 251, 252 [1999], *lv dismissed* 93 NY2d 1032 [1999]). Respondent did not allege that any of the non-testifying witnesses were promised anonymity in exchange for their cooperation in the investigation and therefore qualify for protection as "confidential source[s]" (Public Officers Law § 87[2][e][iii]; *see Cornell Univ. v City of N.Y. Police Dept.*, 153 AD2d 515, 517 [1989], *lv denied* 75 NY2d 707 [1990]). Nor did respondent provide factual support for its contention that a promise of confidentiality can be inferred from the circumstances in which the non-testifying witnesses gave their statements (*see Matter of Gould v New York City Police Dept.*, 89 NY2d 267, 275 [1996] ["blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"]; *Matter of Johnson v New York City Police Dept.*, 257 AD2d 343, 346 [1999], *lv dismissed* 94 NY2d 791 [1999] ["it is necessary that the agency set forth a particularized and specific justification for denying access"] [internal quotation marks and citation omitted]).

Respondent also failed to support its contention that disclosure of Document 14 "would give rise to a substantial likelihood that violators could evade detection by deliberately

tailoring their conduct" (*see Matter of Spencer v New York State Police*, 187 AD2d 919, 921 [1992] [internal quotation marks and citation omitted]; Public Officers Law § 87[2][e][iv]).

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

3998-
3999 Tegra S.A., Index 650029/09
Plaintiff-Appellant,

-against-

Bombardier, Inc.,
Defendant-Respondent.

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Wollmuth Maher & Deutsch LLP, New York (William A. Maher of counsel), for appellant.

Pillsbury Winthrop Shaw Pittman LLP, New York (Eric Fishman of counsel), for respondent.

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Order, Supreme Court, New York County (Barbara R. Kapnick, J.), entered October 14, 2009, which granted defendant's motion to dismiss the complaint on the ground of forum non conveniens, and order, same court and Justice, entered April 29, 2010, to the extent it denied plaintiff's motion for renewal, unanimously affirmed, with costs. Appeal from so much of the April 29, 2010 order as denied plaintiff's motion to reargue, unanimously dismissed, without costs, as taken from an nonappealable order.

The court properly granted defendant's motion to dismiss the complaint on the ground of forum non conveniens (*see* CPLR 327; *Islamic Republic of Iran v Pahlavi*, 62 NY2d 474, 478-480 [1984], *cert denied* 469 US 1108 [1985]). Plaintiff is a Luxembourg company whose principal is a Turkish resident. Defendant is a

Canadian corporation, with its principal place of business in Montreal, Quebec. The subject agreement for the sale and purchase of an aircraft that was built in Quebec was not executed in New York. Almost all the witnesses reside in Quebec, and none reside in New York. Thus, there is a substantial nexus between Quebec and the dispute over the alleged breach of the agreement and no nexus between New York and the dispute. While the agreement contains a choice of law provision in favor of New York law, a choice of law provision is not a forum selection clause.

Plaintiff failed to support its contention that its principal, Taner Yilmaz, was defrauded by defendant into believing that the choice of law provision was also a forum selection clause. Yilmaz does not aver that anybody told him that. Moreover, he was represented by counsel. In light of his statement that he would not have entered into the agreement if he had known that Canadian courts could be the forum for disputes, it is inconceivable that Yilmaz executed the agreement for the purchase of a $20 million aircraft without consulting counsel on this deal-breaking issue. In any event, the agreement also contains a merger clause, expressly disavowing any prior agreement, oral or otherwise, and requiring any modification of the agreement to be in writing. Having failed to set forth any facts showing a misrepresentation by defendant, plaintiff has not

alleged a fraud sufficiently to overcome the merger clause (*see Hobart v Schuler*, 55 NY2d 1023 [1982]; *Sabo v Delman*, 3 NY2d 155, 161 [1957]).

The court correctly denied plaintiff's motion to renew based on the fact that the subject aircraft was sold and moved from Quebec to Wisconsin during the pendency of the motion to dismiss, since, as the court noted, the location of the aircraft is not a significant factor in considering the forum non conveniens question. In any event, the aircraft's location in Wisconsin provides no support for a finding that New York is the more convenient forum.

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

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ

4001 Gertrude Steingart, et al., Index 120875/03
Plaintiffs-Respondents,

-against-

Barbara Hoffman,
Defendant-Appellant.

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Barbara T. Hoffman, New York, appellant pro se.

Munzer & Sunders, LLP, New York (Craig A. Saunders of counsel), for respondents.

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Order, Supreme Court, New York County (Saliann Scarpulla, J.), entered on or about March 17, 2010, which, insofar as appealed from, denied defendant's motion seeking to modify in part the Referee's report, awarded the Referee $77,000 in compensation, and declined to award defendant prejudgment interest, unanimously affirmed, without costs.

The parties co-owned, as tenants in common, a penthouse unit originally purchased by their predecessors in interest in 1976. After the parties acquired the right of possession of the unit, they became involved in disputes over the ultimate disposition of the penthouse and their respective financial interests. Supreme Court appointed a referee in a RPAPL article 9 partition proceeding to sell the unit and to hear and report on the parties' respective interests in the proceeds of the sale.

"It is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Nager v Panadis*, 238 AD2d 135, 135-136 [1997]). Here, based on the existing record, we find no basis to disturb the Referee's computations which were confirmed by the court. Nor do we find any basis to reject the Referee's conclusions explaining the sharp increase in the value of the unit between 2003 and 2007, when it was sold. Notably, the intervening period was characterized by a frenetic real estate market in the area where the unit is located, which, along with the efforts of plaintiff's broker, more plausibly explains the appreciation in value than do the improvements to the unit for which defendant was responsible.

Although there are aspects about the Referee's fee that remain unclear, the appendix submitted by defendant fails to include the necessary information for our review. However, we reject defendant's contention that the fee was restricted to that set forth in CPLR 8003(a), which does not impose on a court the need to justify its award of a fee departing therefrom by a finding of extraordinary circumstances. Furthermore, in view of the equitable nature of the proceeding, and the numerous errors and omissions in certain of the bills sent by defendant to

plaintiff, we find no basis to disturb the finding that defendant was not entitled to prejudgment interest (CPLR 5001[a]).

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

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

ENTERED: JANUARY 4, 2011

CLERK

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

4002 The People of the State of New York, Ind. 1955/07
Respondent,

-against-

Hipolito Marmol,
Defendant-Appellant.

_____

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

Robert T. Johnson, District Attorney, Bronx (Brian J. Reimels 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, Bronx County (Robert Torres, J.), rendered on or about March 10, 2009,

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

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

ENTERED: JANUARY 4, 2011

CLERK

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

Tom, J.P., Moskowitz, Freedman, Richter, Manzanet-Daniels, JJ.

4003N In re Estate of Francis Newton Souza, Deceased, Index 1724/02

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Lynn & Cahill LLP,
Petitioner-Appellant,

Francesca Souza,
Objectant-Respondent.

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Lynn & Cahill LLP, New York (John R. Cahill of counsel), for appellant.

Katten Muchin Rosenman LLP, New York (Arthur S. Linker of counsel), and Law Offices of Diahn W. McGrath, New York (Diahn W. McGrath of counsel), for respondent.

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Order, Surrogate's Court, New York County (Troy K. Webber, S.), entered January 6, 2010, which, to the extent appealed from, in this proceeding pursuant to SCPA 2110 seeking an award of attorneys' fees, granted objectants' motion for a protective order pursuant to CPLR 3103(a), unanimously affirmed, without costs.

The court exercised its discretion in a provident manner in granting the motion for a protective order. Although the burden is on petitioner law firm to establish the reasonableness of the fees and the value of the services provided (*see Matter of Potts*, 213 App Div 59, 61 [1925], *affd* 241 NY 593 [1925]), its request to depose the objectants, who lived in England and India, in addition to the request to produce "all" documents concerning

petitioner, the fiduciaries and the estate administration, are overbroad and burdensome, particularly in light of the documentation already available to petitioner in its own files (*see e.g. Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2007]). Petitioner has not established that the additional documentation is necessary to establish the value of the legal fees sought.

We need not reach the issue of petitioner's request for a hearing, which is left for the Surrogate to determine. Notably, the court granted petitioner's request that objectants comply with its request for expert information, which suggests that a hearing, at least with respect to the experts, is not foreclosed.

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

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

ENTERED: JANUARY 4, 2011

CLERK